

## MISUNDERSTANDING THE ANTI-FEDERALIST PAPERS: THE DANGERS OF AVAILABILITY

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### ABSTRACT

*In recent years, the Supreme Court's use of the Federalist Papers has received much scholarly attention, but no analysis has focused on the Court's use of Publius' lesser-known sibling, the Anti-Federalist Papers. This Article undertakes the first systematic analysis of the Court's use of the Anti-Federalist Papers and concludes that the Supreme Court has misused the Anti-Federalist Papers as a source of original meaning by treating all Anti-Federalist Papers alike when they are actually of differing historical value. Increasingly, the Court treats little-read Anti-Federalist Papers written by unknown authors identically to the widely reprinted writings of those Anti-Federalists present at the Constitutional Convention and prominent in the ratifying debates.*

*The Court's confusion of availability with authority is not unique to the Anti-Federalist Papers. Rather, this confusion represents an under-examined pitfall in the process of canon formation: the dangers of increased availability. In 1981, Herbert Storing published a "complete" volume of Anti-Federalist Papers, including many little-known Papers with relatively low historical impact. Almost immediately, members of the Court cited many of these marginal papers alongside the words of prominent founders, confusing contemporary availability for jurisprudential authority. Storing's 1981 publication effectively served as a controlled experiment: documents which were uncirculated for two centuries were suddenly made widely available in a single volume. Studying the impact of the publication of these documents and the uses to which these documents were put provides insight into the larger challenges posed by increased availability in the modern era.*

*This Article uses the Anti-Federalist Papers as a case study for examining three unrecognized dangers which arise from increased availability, which it labels flattening, cherry-picking, and snowballing.*

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*Each of these dangers is illustrated with an example from the Court's use of the Anti-Federalist Papers. This Article then examines two other circumstances where the dangers of availability have been realized: the cherry-picking of IRS private revenue rulings and the snowballing of unpublished opinions. As electronic databases continue to proliferate and information thus becomes more easily available, the dangers of availability will continue to grow. This Article concludes by proposing ways that scholars, judges, and lawyers can avoid the dangers of availability.*

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## INTRODUCTION

In recent years, the U.S. Supreme Court’s use of the *Federalist Papers* has garnered much scholarly attention,<sup>1</sup> but no analysis has focused on the Court’s use of Publius’ lesser-known sibling, the Anti-Federalist Papers.<sup>2</sup> This Article undertakes the first systematic review of the Court’s use of the Anti-Federalist Papers and concludes that the Court has failed to discriminate between individual Anti-Federalist Papers even though the papers fundamentally differ in their legitimacy and persuasiveness. The Court increasingly cites papers by little-known Anti-Federalist authors who received little or no contemporary attention at the time of the ratification and had no impact on the founding debate. The Court’s indiscriminate use of the Anti-Federalist Papers represents a larger under-examined pitfall in the process of canon formation whereby a source’s availability, rather than its historical relevance, plays a critical role in determining judicial citation. As modern technology renders documents increasingly accessible, scholars, judges, and practitioners must take care not to fall prey to the dangers of availability. A careful examination of the Court’s use of the Anti-Federalist Papers helps shed light on how to avoid this pitfall.

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1. See, e.g., Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329 (2005) (arguing that “[w]hile some may view this increased citation use as a positive development because it demonstrates reliance on legal authority in judicial decisions, we provide evidence that in a period marked by dissensus and controversy, the use of the *Federalist Papers* represents externally and internally oriented strategic attempts by the justices to add legitimacy to constitutional interpretation, and to sway colleagues”); 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, 247 (2005) (examining citations to the Federalist Papers in order to determine “the importance that *The Federalist* played, both in the analysis of the Justices citing it and in the outcome reached by those Justices”); William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (arguing that the Supreme Court should look to *The Federalist* but not to legislative history); Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403, 403 (1998) (examining “which of the Papers have received the most attention from the Justices”); Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324 (1998) [hereinafter Lupu, *Time*] (examining the Court’s use of *The Federalist* over time).

2. This term has been variously spelled “Anti-Federalist” and “Antifederalist” throughout history. In this article, I have standardized all spellings to Anti-Federalist for the sake of simplicity, except where material is quoted directly. Admittedly, the term *Antifederalist* is itself historically loaded, but I have used it here since that is what the Court, and the vast majority of historians, employs. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* xiv (2010) (“The words we use, especially names, shape the stories we tell, and ‘Antifederalist’ was a Federalist term.”).

This Article is divided into eight Parts. Part I provides a historical overview of the Anti-Federalist Papers. Part II describes the Supreme Court's use of the Anti-Federalist Papers, concluding that references to the Anti-Federalist Papers are not limited to the 'originalist' members of the Court and that references to the Anti-Federalist Papers have been increasing over the last fifty years. This Part also explores the three paradigms the Court employs when referencing the writings of the Anti-Federalists: First, the Anti-Federalists are often viewed as the constructive authors of the Bill of Rights, as the first ten amendments respond to many of the Anti-Federalists' concerns. Second, the Anti-Federalists are considered co-authors in the ratification dialogue. Third, the Anti-Federalists' writings are cited as performing a dictionary function, articulating the generally accepted meaning of the words of the Constitution at the time of ratification. Part III proposes a metric for determining the interpretive value of different Anti-Federalist Papers based on three criteria: presence of the author at the Constitutional Convention; prominence of the author in the state ratifying debates; and the particular paper's contemporary impact at the time of publication as measured by the number of the paper's re-printings. Part IV critically examines the Court's use of the Anti-Federalist Papers under this framework, concluding that the Court fails to recognize the heterogeneous nature of the *Federalist Papers* and thus indiscriminately treats all the Anti-Federalist papers alike, a trend that has occurred largely since 1981. Part V explains the Court's increasing citation of relatively obscure papers as resulting largely from the increased availability of these less-circulated papers following the publication of Herbert Storing's *The Complete Anti-Federalist* in 1981.<sup>3</sup> This Part argues that the availability of the documents caused by Storing's volume led the Court to confuse their contemporary availability with their historical legitimacy. This Part examines three dangers from increased availability that have all been exhibited in the Court's increased use of the Anti-Federalist Papers, which it labels flattening, cherry-picking, and snowballing. Part VI examines these availability-based dangers in the context of courts' use of IRS Private Revenue Rulings and unpublished opinions. Part VII proposes preliminary recommendations for courts, academics, and practitioners to guard against the dangers of availability. Part VIII concludes.

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3. See *infra* Part V.

## I. HISTORICAL BACKGROUND OF THE ANTI-FEDERALIST PAPERS

Like their authors, the Anti-Federalist Papers are most easily described in contradistinction to their opponent, *The Federalist*.<sup>4</sup> The *Federalist Papers* are a collection of eighty-five essays written by Alexander Hamilton, James Madison, and John Jay urging the citizens of New York to ratify the Constitution.<sup>5</sup> These authors played famously prominent roles in developing the Constitution.<sup>6</sup> James Madison served on the Virginia delegation to the Constitutional Convention, and his notes provide the most complete record of the Framers' debates (although one that was not publicly available until decade after the fact).<sup>7</sup> Madison also played a critical role drafting both the Constitution and the Bill of Rights, although he originally opposed the addition of amendments to the Constitution.<sup>8</sup> Alexander Hamilton represented New York at the Constitutional Convention and convinced Madison and Jay to co-author the documents which made up the *Federalist Papers*.<sup>9</sup> Hamilton also floor-managed the Constitution through the tumultuous New York Ratifying Convention.<sup>10</sup> John Jay did not attend the Constitutional Convention (he was Secretary of Foreign Affairs at the time), but he later served as Chief Justice of the Supreme Court, appointed by George Washington, and was a prominent member of the New York State Ratifying Convention.<sup>11</sup>

4. See, e.g., 1 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 4 (1981) ("For this reason it will be necessary to take some note of the *Federalist* as well as the Anti-Federalist side of the debate, but the purpose is to present only so much of what the Anti-Federalists were against as is necessary to understand what they were for.")

5. While there are still disputes regarding whether Hamilton or Madison wrote a few of the papers, no scholar claims that others helped them. 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 489 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter *DHRC*]; see also Robert A. Bosch & Jason A. Smith, *Separating Hyperplanes and the Authorship of the Disputed Federalist Papers*, 105 *AM. MATHEMATICAL MONTHLY* 601 (1998) (applying a mathematical approach based on word frequency to determine the authorship of the disputed papers).

6. Chief Justice Marshall, speaking of *The Federalist*, noted that "the part two of its authors [Hamilton and Madison] performed in framing the constitution, put it very much in their power to explain the views with which it was framed." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821). While John Jay played the smallest role in constitutional development, he also wrote the fewest number of the *Federalist Papers*, writing only five papers (the second, third, fourth, fifth and sixty-fourth), largely due to illness at the time. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 *B.U. L. REV.* 801, 812 (2007).

7. Adrienne Koch, *Introduction* to JAMES MADISON, *NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787*, vii, vii-x (1987).

8. ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 92-93 (1997).

9. Hamilton approached Pennsylvania delegate Gouverneur Morris about the position but settled on Jay and Madison when Morris "declined because of his business commitments." RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 406 (2009).

10. Maggs, *supra* note 6, at 809.

11. *Id.* at 809-10.

Hamilton, Madison, and Jay signed all eighty-five of their Papers under the pen name “Publius,”<sup>12</sup> maintaining the illusion that every document of *The Federalist* was written by the same author and indicating to the reader that those papers were an ideologically coherent unit.<sup>13</sup> The *Federalist Papers* advanced a detailed defense of the proposed Constitution by three collaborative writers, the principal two of whom (Madison and Hamilton) were intimately familiar with the Constitution’s drafting by virtue of their presence at the Constitutional Convention, and all of whom were heavily involved with the subsequent fight over the Constitution’s ratification.

In contrast, the Anti-Federalist Papers were written by a diverse, uncoordinated collection of individuals expressing varying degrees of opposition to the Constitution for a variety of reasons.<sup>14</sup> Unlike the triumvirate of Madison, Hamilton, and Jay, “[t]here is in fact no hard and fast way of even identifying ‘Anti-Federalists,’”<sup>15</sup> since so many individuals contributed to the project. Moreover, unlike the *Federalist Papers*, which were published as a complete volume in 1788 while the ratification debate still raged,<sup>16</sup> there is no single authoritative collection of the Anti-Federalist Papers. The most widely-cited “comprehensive” collection is Herbert Storing’s 1981 volume, *The Complete Anti-Federalist*, which runs over 800 pages.<sup>17</sup> Nevertheless, even Storing’s volume has been assailed as incomplete.<sup>18</sup> The Anti-Federalists made no effort, contemporaneously or thereafter, for their Papers to be read as a coherent whole. And the Anti-Federalist Papers cannot be read as a coherent unit because their authors operated independently of each other and advanced varied reasons for opposing the Constitution.<sup>19</sup> The Constitution was fundamentally flawed;<sup>20</sup> the Constitution needed amendment;<sup>21</sup> only the

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12. They had originally intended to sign as “A Citizen of N.Y.,” James Madison of Virginia to the contrary. MAIER, *supra* note 2, at 84.

13. This is not to say the *Federalist Papers* were without internal contradiction.

14. 1 STORING, *supra* note 4, at 5 (“It would be difficult to find a single point about which *all* of the Anti-Federalists agreed. They did not, finally, even agree unanimously in opposing the adoption of the Constitution. Many favored adoption if amendments could be secured; and others finally accepted the Constitution, even without a guarantee of amendment, as the best of the available choices.”).

15. *Id.*

16. MAIER, *supra* note 2, at 84.

17. Another earlier volume collected eighty-five documents and attempted to order them against their counterparts from *The Federalist*. See THE ANTIFEDERALIST PAPERS (Morton Borden ed., 1965).

18. Paul Finkelman, *The Complete Anti-Federalist Edited by Herbert J. Storing*, 70 CORNELL L. REV. 182, 183 (1984) (book review) (“At the outset it should be noted that *The Complete Anti-Federalist* is not really complete. Some relatively well-known antifederalist documents are missing.”).

19. See MAIER, *supra* note 2, at 89–93 (describing the high levels of variation amongst prominent Anti-Federalists).

20. *Id.* at 93 (discussing the views of Luther Martin, Yates, and Lansing).

21. *Id.* (describing Mason, Gerry, and Lee).

Federalists thought that this Constitution was just right.<sup>22</sup> Unlike “Publius,” the pen names of the Anti-Federalists varied widely. Some wrote under their own names; others under classical names like “Brutus”; yet more sought to cast themselves as a simple “Farmer.”<sup>23</sup>

Like the authors of *The Federalist*, the authors of the Anti-Federalists Papers included prominent delegates to the Constitutional Convention, such as George Mason, who began writing his critique of the Constitution in the final week of the Convention “on the blank pages of his [draft] copy of the [Constitution from the] Report of the Committee of Style.”<sup>24</sup> But at the other extreme were anonymous and now forgotten authors, such as “Honestus,” whose short objections to the Constitution appeared in the *New York Journal* without republication or further note.<sup>25</sup> Similarly, “Agrippa” was likely Harvard librarian James Winthrop, the register of probate in Middlesex, hardly a figure of Hamiltonian stature.<sup>26</sup>

The contemporary circulation of the documents now commonly identified as the Anti-Federalist Papers also varied widely. Elbridge Gerry’s *Objections to Signing the National Constitution* was reprinted forty-six times,<sup>27</sup> a remarkable achievement given that there were approximately ninety newspapers in the United States during that period.<sup>28</sup> In contrast, other Anti-Federalist Papers, such as James Winthrop’s *Letter of Agrippa, 12*, were never reprinted<sup>29</sup> and thus were not widely read.

Since the authors of the Anti-Federalist Papers held a diverse array of views, they failed to reflect any broad ideological coherency in their writings. Similarly, the writers of the Anti-Federalist Papers were ill-equipped to rebut Federalist critiques of their writings, since the Anti-Federalists were geographically dispersed and rarely in regular contact with each other. In contrast, the authors of the *Federalist Papers* benefited from the Philadelphia Convention, which allowed the Federalists to prepare in

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22. *Id.*

23. *Id.*

24. BEEMAN, *supra* note 9, at 372.

25. See Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 319, n.96 (2011) (discussing the publications of “Honestus”).

26. 4 STORING, *supra* note 4, at 68.

27. SAUL CORNELL, *THE OTHER FOUNDERS* app. 1 at 309 (1999). See also 13 DHRC, *supra* note 5, at 548.

28. See ALFRED MCCLUNG LEE, *THE DAILY NEWSPAPER IN AMERICA* app. at 718 tbl.VIII (1937) (listing ninety-two papers published in the United States in 1790); WILLIAM A. DILL, *GROWTH OF NEWSPAPERS IN THE UNITED STATES* 11 tbl.I (1928) (listing ninety-three papers published in 1788 and 106 in 1790.).

29. 5 DHRC, *supra* note 5, at 741. The DHRC attempts to identify all available reprintings of the documents it lists, and none are listed for *Agrippa 12*. It is, of course, always possible that a reprinting will be unearthed by future historians, but even then, it would likely come from a marginal newspaper. For a more extensive discussion of *Agrippa*, see *infra* pp. 32–33.

advance coherent responses to many of the objections anticipated to the Constitution, since “[m]any of the objections [the Federalists] would confront in the coming months had been raised, debated, and resolved over the course of the summer [of 1787].”<sup>30</sup> The authors of *The Federalist* also had the distinct advantage of having “a specific object for their advocacy—the Constitution itself,” while the Anti-Federalists were unable to “present a preferable alternative [to the Articles of Confederation] in a timely fashion.”<sup>31</sup>

Thus, the *Federalist Papers* comprise an easily-recognizable collection of consecutively numbered documents by three prominent authors who benefited from a prolonged convention in which they and their colleagues articulated and solidified the arguments in favor of ratification and who largely agreed among themselves. Moreover, they published those arguments in *seriatim*, and they were quickly collected into a coherent single volume, collected in pamphlet form, and putatively written by a single author “Publius.”<sup>32</sup> In contrast, the Anti-Federalist Papers are a wide-ranging collection of works written by a variety of uncoordinated authors of varied prominence with widely divergent contemporary circulations, united only by a shared spirit of opposition to the Constitution.

## II. THE SUPREME COURT’S USE OF THE ANTI-FEDERALIST PAPERS

This Part examines how the Supreme Court uses the Anti-Federalist Papers. The first Subpart finds that the frequency of the Court’s citations to the Anti-Federalist Papers has increased rapidly in recent times, with a noted diversification of material cited since 1981, corresponding with the publication of Herbert Storing’s *The Complete Anti-Federalist*. Not only has the Court made greater use of the Anti-Federalist Papers but it has, since Storing’s book appeared, cited a more diverse array of papers. The second Subpart examines which justices cite the Anti-Federalist Papers, concluding that their use is not limited to “originalists.” Rather the Anti-Federalist Papers are invoked by justices across the ideological spectrum. The third Subpart examines the three ways in which the Court employs the Anti-Federalist Papers: first, as statements by the Anti-Federalists as co-authors of the Constitution; second, as the writings of the constructive authors of the Bill of Rights whose concerns animated the first ten Amendments; third, as a dictionary, indicating the generally accepted meaning of the words of the Constitution at the time of its ratification.

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30. BEEMAN, *supra* note 9, at 373–74.

31. *Id.* 374–75.

32. This is not to say that the Federalists presented a perfectly coherent ideological front, nor that they were free of contradiction, only that the essays “demonstrate a remarkable coherence.” *Id.* at 406.



*A. How Often Are the Anti-Federalist Papers Cited?*<sup>33</sup>

During the nineteenth century, the Supreme Court referenced the Anti-Federalist Papers only five times, and never explicitly quoted them.<sup>34</sup> This paucity of citation is likely due, at least in part, to the disrepute into which the papers fell following the Civil War as they had been invoked by the South as support for the right to secede.<sup>35</sup> Indeed, the Court's second citation of an Anti-Federalist Paper in the nineteenth century was in the much-reviled *Dred Scott* decision.<sup>36</sup> From 1900 to 1959, the Court cited the Anti-Federalist Papers approximately once per decade. Over the subsequent fifty years, citations to the Anti-Federalist Papers have increased dramatically, with a minimum of three and a maximum of eleven such citations per decade. This pattern is almost identical to the Court's citations of the *Federalist Papers* with a fifty-year lag. From 1790 to 1819, "the Supreme Court rarely cited *The Federalist*."<sup>37</sup> From 1820 to 1929, "the number of *The Federalist*-citing decisions varied from a low of three per decade to a high of nine, with an average of about six per decade."<sup>38</sup> A

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33. Since the Court does not always explicitly title The Anti-Federalist, as it does *The Federalist*, one cannot simply search for "The Anti-Federalist" to determine citations. See, e.g., Lupu, *Time*, supra note 1, at 1327 n.19 (tracking all uses of the *Federalist Papers* by "utiliz[ing] the search term (PUBLIUS) OR (FEDERALIST W/10 NO. OR NUMBER OR NOS. OR PAPER!) OR (FEDERALIST W/P MADISON OR JAY OR HAMILTON)"). In this Article, I have utilized a variety of search terms to attempt to locate all entries. First, I have run a search for "Anti-Federal!"; second, I have run a search with the name of every Anti-Federalist author (for example, "Brutus," "Centinel," "Agrippa," "Honestus," etc.); third, I have run a search with the name of the author of the prominent Anti-Federalist collections (e.g., "Herbert Storing"). I collected and read these decisions to determine when the papers have actually been cited. I believe I have located all references to the Anti-Federalist Papers, but it is possible there are some which have escaped my analysis.

34. *Hans v. Louisiana*, 134 U.S. 1, 14 (1890) ("In the Virginia convention the same objections [regarding suits against States] were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows."); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 511 (1856) ("Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the 9th and 10th amendments to the Constitution were designed to include the reserved rights of the States . . ."); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 518 (1854) ("Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry").

35. See, e.g., Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 465 n.82 (2000) ("The Anti-Federalists . . . believed in . . . 'a league of sovereign and independent states whose representatives met in congress to deal with a limited range of common concerns in a system that relied heavily on voluntary cooperation . . . .' The political vision of a republic of 'sovereign and independent states' . . . resurfaced all too soon as the legitimating basis for nullification and for the bloody war of secession that followed. And for more than a century since, its spirit has animated resistance to the idea that all men are created equal."). Some have also suggested that the Anti-Federalist Papers were disregarded during the Cold War because of the desire to "stress our cohesion," which the dissent present in the Anti-Federalist Papers did not match. Edward Countryman, *Foreword* to JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788*, xiii (rev. ed. 2004).

36. 60 U.S. (19 How.) 393, 511 (1856).

37. Lupu, *Time*, supra note 1, at 1329.

38. *Id.* at 1329-30.

chart indicating the Court's frequency of citation to the Anti-Federalist Papers by decade is below.<sup>39</sup>

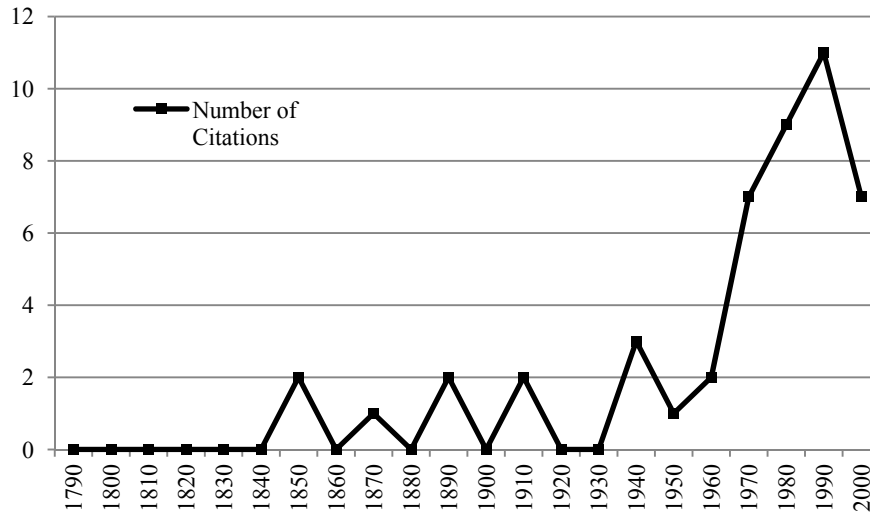


Chart 1: Supreme Court Citations to the Anti-Federalist Papers by Decade

In addition to increased citation of the Anti-Federalist Papers, the Court has also cited an increasing diversity of papers over the past fifty years, with a variety of new Anti-Federalist authors introduced in recent times. While the quantitative increase in Anti-Federalist citations may be explained, at least in part, by a renewed interest in originalism, the explosive diversification of Anti-Federalist Papers cited by the Court has its roots in the dangers of availability as explored further at Part VI.

### B. Who Cites the Anti-Federalist Papers?

While the originalists on the Court cite the Anti-Federalist Papers with greater frequency than their colleagues,<sup>40</sup> recent decades reflect use of the Anti-Federalist Papers by a variety of justices with different judicial philosophies. Justices Stevens,<sup>41</sup> Kennedy,<sup>42</sup> and O'Connor<sup>43</sup> have all cited

39. For an analogous chart containing information regarding citation to *The Federalist*, see *id.* at 1328.

40. Justices Scalia and Thomas have each cited the Anti-Federalists six times in their opinions. See *infra* Table 2: Additional Citations to the Anti-Federalist Papers, 1981–2009.

41. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 791 (1995).

42. *Boumediene v. Bush*, 553 U.S. 723, 743–44 (2008).

to the Anti-Federalist Papers, as had Justices Brennan,<sup>44</sup> Frankfurter,<sup>45</sup> and Douglas<sup>46</sup> before them. Thus, the Anti-Federalist Papers are not merely cited by those Justices most commonly identified as originalists. Rather, the Anti-Federalist Papers are cited by a wide variety of Justices, echoing findings that “[i]deology . . . ha[s] little bearing on how often a justice appeals to the [*Federalist Papers*].”<sup>47</sup>

### C. How Does the Court Use the Anti-Federalist Papers?

The Court employs the Anti-Federalist Papers in three ways. First, the Anti-Federalists are viewed as co-authors of the Constitution, present at creation, whose comments can illuminate the intent of the Founders and the original meaning of the Constitution. Second, the Court treats the Anti-Federalists as the constructive authors of the Bill of Rights. Under this constructive authorship paradigm, the Bill of Rights was drafted in response to objections of the Anti-Federalists. Consequently the Anti-Federalists are legitimately seen as the effective authors of the first ten Amendments. Third, the Court uses the Anti-Federalist Papers as a dictionary to determine the meaning of words at the time the Constitution was drafted. Each of these three uses is explored further below.

#### 1. The Anti-Federalists as Co-Authors of the Constitution

The Court uses the Anti-Federalist Papers as a source of original intent for the Constitution, since the Anti-Federalists were involved in a “founding dialogue” with the Federalists.<sup>48</sup> Thus, the Anti-Federalists present an original view of the Constitution’s meaning, which can either support or refute *The Federalist*.<sup>49</sup> The Anti-Federalists as co-authors of the

43. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 584–85 (1983).

44. *McCleskey v. Kemp*, 481 U.S. 279, 339 n.10 (1987) (Brennan, J., dissenting).

45. *Culombe v. Connecticut*, 367 U.S. 568, 581 n.23 (1961).

46. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 316 (1967) (Douglas, J., dissenting).

47. Buckner F. Melton, Jr. & Jennifer J. Miller, *The Supreme Court and The Federalist: A Supplement, 1996–2001*, 90 KY. L.J. 415, 417. See also Corley et al., *supra* note 1 (finding that “references to [*The Federalist*] in Supreme Court opinions are less the manifestation of originalist authority and more the expression of ideology and the use of strategy by the justices to provide originalist legitimacy”).

48. CORNELL, *supra* note 27, at 6. For a view of the use of the *Federalist Papers* as a source of original intent, see Eskridge, *supra* note 1.

49. Justice Thomas has introduced a canon of interpretation for when the Anti-Federalists and Federalists disagree: “When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.” *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring).

Constitution provide insight in interpreting “the intent of the framers.”<sup>50</sup> As such co-authors, the Anti-Federalists effectively illuminate the thoughts of the Founders at the time of drafting.

For example, Justice Kennedy’s majority opinion in *Boumediene v. Bush* references Patrick Henry’s speech to the Virginia ratifying convention to “provide additional evidence that the Framers deemed the writ [of habeas] to be an essential mechanism in the separation-of-powers scheme.”<sup>51</sup> *Boumediene* was a “momentous decision along many dimensions.”<sup>52</sup> Justice Kennedy’s majority opinion held, for the first time in American history, that the Suspension Clause “affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention.”<sup>53</sup> In doing so, Kennedy used the Anti-Federalist Papers as a window into the minds of the Constitution’s adopters.

Justice Stevens’ majority opinion in *United States Term Limits v. Thornton*, described by a contemporary commentator as “one of the most significant cases of this generation,”<sup>54</sup> also used the Anti-Federalist papers in the co-authorship paradigm. Justice Stevens referenced Samuel Bryan’s *Centinel I* and Mercy Otis Warren’s *A Columbian Patriot* to find term limits for members of Congress unconstitutional.<sup>55</sup> Justice Stevens based his *Thornton* opinion in part on the “complete absence in the ratification debates of any assertion that States had the power to add qualifications [for candidates to Congress],”<sup>56</sup> debates which included the Anti-Federalists as active participants. Thus, Justice Stevens construed the Anti-Federalists’ silence as an important indicator of ratifiers’ intent.

Under the co-authorship theory, the Anti-Federalists are not the “often-forgotten, maligned historical losers”<sup>57</sup> of America’s high school textbooks (or at least their footnotes). Rather, the Anti-Federalists were legitimate participants in the founding dialogue, and their thoughts provide

50. Edwin Meese III, Attorney Gen., Speech before the American Bar Association: *The Great Debate*, The Federalist Society; 31–42 (July 9, 1985), available at <http://www.fed-soc.org/resources/page/the-great-debate-attorney-general-ed-meese-iii-july-9-1985>.

51. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

52. Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1 (2008). But see Robert Chesney, *International Decisions: Boumediene v. Bush*, 102 AM. J. INT’L L. 848, 851 (2008) (“Symbolism aside, however, . . . [*Boumediene*] was not the sharp departure from the status quo that both sides implied.”).

53. Meltzer, *supra* note 52.

54. Ronald P. Rotunda, *Rule of Law: The Constitution Lets States Impose Term Limits*, WALL ST. J., Nov. 30, 1994, at A19.

55. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

56. *Id.* at 812.

57. CHRISTOPHER M. DUNCAN, THE ANTI-FEDERALISTS AND EARLY AMERICAN POLITICAL THOUGHT 3 (1995).

“additional evidence” of original intent.<sup>58</sup> Nevertheless, as co-authors, the “losers” generally provide only “additional” support, not their own independent interpretive authority. When the Anti-Federalists are invoked by the Court as co-authors of the Constitution, it is often to support views already stated in *The Federalist* or other places.<sup>59</sup>

## 2. *The Anti-Federalists as Constructive Authors of the Bill of Rights*

While the Court often views the Anti-Federalists as co-authors providing “additional information” regarding the original understanding of the Constitution, the Anti-Federalists are also viewed by the Court as the constructive authors of the Bill of Rights. Under the constructive authorship paradigm, the “concerns voiced by the Antifederalists led to the adoption of the Bill of Rights.”<sup>60</sup> Thus, the Anti-Federalists’ concerns animated the first ten amendments.<sup>61</sup> The constructive authorship paradigm flows from the historical fact that, as the Court noted, the “virtually complete absence of a bill of rights in the proposed Constitution was the principal focus of the Anti-Federalists’ attack on the Constitution.”<sup>62</sup> Since “the major legacy of the Anti-Federalists is the Bill of Rights,”<sup>63</sup> their concerns illuminate the meaning of those rights. While the co-authorship paradigm typically invokes the Anti-Federalist Papers in support of the *The Federalist*, the constructive authorship paradigm does not relegate the Anti-Federalists to a supportive role; rather, the Anti-Federalists serve as an independent source of authority for the meaning of the first ten amendments, adopted in response to Anti-Federalist concerns.

For example, in *Furman v. Georgia*, the Court observed that there was “very little evidence of the Framers’ intent in including the Cruel and

58. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

59. For other uses, see, for example, *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) (using the Anti-Federalists objections to the Commerce Clause’s potential powers and the Federalist response to support a narrow reading of congressional power under the Commerce Clause); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 138–39 (1996) (Souter, J., dissenting) (quoting George Mason to support “Marshall’s understanding that everyone had to know that the new Constitution would not draw the common law in its train”).

60. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 584 (1983).

61. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 53 (2000) (Thomas, J., concurring) (“In response to such calls, James Madison penned the Fifth Amendment.”); *City of Boerne v. Flores*, 521 U.S. 507, 549 (1997) (O’Connor J., dissenting) (“Anti-Federalists . . . insisted on more definite guarantees. . . . [T]hey wanted explicit assurances that the Federal Government had no power in matters of personal liberty.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 364 (1994) (Thomas J., concurring) (“[T]he Anti-Federalists . . . were the driving force behind the demand for a Bill of Rights.”).

62. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting).

63. 1 STORING, *supra* note 4, at 64. See also J.R. POLE, *THE AMERICAN CONSTITUTION: FOR AND AGAINST* 17 (1987) (“More than anything else, however, the Anti-Federalists demanded the addition of a bill of rights.”).

Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights.”<sup>64</sup> Consequently, the Court turned to Patrick Henry’s speech at the Virginia Convention to provide “some light on what the Framers meant by ‘cruel and unusual punishments.’”<sup>65</sup> Henry, who opposed the Constitution on the grounds that it lacked such a prohibition, was invoked as a constructive author of the amendments subsequently addressing his objections. Similarly, in *District of Columbia v. Heller*, the Court cited the Federal Farmer and John Smilie’s “fear that the federal government would disarm the people in order to impose rule through a standing army or select militia” to support the conclusion that “the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.”<sup>66</sup> The Anti-Federalists, fearful of losing their weapons, were treated as the constructive authors of the provision of the Bill of Rights guaranteeing them their arms.

In *Crawford v. Washington*, the Court referenced Federal Farmer’s objections to the Constitution to construe the right of confrontation secured by the Sixth Amendment.<sup>67</sup> Indeed, the Court has invoked the Anti-Federalist Papers as constructive authors of every amendment in the Bill of Rights save the Third (which has seen very little use over the years).<sup>68</sup>

64. *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

65. *Id.* at 260. *See also* *Rummel v. Estelle*, 445 U.S. 263, 287 (1980) (Powell, J., dissenting) (“Although the legislative history of the Eighth Amendment is not extensive, we can be certain that the Framers intended to proscribe inhumane methods of punishment. . . . When the Virginia delegates met to consider the Federal Constitution, for example, Patrick Henry . . . feared that without a ‘cruel and unusual punishments’ clause, Congress ‘may introduce the practice . . . of torturing, to extort a confession of the crime.’”); *Gregg v. Georgia*, 428 U.S. 153, 169–70 & n.17 (1976) (“The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment. . . . This conclusion derives primarily from statements made during the debates in the various state conventions . . . . For example, Virginia delegate Patrick Henry objected vehemently to the lack of a provision banning ‘cruel and unusual punishments’ . . . .”); *Furman*, 408 U.S. at 320 (Marshall, J., concurring) (“The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred . . .”).

66. *District of Columbia v. Heller*, 554 U.S. 570, 598–99 (2008).

67. *Crawford v. Washington*, 541 U.S. 36, 48–49 (2004). *See also* *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (citing *Federal Farmer No. 15* for the proposition that the right to jury trial is “no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

68. In fact, the Third Amendment’s small impact has become an affirmative source of entertainment. *See Third Amendment Rights Group Celebrates Another Successful Year*, THE ONION (Oct. 5, 2007), [http://www.theonion.com/content/news/third\\_amendment\\_rights\\_group](http://www.theonion.com/content/news/third_amendment_rights_group) (“The organization quickly grew in influence and cites its vigilance as the primary reason why the amendment has only been litigated once in a federal court since the Bill of Rights was ratified.”). For a discussion of this case, see Ann Marie C. Petrey, *The Third Amendment’s Protection Against Unwanted Military Intrusion: Engblom v. Carey*, 49 BROOK. L. REV. 857 (1983).

Since the Anti-Federalists' most enduring contribution to the Constitution was the Bill of Rights, the Court's constructive author paradigm recognizes the pivotal role the Anti-Federalists played in establishing the Bill of Rights, and employs them as the primary authors behind the first ten amendments.

### 3. *The Anti-Federalist Papers as Dictionary*

Lastly, the Anti-Federalist Papers are used like a dictionary to illuminate the generally accepted meaning of words at the time of the Founding. Under this theory, the Constitution is properly construed with reference to the ordinary meaning of the text at the time of drafting.<sup>69</sup> For example, in *United States v. Lopez*, Justice Thomas's concurrence references the Anti-Federalist Papers to support the notion that "trade (in its selling/bartering sense) and commerce [were used] interchangeably."<sup>70</sup> Justice Thomas used the Anti-Federalists as any other contemporary document could be used: to determine the generally accepted meaning of words at the time of drafting. The dictionary paradigm can often operate in conjunction with the co-author and constructive author paradigms, since the contemporary meaning of a phrase, particularly a relatively novel one, likely bore a reasonable relationship to what its original authors thought it meant. However, the Court rarely uses the Anti-Federalist Papers exclusively in the dictionary paradigm, typically combining them with the authorship or co-authorship paradigms instead.

## III. DISTINGUISHING BETWEEN ANTI-FEDERALIST PAPERS

The Anti-Federalist Papers are a diverse group of documents, which vary widely in authorship and contemporary impact. Indeed, it is not clear which documents should constitute the canonical Anti-Federalist Papers.<sup>71</sup> In contrast, *The Federalist* constitutes a well-defined group of papers, largely homogenous in authorship and circulation. Madison and Hamilton were both present at the Constitutional Convention. As they were present at

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69. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, in *A MATTER OF INTERPRETATION* 38 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

70. *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring). For an analogous use of *The Federalist*, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 858–59 (1989) (using *The Federalist* to help define the meaning and scope of "Executive Power" and finding that "the proponents of the Constitution during the ratification campaign felt constrained to emphasize the important differences between British royal prerogative and the powers of the presidency").

71. See *supra* notes 14–18 and accompanying text.

creation, they had a unique view into the original intent of the document's drafters.<sup>72</sup> The *Federalist Papers* were also published in a complete and numbered pamphlet in 1788, and were seen by contemporaries as a complete volume.<sup>73</sup> In contrast, there is no single authoritative copy of the Anti-Federalist Papers. The authors of the Anti-Federalist Papers vary widely, from George Mason, an important figure who was present for the Convention, to anonymous authors whose work received little contemporary notice when published.<sup>74</sup> In contemporary terms, the Anti-Federalist Papers range from widely circulated opinion pieces published by prominent lawmakers in national publications to little read blogs by anonymous authors.<sup>75</sup>

Thus, it is necessary to determine the relative interpretive value of individual Anti-Federalist Papers relative to each other, since "[r]econstructing the dynamics of the original debate over ratification requires that texts be weighted according to their influence at the time."<sup>76</sup> Otherwise, appealing to the Anti-Federalist Papers whenever ideologically convenient amounts to little more than the proverbial "looking out over a crowd and picking out your friends."<sup>77</sup> All Anti-Federalist Papers were not created alike, and should be recognized as diverse in their origins and importance. The widely reprinted words of a constitutional delegate likely had more influence on the contemporary ratification debates and understanding of the Constitution than the never republished musings of a Harvard Librarian in a relatively obscure newspaper. This Part proposes that three factors properly determine the relative interpretive weight of each Anti-Federalist Paper: first, the presence vel non of the author at the Constitutional Convention; second, the prominence of the author in the

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72. Madison played a far larger role at the Convention than Hamilton. Indeed, Madison played a critical role in the drafting of the Constitution even before the Convention started, when he called the Virginia delegation together to caucus and draft the Virginia Plan, which would serve as the framework for the Constitution.

73. Elaine F. Crane, *Publius in the Provinces: Where Was The Federalist Reprinted Outside New York City?*, 21 WM. & MARY Q. 589, 589–591 (1964).

74. The Anti-Federalists also do not present a homogenous ideological unit: "[I]t was their cacophony, not their harmony, that distinguished the opponents of the Constitution." CORNELL, *supra* note 27, at 27.

75. *See also id.* at 25 ("Anti-Federalists wrote hundreds of essays and short squibs; the vast majority of these, however, were never republished. Fewer than 150 essays were reprinted at least twice or sustained a print run as a pamphlet large enough to have an impact beyond their immediate point of origin . . .").

76. *Id.*

77. *U.S. Senate Judiciary Committee Holds a Hearing on the Nomination of John Roberts to Be the Chief Justice of the Supreme Court, Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST (Sept. 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html> (last visited Feb. 29, 2012) (statement of John Roberts).



state ratifying debates surrounding the Constitution; third, the contemporary circulation of the paper at the time of publication.<sup>78</sup>

*A. Factor One: Presence of the Author at the Convention*

If the search for original meaning is a search for “the original intent of the Framers,”<sup>79</sup> there is no stronger authority on the framers’ intent than the framers themselves.<sup>80</sup> In *Cohens v. Virginia*, Chief Justice John Marshall justified looking to *The Federalist* because of the “part two of its authors performed in framing the constitution, [which] put it very much in their power to explain the views with which it was framed.”<sup>81</sup> The same logic applies to those Anti-Federalists present at the Constitutional Convention. These men were intimately familiar with the secret discussions in Philadelphia and the drafting of the Constitution. Some prominent Anti-Federalists were present for more of the Constitutional Convention than Alexander Hamilton, who was away much of the time in New York.

Three Anti-Federalists were present for the entire Convention but refused to sign the final document: George Mason, Elbridge Gerry, and Edmund Randolph. The Anti-Federalist Papers they wrote should thus be given particular weight under the author paradigm for determining the original intent of the Constitution. Although these men did not sign the Constitution, they were participants in the process leading to its drafting.<sup>82</sup> Three other Anti-Federalists each attended a portion of the Convention: Robert Yates, John Lansing, and Luther Martin. Their writings should also be given some, but not as much, deference in determining original intent at the Convention since they were not present for the full drafting of the document. Martin’s writings are entitled to more weight because he played a more prominent role at the Convention and stayed later than Yates and Lansing, who left early in the summer.<sup>83</sup> Less deference should be provided to the early departees when interpreting provisions for which they were not present during the drafting stages.

The most prominent Anti-Federalist at the Convention, George Mason of Virginia, began writing his critique of the Constitution during the

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78. I was aided in crafting the following Part by Professor Maggs’s excellent work on the Anti-Federalist Papers, which provided my initial exposure to some of the cases cited below. Maggs, *supra* note 6.

79. Maggs, *supra* note 6, at 820. *See also* Scalia, *supra* note 69.

80. *See, e.g.*, Maggs, *supra* note 6, at 820 (describing the search for “evidence of the original intent of the Framers”).

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

82. These authors’ views regarding the meaning of the Bill of Rights should also bear some weight, given the fact that they often advocated for a Bill of Rights at the Convention itself, and thus were among the Bill of Rights constructive authors. *See supra* Part II.C.2.

83. MAIER, *supra* note 2, at 90–92.

Convention's final week "on the blank pages of his [draft] copy of [the Constitution from] the Report of the Committee of Style."<sup>84</sup> He was an outspoken critic of the Constitution, and asked a variety of questions throughout the Convention regarding the meaning of particular aspects of the Constitution.<sup>85</sup> Arguably, Mason wrote the first critiques of the Constitution with which he was so intimately familiar and on which he had a front row seat in creating. Elbridge Gerry, another prominent Anti-Federalist who would later give his name to creative congressional redistricting, represented Massachusetts at the Constitutional Convention. Anti-Federalist Edmund Randolph served as a delegate from Virginia, introduced the Virginia Resolutions which set the framework for the Convention, and sat on the Committee of Detail which created the first draft of the Constitution.<sup>86</sup> Gerry's objections caused a "furor" when they were published in Massachusetts, fueled, in no small part, by his status as a delegate to the Convention.<sup>87</sup> Thus, these three Anti-Federalist authors had an intimate view of the Constitution's creation and, as participants in the entire Convention, were well-positioned to understand the original meaning of the work which emanated from the Convention.<sup>88</sup>

Three other Anti-Federalists attended some portion of the Convention but did not stay for its entirety. Luther Martin attended almost the entire Constitutional Convention. He departed on September 10, 1787, seven days before the final draft was completed. He represented Maryland and argued strenuously for stronger representation of the smaller states.<sup>89</sup> Martin's *The Genuine Information Delivered to the Legislature of the State of Maryland* was "the primary and, for many, the only source of information about the proceedings of the Philadelphia Convention" since "[f]ew, if any, details about the convention had been leaked to the press" because the Convention had "impose[d] a rule of secrecy."<sup>90</sup> Robert Yates and John Lansing, Jr., both of New York, saw much less of the Convention than Martin. They departed two months earlier, on July 10, 1787. Yates and Lansing

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84. BEEMAN, *supra* note 9, at 372.

85. See, e.g., JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (1840) (1987, W.W. Norton & Co.) 605 (describing Mason's questions about the Impeachment Clause and its limitations.).

86. MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY 9 (2002). Later on, Randolph would serve as the first Attorney General of the United States. JOHN J. REARDON, EDMUND RANDOLPH 178-80 (1975).

87. MAIER, *supra* note 2, at 88.

88. This is not to claim that those at the convention were privy to some "private intent" not available to the public. Rather, that given the time, energy, and effort they invested in the project, as well as the opportunity to ponder the document and see its creation, they likely had a more effective understanding of the document than those who were not in Philadelphia.

89. BILL KAUFFMAN, FORGOTTEN FOUNDER, DRUNKEN PROPHET: THE LIFE OF LUTHER MARTIN 36-38 (2008).

90. CORNELL, *supra* note 27, at 52.

witnessed little of the actual drafting, but their presence at the Convention signals the high esteem in which they were held in New York. Moreover, they were present for the critical debates involving the creation of the House and Senate, and thus could speak with authority on the Framers' intent on those matters.

In sum, of the many Anti-Federalist authors, six were in a unique position to understand the original intent of the Constitution since they took part in the Convention. Thus, their writings carry greater weight than those of other Anti-Federalists insofar as the issue is the Framers' intent, since these men were present, in whole or in part, at the creation. In the words of Chief Justice Marshall, they had a distinct role which they "performed in framing the constitution, [which] put it very much in their power to explain the views with which it was framed."<sup>91</sup>

*B. Factor Two: Prominence of Author in the State Ratification Debate*

Part of the Constitution's original meaning derives from the understanding of the Constitution at the state ratifying conventions.<sup>92</sup> In contrast to the gag order surrounding the deliberations in Philadelphia, the ratifying conventions constituted public and transparent discussions regarding the merits and meaning of the Constitution.<sup>93</sup> Thus, the relative prominence of particular Anti-Federalist authors in the state ratification debates should play a role in determining the relative historical value of the works each produced. The more prominent authors were heard by many at the ratifying conventions. While there were a number of prominent Anti-Federalists at the state level, one in particular bears special mention: Patrick Henry.

Patrick Henry played a prominent role in the American Revolution and served as Governor of Virginia from 1784 to 1786. Henry declined to attend the Constitutional Convention. Some claim that he declined because he "smelt a rat" in Philadelphia, but it is more likely that Henry was too busy with "personal and local matters" of his home state of Virginia to make the trip to Philadelphia.<sup>94</sup> Henry was an important symbolic leader of the Anti-Federalist movement, spearheading the charge against the Constitution's adoption in the largest state. Despite the presence of a number of other prominent Anti-Federalists, Henry spoke alone for almost a week against the Constitution and dominated the Virginia ratifying

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

92. *See, e.g., Maggs, supra* note 6, at 823 ("[T]he Court has continued to cite the *Federalist Papers* to show the original understanding of the ratifiers.").

93. *See* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2011), available at <http://lawweb.usc.edu/who/faculty/workshops/documents/Amarspaper.pdf>.

94. BEEMAN, *supra* note 9, at 92.

convention.<sup>95</sup> Henry produced no public writing regarding the Constitution. However, the transcripts of his speeches at the Virginia ratifying convention were widely reprinted and played a prominent role in the Virginia ratifications as well as in other states.<sup>96</sup> Henry was the dominant voice in the Virginia convention. His words reached throughout the colonies and undoubtedly impacted the views of many regarding the meaning of the Constitution at the time of ratification.

*C. Factor Three: Contemporary Circulation of the Anti-Federalist Papers*

To assess the value of an individual Anti-Federalist Paper in the context of the ratifying debate, it is also necessary to examine the degree to which individual Anti-Federalist Papers impacted contemporary discourse. As a metric of such impact, this article proposes using the contemporary circulation of each of the Anti-Federalist Papers as measured by the number of its reprintings. This metric allows a modern reader to measure how widely disseminated were the beliefs espoused by the particular author. While an imperfect measurement, the more eyes an Anti-Federalist Paper reached, the more minds it was likely to influence and the more its conception of the Constitution likely influenced public opinion. Moreover, printers in this era were more likely to run pieces which they thought of interest to their readers and which advanced plausible arguments. Thus, the number of reprints assists the modern reader in assessing the historical import of the paper in question.

The number of reprints is particularly important under the constructive authorship paradigm: the more widely circulated a document, the more likely that it actually influenced public opinion and thus more likely that it contributed to the creation of the Bill of Rights. A document printed once in New Hampshire had less impact on public opinion than did a writing reprinted many times along the entire breadth of the colonies.<sup>97</sup> For instance, William Paca's proposed amendments to the Constitution offered in the Maryland Convention was reprinted forty-six times, running in approximately half the newspapers then in print in the United States.<sup>98</sup> In

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95. RICHARD J. ELLIS, *FOUNDING THE AMERICAN PRESIDENCY* 259 (1999).

96. *See infra* Part IV.C.

97. Optimally, the number of reprinting should be indexed to the circulation of each newspaper the reprint appears in. However, there is very little data regarding circulation statistics for this period. DILL, *supra* note 28, at 10. The average circulation during this period was, at greatest, 600–700 copies. FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 260 YEARS: 1690 TO 1950*, 159 (rev. ed. 1950). The readership, however, was likely larger. For instance, “[t]averns . . . may have kept issues of newspapers for their guests to read.” Maggs, *supra* note 6, at 815.

98. *See sources cited supra* note 28.

contrast, many Anti-Federalist Papers were never reprinted and fewer than 150 Anti-Federalist papers were reprinted two or more times.<sup>99</sup>

To summarize, three elements affect the relative authoritativeness of the different Anti-Federalist Papers: the presence vel non of the author at the Constitutional Convention, the prominence of the author at a state ratifying convention, and the contemporary circulation of the piece in question. The next Part applies these three metrics to analyze the Court's use of the Anti-Federalist papers.

#### IV. HOW THE SUPREME COURT MISUSES THE ANTI-FEDERALISTS

The Supreme Court has fallen into the trap of treating all Anti-Federalist Papers alike. This approach—treating all available papers as similar in authority—is sensible for *The Federalist*, a coherent body of work produced by cooperating co-authors of similar stature, prominence, and outlook. However, in the context of the Anti-Federalist Papers, the Court fails to recognize the diversity of the different documents and has treated all as equally authoritative, irrespective of the author's presence vel non at the Convention, the author's role (or lack thereof) in the ratifying process, and the circulation of such papers. The increasing diversity of Anti-Federalist papers cited in the last three decades reflects an increasingly indiscriminate use of historical sources. In this Part, I first examine a single opinion which typifies the Supreme Court's indiscriminate use of the Anti-Federalist Papers: Justice Thomas's dissent in *Camps Newfound/Owatonna v. Town of Harrison*.<sup>100</sup> Next, I examine the Court's Anti-Federalist jurisprudence more broadly, finding that the Court has never distinguished among different Anti-Federalist Papers. Rather, the Court has done just the opposite: it increasingly cites to anonymous Anti-Federalist authors whose papers received little circulation at the time of publication and whose authors are still anonymous. Such documents at most weakly claim to reflect a contemporary understanding of the Constitution.

##### A. Camps Newfound: A Case Study

The indiscriminate invocation of different Anti-Federalist Papers is typified by Justice Thomas's dissent in *Camps Newfound/Owatonna v. Town of Harrison*.<sup>101</sup> In that case, the Supreme Court reversed the Maine

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99. CORNELL, *supra* note 27, at 25.

100. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

101. *Id.*

Supreme Court and held that a property tax assessed on a non-profit camp violated the dormant Commerce Clause, since the tax was assessed because a majority of the camp's attendees came from out of state.<sup>102</sup> Justice Thomas, in dissent, argued that Article I, Section 10, should apply, rather than the Court's dormant Commerce Clause jurisprudence.<sup>103</sup> Section 10 declares, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."<sup>104</sup> Justice Thomas employed the Anti-Federalist Papers to interpret this clause, in particular focusing on the meaning of "duty"<sup>105</sup> and invoked five Anti-Federalist authors to do so:

[When Martin inquired at the Convention about] the somewhat ambiguous usage of the words "duty" and "impost," . . . James Wilson . . . replied as follows: "[D]uties are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects . . ." [S]ee also . . . (*Luther Martin, in Maryland Convention*, describing same colloquy); *The Fallacies of the Freeman Detected by a Farmer* . . . ("Under the term duties [in Art. I, § 8], every species of indirect taxes is included, but it especially means the power of levying money upon printed books, and written instruments"). . . .

That power is broader than the prohibition on States found in Art. I, § 10, which reaches not all duties, but only those on "imports or exports." . . . See, e.g., *DeWitt, Letter To the Free Citizens of the Commonwealth of Massachusetts* . . . (noting that Congress "shall have the *exclusive* power of imposts and the duties on imports and exports, [and, implicitly, a concurrent] power of laying excises and other duties" . . .); *Letters from The Federal Farmer*, Oct. 10, 1787, in 2 *Storing* 239 (distinguishing between "impost duties, which are laid on imported goods [and] may usually be collected in a few seaport towns," and "internal taxes, [such] as poll and land taxes, excises, duties on all written instruments, etc. [which] may fix themselves on every person and

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102. *Id.*

103. *Id.* at 637.

104. U.S. CONST. art. I, § 10, cl. 2.

105. Section 10 provides, in relevant part, "No State shall, without the Consent of the Congress, lay any Imposts or *Duties on Imports or Exports*, except what may be absolutely necessary for executing it's inspection Laws." U.S. CONST. art. I, § 10, cl. 2 (emphasis added).

species of property in the community”); *Essays of Brutus*, Dec. 13, 1787 . . . .<sup>106</sup>

Justice Thomas treats all five Anti-Federalist sources as equally authoritative, and cites all five Anti-Federalist Papers from the same compendium: Herbert Storing’s *The Complete Anti-Federalist*.<sup>107</sup> While Storing’s book provides brief biographical sketches of the authors, it is silent on the circulation of each paper. When these factors are considered, it becomes clear that these five papers differ widely in their relative merits as historical sources.

First, consider the presence vel non of the authors at the Convention: Luther Martin was a delegate to the Constitutional Convention and provided “the primary and, for many, the only source of information about the proceedings of the Philadelphia Convention.”<sup>108</sup> In the passage cited by Justice Thomas, Martin describes a conversation he had with James Wilson, a member of the Committee of Detail who drafted the Constitution. Martin’s contemporary invocation of his dialogue with a fellow founder at the Convention sheds significant light on the drafting of the Constitution under the authorship paradigm. In contrast, the other four authors cited by Justice Thomas are anonymous writers, who were almost certainly not present at any point in the drafting of the Constitution.<sup>109</sup>

106. *Camps Newfound/Owatonna*, 520 U.S. at 638–39 & n.21 (*duties and imposts* italicized in original; other emphasis added).

107. HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981).

108. CORNELL, *supra* note 27, at 52.

109. The identity of “A Farmer” is unknown. *See* 3 STORING, *supra* note 4, at 181. Similarly, historians have been unable to identify who wrote under the pseudonym “John Dewitt”; Storing does not provide the author’s actual name, 4 STORING, *supra* note 4, at 15, nor does the Documentary History, 4 DHRC, *supra* note 5, at 109. Similarly, Saul Cornell identifies “John Dewitt” as only “one Anti-Federalist.” CORNELL, *supra* note 27, at 58.

The identity of the Federal Farmer is a matter of ongoing discussion. Originally, the author of the letters was thought to be Richard Henry Lee. 14 DHRC, *supra* note 5, at 15. *See also* JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION* 198 (1961). However, Gordon Wood shed significant doubt on this claim. *See generally* Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 31 WM. & MARY Q. 299 (1974). *See also* 2 STORING, *supra* note 4, at 215 (“The present editor’s review of the evidence . . . [and] Gordon Wood’s independent and often parallel investigation . . . led him too to doubt the solidity of the usual attribution [of the Federal Farmer’s identity].”). The Court also appears unsure of Federal Farmer’s true identity. *Compare* Crawford v. Washington, 541 U.S. 36, 49 (2004) (“Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of ‘written evidence’ . . . . R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)”), with McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 343 n.6 (1995) (“‘The Federal Farmer,’ who may have been Richard Henry Lee”), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 271 (1985) (Brennan, J., dissenting) (“The ‘Federal Farmer,’ commonly identified as Richard Henry Lee of Virginia”).

Brutus has also escaped recognition. 13 DHRC, *supra* note 5, at 411 (noting that “[t]he authorship of the ‘Brutus’ essays is uncertain; contemporaries and scholars since then have suggested different authors” and noting that Abraham Yates, Richard Henry Lee, Thomas Treadwell, George Clinton, and Robert Yates have all been considered as potential authors). Most impressively, one contemporary alleged that John Jay, author of six of The Federalist Papers, was actually Brutus. *Id.*

Moreover, the Anti-Federalist Papers cited by Justice Thomas diverge widely in the role their respective authors played at the state ratifying conventions. Martin played a prominent role in the Maryland convention, carrying the opposition for a sustained period of time.<sup>110</sup> Most likely, neither “John Dewitt” nor “Freeman” were present at any ratifying convention.<sup>111</sup> If *Federal Farmer* was written by Richard Henry Lee, as some claim,<sup>112</sup> then he played a prominent role at the Virginia ratifying convention. The same is true for many of the authors alleged to have written Brutus, although no author ever claimed either work later in life. We thus must be skeptical of the possibility that these papers reflect the views of prominent ratifiers.

Most critically, the papers cited by Justice Thomas varied widely in their circulations. The section of Luther Martin’s speech was reprinted at least eight times and was published in New York, Pennsylvania, Maryland, Massachusetts, Virginia, and South Carolina.<sup>113</sup> According to one historian, this section of Martin’s speech was the fifteenth most reprinted Anti-Federalist work in history.<sup>114</sup> *Brutus No. 1* was reprinted three times, and published in Massachusetts, New York, Pennsylvania.<sup>115</sup> The *Federal Farmer No. 3* was printed in pamphlet form and went through at least two reprintings in New York.<sup>116</sup> In contrast, John Dewitt’s second letter, “To the Free Citizens of the Commonwealth of Massachusetts,” was reprinted only once, in the *United States Chronicle* published in Providence, after

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Thus, at best, only Brutus, if written by Abraham Yates, would present a work by an author who was present at the Convention.

110. FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 39 n.\* (John P. Kaminski & Richard Leffler, eds., 2d ed. 1998).

111. I have been unable to unearth any allegations regarding the authorship of these two pieces.

112. See *supra* note 109.

113. Luther Martin’s remarks which Justice Thomas cites were reprinted in pieces during the ratification debates. The section Justice Thomas refers to is from *Luther Martin: Genuine Information VI*, which was originally published in the Baltimore *Maryland Gazette* on January 15, 1788. 15 DHRC, *supra* note 5, at 374. This installment was reprinted in full seven times, and the section referenced by Justice Thomas was reprinted, with other excerpts, an eighth time in the Philadelphia *Freeman’s Journal*. *Id.* at 380 n.1. Professor Cornell lists ten reprintings, but does not provide citations to the additional two. CORNELL, *supra* note 27, app. 1 at 310. These two printings were likely “identified since the publication of the DHRC.” *Id.* at 309. For a comparative breakdown of the number of newspapers per state in this period, see DILL, *supra* note 28, app. II at 79.

114. See CORNELL, *supra* note 27, app. 1 at 310.

115. 13 DHRC, *supra* note 5, at 421 n.1. Cornell lists four re-printings. CORNELL, *supra* note 27, app. 1 at 312.

116. 14 DHRC, *supra* note 5, at 15. According to an advertisement, “Four editions, (and several thousand[)]” [copies were] “in a few months printed and sold in the several states,” but only three editions are identified in the DHRC. *Id.* at 14–15. Cornell lists the *Federal Farmer No. 3* as having five reprintings. CORNELL, *supra* note 27, app. 1 at 311. Cornell notes that “[i]t is difficult to assess the relative impact of publication in a newspaper versus distribution as a pamphlet. When compared with essays that were widely reprinted in both newspaper and pamphlet . . . it seems clear that Federal Farmer’s impact was more circumscribed.” *Id.* at 25–26.



running initially in the Boston-based *American Herald*.<sup>117</sup> *The Fallacies of the Freeman Detected by a Farmer* was reprinted only once and only in Pennsylvania.<sup>118</sup> Moreover, the essay was published four months after the Pennsylvania state convention ended.<sup>119</sup> A table distinguishing the papers Justice Thomas cites appears below:

Table 1: Re-Evaluating the Anti-Federalist Papers in *Camps Newfound*

Author	Present at Convention?	Prominent at State Ratifying Convention?	Reprints
Luther Martin in Maryland Convention	Yes	Yes	8 (10)
The Fallacies of the Freeman	No	No	1
Dewitt No. 2	No	No	1
Federal Farmer No. 3	No	Possible	2
Brutus No. 2	No	Possible	3

Justice Thomas's opinion does not recognize that different Anti-Federalist Papers command different levels of authority.<sup>120</sup> There is no justification for treating these disparate documents identically. Nevertheless, the Thomas dissent places Luther Martin's objections to the Maryland convention on equal footing with "A Farmer." Martin's speech was written by a delegate to the Constitutional Convention who also played a critical role in his state ratifying convention, while "A Farmer" was an anonymous author who was neither at the Convention nor prominent in a state ratifying convention. Moreover, Martin's letter was republished at least eight times in six states, while "A Farmer" was published only twice in Pennsylvania, four months *after* the Keystone State ratified the

117. 4 DHRC, *supra* note 5, at 161 n.1. Cornell does not list any reprinting for Dewitt.

118. 17 DHRC, *supra* note 5, at 145 n.1. The essay was published in three parts; the first part was reprinted a third time in the *Carlisle Gazette*. *Id.* at 146 nn.2 & 5. However, Justice Thomas cites to the second section of the essay.

119. *Fallacies* was published in April 1788. 3 STORING, *supra* note 4, at 181. The Pennsylvania Convention ended December 15, 1787. 17 DHRC, *supra* note 5, at xxiii.

120. See, e.g., CORNELL, *supra* note 27, at 25 (arguing that a proper interpretation is one which insures that "texts be weighted according to their influence at the time").

Constitution. As this comparison demonstrates, the Anti-Federalist Papers are not of equal historical authority, yet Justice Thomas's dissent fails to note that one of its citations is to a prominent framer whose remarks were widely reprinted, while another cited paper is the narrowly circulated musings of an anonymous author. As the next Subpart shows, Justice Thomas is not alone in his indiscriminate invocation of the Anti-Federalist Papers. Rather, the Court increasingly cites papers by little-known Anti-Federalist authors who received little contemporary attention at the time of publication.

*B. The Supreme Court's Indiscriminate Use of the Anti-Federalist Papers*

An examination of the Court's Anti-Federalist jurisprudence indicates increasing citation of papers with little historical authority. In the next two Subparts, this Article presents evidence that the Court's quantitative increase in Anti-Federalist citations has correlated with increasingly indiscriminate use of the Anti-Federalist Papers. The Court has moved from citing the few papers by Anti-Federalist authors who attended the Constitutional Convention and who played prominent roles in state ratifying debates to citation of less circulated works by anonymous authors. This diversification was caused largely by the publication of Herbert Storing's *The Complete Anti-Federalist* in 1981 and is the result of three availability-based processes described further in the next Part: flattening, cherry-picking, and snowballing.

This Article first surveys the Court's Anti-Federalist jurisprudence from 1790 to 1980. During that period, the Court cited almost exclusively to Patrick Henry, George Mason, and Luther Martin, three Anti-Federalists who were either present at the Constitutional Convention or prominent figures in a state ratifying conventions (or both), and whose work was widely circulated. The second Subpart examines the trend from 1981 to 2009, which saw a vast growth in the diversity of Anti-Federalist citations, many of questionable authority.

*C. 1790–1980: The Era of Henry, Mason, and Martin*

From 1790 to 1980, the Supreme Court cited the Anti-Federalist Papers twenty-six times. Fourteen Supreme Court cases cited to Patrick Henry's speeches at the Virginia Ratifying convention, six cases to Luther Martin, four to George Mason, and a single case referred to George Clinton and "Brutus." Thus, ninety-two percent of the Anti-Federalist citations of the first one hundred ninety years are to authors who were both present at the Constitutional Convention and prominent in their state ratifying convention

(Mason and Martin) or were prominent in the state ratifying convention (Henry).

As discussed above, Patrick Henry played a prominent role in the Virginia ratifying convention, leading the opposition to ratification almost single-handedly for the first week of the convention.<sup>121</sup> Moreover, Henry was an immensely influential figure in Virginia, a former governor who had been offered a seat at the Constitutional Convention and declined.<sup>122</sup> Patrick Henry's public contribution to the debates was in the Virginia ratifying convention. While Henry produced no written public documentation against the Constitution, his remarks were circulated widely in the colonies. Henry's remarks of June 5th contain his famous line, "We are come hither to preserve the poor Commonwealth of Virginia, if it can be possibly done: Something must be done to preserve your liberty and mine."<sup>123</sup> Sections of the June 5th debates were reprinted in twelve newspapers in four states.<sup>124</sup> Similarly, the June 7th debate in which Henry figured prominently circulated widely; there were a total of thirteen reprintings, excerpts, and summaries of that debate in six states.<sup>125</sup> Thus, Henry satisfies two of the three criteria for authoritativeness: he was a prominent ratifying convention figure whose comments were widely reprinted. Unsurprisingly, Henry is thus often cited in the constructive author paradigm, particularly with regards to the Eighth Amendment. That Amendment was drafted, in large part, in response to concerns Henry articulated at the Virginia convention. For nearly two centuries, the Court used Henry's speech in a manner consonant with its historical authority as a constructive author of the Eighth Amendment.

As discussed earlier, Luther Martin and George Mason were prominent figures, both in the Constitutional Convention, as non-signers, and in their respective ratifying convention, where they staunchly opposed ratification.<sup>126</sup> George Mason's address at the Virginia state convention was

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121. See *id.*

122. *Id.*

123. 9 DHRC, *supra* note 5, at 952.

124. *Id.* at 969. The *Pennsylvania Journal* printed the minutes in their entirety on June 21, 1788, and excerpts were reprinted in ten other newspapers. *Id.* I have been unable to determine how extensive these reprinting were, but given Henry's prominence in American life, it is likely that the excerpts contained at least some of his remarks. Some of his remarks were less widely circulated. For instance, his convention remarks of June 4th were reprinted only once in excerpt. *Id.* at 941 n.1.

125. The *Pennsylvania Journal* reprinted the full debate. Excerpts appeared in the *Norfolk and Portsmouth Journal*, and excerpts or summaries were "printed outside of Virginia twelve times between 13 and 30 June" in five other states: New York (5), New Jersey (1), Pennsylvania (3), Maryland (1), and South Carolina (2). *Id.* at 1047 n.1. However, the following day's minutes were reprinted only twice (not counting two reports on a "'very warm' debate"). *Id.* at 1087 n.1. Notably, the debates of 11 June, in which Henry did not appear seem to have been reprinted nowhere. *Id.* at 1142 (citing no additional proceedings). It appears that the later convention debates were not widely reprinted, but they also do not contain as much of Henry's critical argument.

126. See *id.*

widely reprinted, appearing in over twenty-five newspapers.<sup>127</sup> Luther Martin's description of the constitutional debate in Philadelphia was also widely published. George Clinton was a prominent Anti-Federalist leader; Governor of New York, he presided over the New York state ratifying convention. Only "Brutus" is an anonymous author who likely did not attend the Constitutional Convention but may have played a role in a state ratifying convention.<sup>128</sup>

In sum, from 1790 to 1980, the Court, with one exception (a solitary cite to Brutus), cited papers whose authors were either present at the Framing or were prominent in state ratifying conventions. Moreover, these cited documents had been widely published at the time of the ratification debates. From 1790 to 1980, the Supreme Court largely got it right: the Anti-Federalist Papers it cited were written by authors who, by virtue of their roles in the drafting of the Constitution and its ratification, as well as the contemporary prominence given to their remarks, had particular authority in describing the meaning of the Constitution as adopted in 1789 and the Bill of Rights adopted shortly thereafter.

#### *D. 1981–Present: The Post-Storing Era*

If the Court got the Anti-Federalist Papers right from 1790 to 1980, it has gotten them wrong since. The Court has cited the Anti-Federalist Papers more frequently during this period, but has been less discriminating in terms of historical authority. From 1790 to 1980, the Court cited to the Anti-Federalist Papers in twenty-one cases. In the twenty-eight years from 1981 to 2009, the Court cited the Anti-Federalist Papers twenty-seven times, and cited a more diverse array of papers than were cited in the first 190 years of the Court's constitutional interpretation. While Henry, Martin, and Mason account for over 92% of the Anti-Federalist citations before 1981, they account for only 37% of post-Storing Anti-Federalist citations. As discussed further in Part V, 1981 marked the publication of the first major printing of Anti-Federalist documents in over a century and caused the Court to give less authoritative, but now equally accessible, papers historical weight.

Brutus, whom the Supreme Court cited only once in almost two centuries, has recently been referenced seven times, beating out Luther Martin during the modern period.<sup>129</sup> The Federal Farmer, an unknown

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127. CORNELL, *supra* note 27, at 309.

128. *See infra* pp. 1096–97.

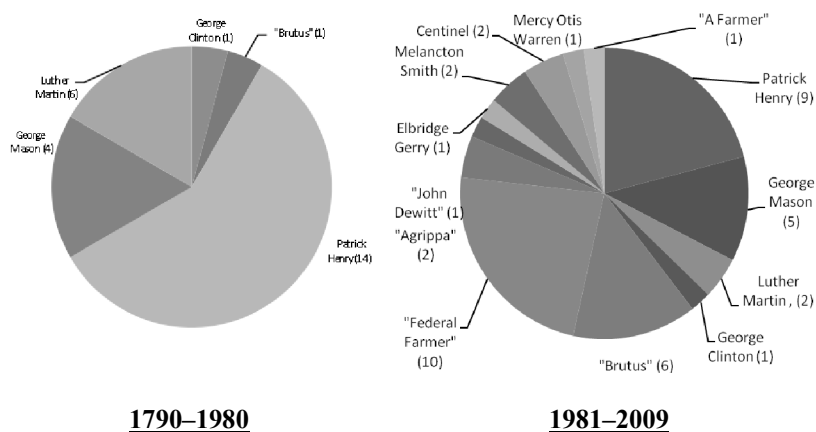
129. Brutus' five citations since 1981 are *District of Columbia v. Heller*, 554 U.S. 570, 597 (2008); *United States v. Hubbell*, 530 U.S. 27, 53 (2000); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 631 (1997); *Missouri v. Jenkins*, 515 U.S. 70, 128–30 (1995); *Atascadero State*

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anonymous author,<sup>130</sup> has been cited ten times in the modern period, after being wholly ignored by the Court before 1981.<sup>131</sup> Centinel, widely identified as Samuel Bryan, the son of a prominent Pennsylvania Supreme Court Justice,<sup>132</sup> garnered two citations by the Court during the modern period, after having been unnoticed by the Court for almost two centuries.<sup>133</sup> Other Anti-Federalists making their U.S. Reports debut in the past three decades include the New York merchant and politician Melancton Smith,<sup>134</sup> the pseudonymous “John DeWitt,”<sup>135</sup> and Harvard librarian James Winthrop, writing as “Agrippa.”<sup>136</sup> The graph below illustrates the increasing diversity in the Court’s Anti-Federalist citations.



Brutus and Federal Farmer are the two Anti-Federalists the citation of which has increased the most since 1981. Because of their newfound prominence, the next two Subparts examine the historical authoritativeness

*Hosp. v. Scanlon*, 473 U.S. 234, 273 (1985). Two different letters of Brutus are cited in *Camps Newfound*, 520 U.S. at 631 (citing *Brutus 1*); *id.* at 640 n.11 (citing *Brutus 5*).

130. As discussed below, Federal Farmer’s identity is a matter of dispute.

131. *Heller*, 554 U.S. at 598; *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Crawford v. Washington*, 541 U.S. 36, 49 (2004); *Hubbell*, 530 U.S. at 53; *Jenkins*, 515 U.S. at 128 (citing *Federal Farmer 15*); *Id.* at 129 (citing *Federal Farmer 3*); *United States v. Lopez*, 514 U.S. 549, 586 (1995); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 365 (1995); *Atascadero State Hosp.*, 473 U.S. at 271.

132. 1 STORING, *supra* note 4, at 130.

133. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 812 n.23 (1995); *Heller*, 554 U.S. at 600 n.17.

134. Smith’s “Address to the People of the State of New York” is referenced in *Lopez*, 514 U.S. at 586 (Thomas, J., concurring) and *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 584 (1983).

135. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 640 n.21 (1997) (Thomas, J., dissenting).

136. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 569 (1985) (Powell, J., dissenting).

of each of these authors considering the three factors described earlier: presence vel non at the Constitutional Convention, importance at a state ratifying convention, and circulation as measured by reprinting. I conclude that these two authors are not entitled to the authoritative weight the Court has granted them in recent times. Both anonymous authors had low contemporary circulation. Neither was present at the Constitutional Convention, although (depending on their true identities) they may have played significant roles in a state ratifying convention. This Article then examines the other recently-cited Anti-Federalist authors, concluding that they are even less valid historical authorities than Brutus and Federal Farmer.

### 1. “Brutus”

Brutus was first cited by the Supreme Court in Chief Justice Warren’s opinion in *Powell v. McCormack*, where Brutus is described as a “prominent antifederalist[.]”<sup>137</sup> a description echoed in later opinions.<sup>138</sup> Since 1981, Brutus has been cited six times, both in the constructive author<sup>139</sup> and co-author<sup>140</sup> paradigms, i.e., both to indicate the concerns the Bill of Rights was designed to address and to explain the meaning of the original Constitution. While Brutus’ writings are clear and coherent, he was hardly a “prominent voice” by any of the three metrics identified above. Brutus’ letters were not widely reprinted. Of the seven Letters of Brutus cited by the Court, the most widely circulated, *Brutus 1* and *3*, were reprinted only three times.<sup>141</sup> *Brutus 4*, cited by Chief Justice Warren, was reprinted only twice.<sup>142</sup> *Brutus 11* and *13*, cited in *Missouri v. Jenkins*<sup>143</sup> and *Atascadero State Hosp. v. Scanlon*,<sup>144</sup> were never reprinted after their initial publications.<sup>145</sup> Thus, Brutus was likely not widely read.

137. *Powell v. McCormack*, 395 U.S. 486, 540 (1969).

138. *See, e.g., United States v. Hubbell*, 539 U.S. 27, 53 (2000) (Thomas, J., dissenting) (describing Brutus as a “prominent voice[] outside the conventions”).

139. *See, e.g., id.* (“Similarly worded proposals to protect against compelling a person ‘to furnish evidence’ against himself came from prominent voices outside the conventions. *See . . . Letter of Brutus, No. 2 (1788) . . .*”).

140. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 273 (1985) (Brennan, J., dissenting) (“Another noted anti-Federalist writer who published under the pseudonym ‘Brutus’ also attacked what he saw as the untoward implications of the state-citizen diversity clause . . .”).

141. 13 DHRC, *supra* note 5, at 412 (noting three publications for *Brutus 1*); 14 DHRC, *supra* note 5, at 119 (noting three publications for *Brutus 3*).

142. 14 DHRC, *supra* note 5, at 297 (noting that there were two reprintings, although some sections were reprinted an additional two times).

143. *Missouri v. Jenkins*, 515 U.S. 70, 128–29 (1995) (Thomas, J., concurring).

144. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 273 (1985) (Brennan, J., dissenting).

145. 15 DHRC, *supra* note 5, at 517 (citing no additional publications for *Brutus 11*); 16 DHRC, *supra* note 5, at 172 (citing no additional publications for *Brutus 13*). While Storing writes that the

Brutus' identity remains uncertain.<sup>146</sup> Contemporary writers attributed authorship of the Brutus papers at various times to William Shippen, a Philadelphia Anti-Federalist, Richard Henry Lee, John Jay, and George Clinton.<sup>147</sup> In the late nineteenth century, Paul Leicester Ford identified Robert Yates, a delegate to the Constitutional Convention who departed in July 1787, as Brutus but provided no support for this assertion.<sup>148</sup> Since then, "most scholars have accepted Yates as the author."<sup>149</sup> However, Leicester's attribution has come under attack in the last half-century, and Brutus' identity is still an open question.<sup>150</sup> If Brutus were Yates, his presence for part of the Constitutional Convention would validate Brutus as a co-author of the Constitution. However, Yates left the convention early and thus missed much of the critical drafting which took place later in the summer of 1787.<sup>151</sup> Moreover, even if Brutus were Yates, the relatively low circulation Brutus enjoyed and the anonymity of the work at the time of the ratifying conventions makes it unlikely that Brutus played a major role molding popular opinion during the ratification debates. In sum, Brutus' claim to constructive authorship of the Bill of Rights or as a co-author of the Constitution is weak.

## 2. "Federal Farmer"

After a 195-year drought, the "Federal Farmer" was first cited by Justice Brennan in *Atascadero State Hospital v. Scanlon*.<sup>152</sup> He is now the most cited Anti-Federalist of the post-Storing period. Justice Brennan quoted "Federal Farmer" in the co-author paradigm interpreting the Diversity Clause of Article III.<sup>153</sup> Since then, "Federal Farmer" has been

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'Brutus' essays "were widely reprinted and referred to," 2 STORING, *supra* note 4, at 358, I can find evidence of few reprintings, confirming that "[t]he 'Brutus' essays were not widely reprinted." 13 DHRC, *supra* note 5, at 411. See also MAIER, *supra* note 2, at 83 ("Even 'Brutus' was seldom reprinted . . ."). However, the Brutus essays were "criticized or defended by newspaper writers in . . . towns . . . where the essays are not known to have been published" suggesting that there may have been a wider circulation than reprintings alone dictate. 13 DHRC, *supra* note 5, at 411.

146. *Id.* ("The authorship of the 'Brutus' essays is uncertain . . .").

147. *Id.*

148. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES bibliog. at 424 (Paul Leicester Ford ed., The Lawbook Exch. 2000) (1888) ("I have since concluded that [the essays of Brutus] were from the pen of Robert Yates, member of the Federal Convention from New York.").

149. 13 DHRC, *supra* note 5, at 411.

150. *Id.*

151. *See id.*

152. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 271 (1985) (Brennan, J., dissenting). This is not to claim that the Federal Farmer was unavailable prior to Storing's printing. However, Storing's printing increased the availability of his letters in a prominent and easily accessible volume.

153. *Id.* ("The debate in the press sheds further light on the effect of the Constitution on state sovereign immunity. . . . The 'Federal Farmer,' commonly identified as Richard Henry Lee of Virginia, was one influential and widely published anti-Federalist.").

cited nine additional times by the Supreme Court, both as co-author of the Constitution and as a constructive author of the Bill of Rights.<sup>154</sup> Justice Brennan described the Federal Farmer as an “influential and widely published anti-Federalist.”<sup>155</sup> However, the Federal Farmer’s contemporary impact was less than the Supreme Court and many legal scholars have previously believed.<sup>156</sup>

The complete “Federal Farmer” was never printed in newspaper form and was only circulated as a pamphlet.<sup>157</sup> The first five “Federal Farmer” letters were reprinted three times in New York and once in Boston.<sup>158</sup> A single newspaper, the Poughkeepsie *Country Journal*, reprinted *Letters 1 through 5* at the request of “A Customer.”<sup>159</sup> The Federal Farmer’s *Additional Number of Letters* was even less widely reprinted.<sup>160</sup> Thus, the general circulation of the Federal Farmer was relatively low compared to many Anti-Federalist Papers which circulated in both pamphlet and print.<sup>161</sup> And “if the measure of influence is . . . the effect a particular author had on public debate, then Federal Farmer would be counted less influential than other [Anti-Federalist] advocates of middling democratic ideology” whom the Court never cites.<sup>162</sup>

Federal Farmer’s identity has been difficult to determine. He is almost certainly not one of the six non-signers who attended the Constitutional Convention.<sup>163</sup> For many years, Richard Henry Lee was widely held to be the author of the Federal Farmer,<sup>164</sup> a view that the Court has, on occasion,

154. For the constructive author paradigm, see, for example, *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008), discussing the debate over whether the right to bear arms “needed to be codified in the Constitution” and *Crawford v. Washington*, 541 U.S. 36, 49 (2005), quoting the Federal Farmer’s objections to the lack of constitutional protections for the accused and noting that the “First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.” For the co-author paradigm, see, for example, *Missouri v. Jenkins*, 515 U.S. 70, 128 (1995), quoting the Federal Farmer in interpreting the extent that “equity granted federal judges excessive discretion to deviate from the requirements of the law.”

155. *Atascadero State Hosp.*, 473 U.S. at 271 (Brennan, J., dissenting).

156. See CORNELL, *supra* note 27, at 26.

157. 14 DHRC, *supra* note 5, at 14.

158. *Id.* at 14–15.

159. *Id.* at 16.

160. 17 DHRC, *supra* note 5, at 265–67. However, the “Antifederalist New York Federal Republican Committee distributed the *Additional Letters* widely” via post. *Id.* at 267. As with the earlier letters, the “ideas expressed by ‘Federal Farmer’ produced little Federalist response.” *Id.* at 268.

161. Nevertheless, “Federal Farmer” was recognized as thoughtful in its time. Publius described the Federal Farmer as the “most plausible” Anti-Federalist work. THE FEDERALIST NO. 68, at 331 (Alexander Hamilton) (Terence Ball ed., 2003). However, “[i]n general . . . Federalists published few rebuttals to the *Letters*.” 14 DHRC, *supra* note 5, at 18.

162. CORNELL, *supra* note 27, at 26.

163. No contemporary authors referenced any of the six non-signers as the Federal Farmer’s plausible alter-ego.

164. See, e.g., 2 STORING, *supra* note 4, at 215 (“The Federal Farmer is generally supposed to have been Richard Henry Lee . . .”).



shared.<sup>165</sup> The link between Lee and Federal Farmer likely originates in a piece by “New England” in the *Connecticut Courant*,<sup>166</sup> published on December 24, 1787. Without any supporting authority, “New England” declares, “To the Hon. Richard Henry Lee, Esq.[:] We have . . . received your labored essay . . . entitled *Letters from a Federal Farmer*.”<sup>167</sup> This attribution of authorship was repeated subsequently in four Massachusetts papers, which likewise did not provide any independent evidence for the attribution.<sup>168</sup> However, analysis of the Federal Farmer and Richard Henry Lee’s writings has led many to doubt Lee’s authorship. Thus, the true identity of Federal Farmer remains unclear.<sup>169</sup> Even if the Federal Farmer were Richard Henry Lee, Lee was unable to attend to the Virginia state ratifying convention because of ill health.<sup>170</sup>

### 3. *The New Guard*

While Brutus and Federal Farmer are responsible for over one-third of the Court’s citations to the Anti-Federalist Papers since 1981, many new Anti-Federalist authors have also made their appearances in the Court’s opinions since 1981. The table below indicates the number of times each author is referenced by the Court, the likelihood of the author’s presence at the Convention, the relative prominence of the author in a state ratifying convention, and the number of reprintings of each paper. This data reveals a wide diversity in the quantum of publication, ranging from Centinel’s

165. *Compare* Crawford v. Washington 541 U.S. 36, 49 (2004) (“Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of ‘written evidence’ . . .”) (citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)), *with* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 343 n.6 (1995) (“‘The Federal Farmer,’ who may have been Richard Henry Lee”), *and* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 271 (1985) (Brennan, J., dissenting) (“The ‘Federal Farmer,’ commonly identified as Richard Henry Lee of Virginia”).

166. The *Connecticut Courant* is the precursor of the modern *Hartford Courant*. *Older than the Nation*, HARTFORD COURANT, <http://www.courant.com/about/thc-history,0,4107859.html> (last visited Mar. 21, 2012).

167. *New England*, CONN. COURANT, Dec. 24, 1787, *reprinted in* 15 DHRC, *supra* note 5, at 81.

168. *Extract of a Letter from Cambridge*, MASS. GAZETTE, Jan. 1, 1788, *reprinted in* 15 DHRC, *supra* note 5, at 158–59 (discussing “Richard H. Lee’s hacknied trumpetry, in a pamphlet”); *The Wonder of Wonders, or Anti-Federalism Concentrated in a Body*, MASS. GAZETTE, Jan. 1, 1788, *reprinted in* 15 DHRC, *supra* note 5, at 159 (citing “the flimsey and well-known objections of mr. R. H. L. to the federal constitution”); MASS. CENTINEL, Jan. 2, 1788, *reprinted in* 15 DHRC, *supra* note 5, at 159 (describing “‘*Letters from the Federal Farmer to the Republican*,’ said to be written by Richard Henry Lee”); BOS. AM. HERALD, Jan. 7, 1788, *reprinted in* 15 DHRC, *supra* note 5, at 159 (discussing Federal Farmer and “whether Richard Henry Lee doubted of the military abilities of General Washington in 1775, or not”).

169. *See, e.g.*, STORING, *supra* note 4, at 215 (“The present editor’s review of the evidence was at an advanced stage when he was pleased to discover that Gordon Wood’s independent and often parallel investigation . . . led him too to doubt the solidity of the usual attribution [of Federal Farmer’s identity].”). For the most detailed refutation of the Lee thesis, see Wood, *supra* note 109.

170. AM. PHIL. SOC’Y, RICHARD HENRY LEE PAPERS 1763–1823, 6 (2003), *available at* <http://www.amphilsoc.org/mole/style/pdfoutput/Mss.B.L51-ead.pdf>.

twenty seven reprintings to “Agrippa,” who was never republished after first appearing in the *Massachusetts Gazette*. The Court, however, has failed to consider that the former is more likely to have influenced contemporary opinion than the latter.

Similarly, the Court treats Elbridge Gerry, a non-signing member of the Constitutional Convention, the same as James Winthrop, the Librarian of Harvard University who played no role at either the Philadelphia convention or the Massachusetts ratifying convention.

	Citations by the Court	Number of Re-printings	Presence at Framing	Prominence in State Convention
“A Farmer”	1	1 <sup>171</sup> (2) <sup>172</sup>	No <sup>173</sup>	Unlikely <sup>174</sup>
“Agrippa” (John Winthrop)	2	0 <sup>175</sup>	No <sup>176</sup>	No <sup>176</sup>
“John Dewitt”	1	1 <sup>177</sup>	No <sup>178</sup>	No <sup>179</sup>
“Centinel”	2	18 <sup>180</sup> (27) <sup>181</sup>	No <sup>182</sup>	No <sup>182</sup>

171. 17 DHRC, *supra* note 5, at 145 n.1.

172. CORNELL, *supra* note 27, at 314.

173. I can find no indication of the true identity of “A Farmer.” However, since “A Farmer” is targeted at Pennsylvania, it appears likely he was a native of that State. No Anti-Federalist delegate to the Constitutional Convention hailed from Pennsylvania.

174. It is unlikely that “A Farmer” was a prominent delegate at the Pennsylvania ratifying convention, given that his arguments do not closely tracks any prominent Anti-Federalist there, and none have suggested his possible identity as a prominent member of the convention.

175. 5 DHRC, *supra* note 5, at 743 n.1 (citing no reprintings of *Agrippa 12*); *id.* at 863 (citing no reprinting of *Agrippa 16*).

176. “Agrippa” was most likely written by James Winthrop, Harvard librarian and register of probate in Middlesex. 4 STORING, *supra* note 4, at 68.

177. 4 DHRC, *supra* note 5, at 161 n.1.

178. I can find no indication of the true identity of “John DeWitt.” Storing does not venture a guess, 4 STORING, *supra* note 4, at 15–16, nor does the DHRC. No contemporary sources made allegations regarding “DeWitt.” It is therefore unlikely that “DeWitt” was a prominent member of the Massachusetts ratifying convention, although he may have been one who was unusually good at concealing his identity.

179. Dewitt’s essays are addressed “To the Free Citizens of the Commonwealth of Massachusetts.” 4 STORING, *supra* note 4, at 16. The only Anti-Federalist attendee at the Constitutional Convention from Massachusetts was Elbridge Gerry, who was never implicated as the author, and who did not resemble “Dewitt” in writing style or argumentation.

180. 13 DHRC, *supra* note 5, at 327 (citing Centinel “printed in whole or in part in nineteen newspapers in sixteen towns, most of them north of Pennsylvania”). *See also id.* at 336–37 nn.1 & 5 (identifying the states where Centinel was reprinted).

181. CORNELL, *supra* note 27, at 309.

	Citations by the Court	Number of Re-printings	Presence at Framing	Prominence in State Convention
Elbridge Gerry	1	3 <sup>183</sup>	Yes	Yes <sup>184</sup>
“A Plebian”	2	2 <sup>185</sup> (3) <sup>186</sup>	No	Likely Yes <sup>187</sup>
“A Columbian Patriot”	1	4 <sup>188</sup>	No <sup>189</sup>	No <sup>189</sup>
“Philadelphiaensis”	1	2 <sup>190</sup> (3) <sup>191</sup>	No <sup>192</sup>	No <sup>192</sup>

Table 2: Additional Citations to the Anti-Federalist Papers, 1981–2009

As this data reveals, the Supreme Court’s increased use of the Anti-Federalist Papers in the past thirty years has been regrettably indiscriminate. The Court has made no attempt to differentiate between the different authoritativeness of different Anti-Federalist sources, even though those sources vary widely with respect to the prominence of their authors and their circulation. In the next Part, I analyze the potential reasons for the

182. Centinel was likely the product of Samuel Byran, the son of George Byran, who was a “prominent Pennsylvania legislator and judge.” 2 STORING, *supra* note 4, at 130; 2 DHRC, *supra* note 5, at 326–27 (listing members of the Pennsylvania Convention).

183. The Court cites Gerry’s April 18, 1788 Letter, which was reprinted three times. 7 DHRC, *supra* note 5, at 1751.

184. Gerry had a complicated role at the Massachusetts ratifying convention. He was not a delegate, but, due to his prominence, he was invited to sit and answer questions. However, he was restricted to answering questions in writing, which were reprinted a number of times by Massachusetts papers. 5 DHRC, *supra* note 5, at 787–88.

185. 17 DHRC, *supra* note 5, at 146.

186. CORNELL, *supra* note 27, at 314.

187. “A Plebian” was very likely Melancton Smith. Paul Leicester Ford identifies “Melancton Smith of New York, a member of the Continental Congress (1785–88), and of the New York State Convention” as “A Plebian.” PAMPHLETS ON THE HISTORY OF THE CONSTITUTION OF THE UNITED STATES, *supra* note 148, at 87. The language and argument of “A Plebian” track Smith’s argument relatively closely. 17 DHRC, *supra* note 5, at 146. However, given that Smith was anonymous at the time, circulation is likely a better measure of impact.

188. 16 DHRC, *supra* note 5, at 272–74.

189. Although not recognized as such at the time, “A Columbian Patriot” was Mercy Otis Warren. *Id.* at 272–73. Warren was a notable poet and playwright. Larry M. Lane & Judith J. Lane, *The Columbian Patriot: Mercy Otis Warren and the Constitution*, 10 Women & Pol. 17 (1990).

190. 13 DHRC, *supra* note 5, at 581 n.1.

191. CORNELL, *supra* note 27, at 313.

192. Philadelphiaensis “was probably Benjamin Workman, a tutor in mathematics at the University of Pennsylvania.” 13 DHRC, *supra* note 5, at 573.

Court's indiscriminate use of the Anti-Federalist Papers, and the implications of this analysis for canon formation generally.

#### V. THE DANGERS OF AVAILABILITY

The Court is not alone in its over-reliance on Brutus and the Federal Farmer. As Professor Saul Cornell has noted, “[The] tendency to focus on the most thoughtful and sophisticated voices of the middling democrats (such as Federal Farmer and Brutus) has distorted our understanding of ratification.”<sup>193</sup> However, the Court has not merely elevated the Federal Farmer and Brutus to canonical status; the Court has also raised a variety of unknown and lightly circulated Anti-Federalist authors to prominence. The root of this indiscriminate use is the widespread availability of the Anti-Federalist Papers through Herbert Storing’s 1981 seven-volume publication, *The Complete Anti-Federalist*.<sup>194</sup>

Lawyers and judges are not historians; they do not typically undertake extensive research in archives or pore over vast amounts of literature. Rather, they read and refer to what is accessible.<sup>195</sup> In the twenty-first century, the emergence of electronic databases, such as Lexis, Westlaw, and HeinOnline, increases the availability of material and thus enhances its probability of being cited. This Part uses the Anti-Federalist papers to examine three dangers that result from increased availability, flattening, cherry-picking, and snowballing. When sources are flattened, the differing historical value of individual documents is obscured. Heterogeneity is lost; peaks and valleys of authority are transformed into a plateau of equal apparent weight. When newly available sources are cherry-picked, individuals selectively choose from among widely-available those documents most favorable to their position. Snowballing occurs when newly available sources of little authority are cited with increasing frequency, until courts are forced to acknowledge that these sources are seen as authoritative. All three of these dangers were realized with the

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193. CORNELL, *supra* note 27, at 26. Professor Cornell also notes that:

Historians have been more attuned than either constitutional scholars or political theorists to the diversity of Anti-Federalism. Yet, even when they have noted it, historians have invariably sought an authoritative Anti-Federalist position, focusing on a single strain of Anti-Federalism as an expression of the true voice of the opposition to the Constitution.

*Id.* at 7.

194. Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 9 n.6 (2006).

195. See Akhil Reed Amar, Comment, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 287–88 (1987) (“In interpreting the Constitution, judges, litigators, and even law professors tend to rely most on those primary sources that are most accessible . . . [Those sources that are] still in print, easy to read, relatively short, carefully indexed, easily found in libraries and book stores . . .”).

Anti-Federalist Papers. Storing's 1981 publication effectively served as a controlled experiment: documents which had not been reprinted in over two centuries were suddenly made widely available. Studying the impact of these documents and the uses to which they were put provides insight into the larger phenomena of availability. The next three Subparts examine these three dangers: flattening, cherry-picking, and snowballing, in the context of the Anti-Federalist Papers.

*A. Availability Danger One: Flattening*

As an historical matter, increased contemporary availability does not correlate with increased historical worth; a work does not become more authoritative as a statement of drafters' or adopters' intent because it has been published in a new volume or scanned as a PDF. When current availability is the primary yardstick by which historical authority is judged, courts resemble the proverbial drunk searching for his keys near the street light, not because that is where he lost them, but because "that's where the light is."<sup>196</sup> This process is best described as "flattening," when equal contemporary availability of sources causes readers to ascribe to them equivalent historical authority. Flattening results when contemporary availability is mistaken for historical authority.

Recent cognitive research indicates that "flattening" is not a phenomenon unique to the judicial process. Experiments indicate that there are "situations in which people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind."<sup>197</sup> Individuals rely on this "availability heuristic" to more easily assess the probability of an event actually occurring.<sup>198</sup> For instance, "one may assess the risk of heart attack among middle-aged people by recalling such occurrences among one's acquaintances."<sup>199</sup> In the legal context, unless consciously guarded against, it is thus natural to assess the historical impact of an argument by recalling occurrences of the argument in contemporary readings. When documents appear to have the same weight in a volume, they also appear to be of equal historical authority, resulting in potential misapprehension of a document's actual historical authority. Such flattening may be particularly powerful in the legal context since, "in law, more than any other discipline, the structure of

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196. Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335, 358 (2000) ("[T]his reasoning is reminiscent of the drunk searching for his keys under a lamppost because, as he explains, the light is better.").

197. Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974).

198. *Id.*

199. *Id.*

the literature implies the structure of the enterprise itself.”<sup>200</sup> When assessing Anti-Federalist Papers, the more easily available the paper is today, the more likely (but erroneously) it is assumed to have been available in the past.

From 1790 to 1980, the Court cited only a few Anti-Federalist Papers by prominent Anti-Federalist authors. In this period, the vast majority of the Court’s Anti-Federalist citations derived from Elliot’s *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, a five-volume collection published in 1845, which contained few Anti-Federalist writings.<sup>201</sup> In 1981, Professor Herbert Storing’s seven-volume work, *The Complete Anti-Federalist* was published.<sup>202</sup> Almost immediately thereafter, the Court began to cite to an increasingly diverse group of Anti-Federalists, and often cited to Storing’s reprinting.<sup>203</sup>

Storing carefully noted that *The Complete Anti-Federalist* was an inclusive project, encompassing “[a]ll Anti-Federalist pamphlets that [he was] able to find, all substantial newspaper essays and series of essays, some of the most important speeches by Anti-Federalists in ratifying conventions . . . and some manuscript notes.”<sup>204</sup> Moreover, Storing explicitly noted that “two-thirds of the items [in *The Complete Anti-Federalist*] have never been printed since their original publication in 1787 and 1788.”<sup>205</sup> Storing thus assembled a comprehensive catalogue of the Anti-Federalist Papers, and made no claims as to any document’s importance as a historical source.<sup>206</sup>

However, the Court has not been so careful and has instead treated Storing’s documents indiscriminately as equally authoritative.<sup>207</sup> Despite Storing’s warnings, his volume effectively flattened the Anti-Federalist Papers. After Storing’s publication appeared in 1981, every one of the

200. Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future*, 1 HIGH TECH. L.J. 27, 29 (1986).

201. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1845). The Library of Congress describes *Elliot’s Debates* as “the best source for materials about the national government’s transitional period between the closing of the Constitutional Convention in September 1787 and the opening of the First Federal Congress in March 1789.” *Elliot’s Debates*, THE LIBR. OF CONGRESS, <http://memory.loc.gov/ammem/amlaw/lwed.html>. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 153 n.8 (1973); *Wesberry v. Sanders*, 376 U.S. 1, 34 n.19 (1964).

202. 1 STORING, *supra* note 4, at iv.

203. The impact of Storing’s work is not limited to the legal realm. As Professor Cornell notes, “The revival of interest in the quality of Anti-Federalist political thought has been greatly facilitated by the publication of Storing’s *Complete Anti-Federalist*.” CORNELL, *supra* note 27, at 6 n.11.

204. 1 STORING, *supra* note 4, at xix.

205. *Id.* (emphasis added).

206. With the exception of the more “influential” documents which Storing places in Volume 2, there is no attempt made to differentiate between the relative historical impact of different papers.

207. Storing passed away in 1977, and his volumes were published by his former student in 1981, so Storing could not comment on the Court’s later use of the papers.

papers appears alongside each other, in an easily accessible format,<sup>208</sup> suggesting a similar historical value to the uncritical reader. Little circulated works by relatively unknown authors are as available as the widely circulated works of the Anti-Federalist founders like George Mason. Once Storing made many works equally available, the Court treated the documents as all equally authoritative, even though they were not. Given the timing of this flattening of the documents, Storing's collection was the central force behind the Court's increased use (and misuse) of the now-flattened Anti-Federalist Papers.<sup>209</sup>

Moreover, the false appearance of homogeneity is particularly pronounced when contrasted with the limited availability and self-pronounced heterogeneity of the Anti-Federalist Papers at the time of the ratification. No contemporary possessed the entire array of Anti-Federalist documents Storing cites at the time of ratification. Storing's collection, if used uncritically, overemphasizes the degree to which there was a coherent body of work known as the "Anti-Federalist Papers," accessible to all at the time of ratification. Rather, each state ratifying convention confronted a series of documents on its own terms, without the benefit of the entire collection of Anti-Federalist press.<sup>210</sup> However, insensitivity to the flattening induced by Storing's collection has caused the Court to treat all Anti-Federalist Papers (now equally available) as of the same historical value. Justice Thomas's *Camps Newfound* dissent vividly illustrates "flattening" in action.<sup>211</sup> Thirty years prior, when only the most prominent Anti-Federalists at the time of ratification were widely available, the writings of historically marginal figures were not cited. After the publication of Storing's volume, all Anti-Federalists could easily be seen as of equal historical weight, regardless of historical authority.

### *B. Availability Danger Two: Cherry-Picking*

In addition to flattening, the availability of a great variety of Anti-Federalist Papers in 1981 made the documents vulnerable to cherry-picking, the selective use of documents to advance a particular narrative. The availability of more marginal documents facilitates cherry-picking, since it grants a larger field from which to choose citable support.

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208. *But see supra* note 206.

209. *See, e.g., infra* notes 212–14 (describing Justice Scalia's use and misuse of Storing's work).

210. *See* MAIER, *supra* note 2, at 85 ("Today virtually all the writings for and against the Constitution published over the course of the ratification contest are readily available in print, and many are also online. They were nowhere near so accessible to those who had to decide the Constitution's fate, especially if they lived outside Pennsylvania and New York . . .").

211. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 621–22 (Thomas, J., dissenting).

Consider, for example, the Court's landmark decision in *District of Columbia v. Heller*, holding that the Second Amendment included an individual right to bear arms.<sup>212</sup> In the majority opinion, Justice Scalia cited Federal Farmer, as republished in Storing's volume, to support the proposition that "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."<sup>213</sup> Justice Scalia's single citation to Federal Farmer, a relatively lightly circulated Anti-Federalist, is hardly an indication of "pervasive" Anti-Federalist rhetoric. Rather, it is the selection of a confirmatory instance from among a sea of potential documents Storing made available. Similarly, Justice Scalia cites *Centinel, Revived, No. XXIX* for the proposition that "[b]oth the Federalists and Anti-federalists read [Article I] as it was written, to permit the creation of a 'select' [i.e., private] militia" for the head of state.<sup>214</sup> *Centinel* was also hardly representative of the larger vein of Anti-Federalist literature; it is an unpersuasive exercise in cherry-picking to cite a lone Anti-Federalist as indicative of how "Anti-Federalists" read a provision of the Constitution.<sup>215</sup>

Such cherry-picking of the Anti-Federalists was not limited to *Heller*'s majority opinion. Justice Stevens, in dissent, argued that while Article I "empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's disarmament."<sup>216</sup> For support of this proposition, Justice Stevens cited George Mason at the Virginia convention, arguing that the "militia may be here destroyed by that method which has been practiced in other parts of the world before; that is, by rendering them useless—by disarming them."<sup>217</sup> While Justice Stevens is somewhat more careful than Justice Scalia (he does not claim that Mason is representative of the universe of Anti-Federalist thought), he selectively invokes Mason's declaration for support in his dissent. Thus, both the majority and dissent in *Heller* illustrate a danger of increased availability in the form of cherry-picking from among the disparate materials now available.

### *C. Availability Danger Three: Snowballing*

The third danger of availability is snowballing. When the authority of cited material snowballs, the continued and increasing citation of such

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212. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

213. *Id.* at 598.

214. *Id.* at 600 n.17.

215. Indeed, the *Centinel, Revived*, papers were actually published after the ratification of the Constitution was completed (thus the "Revived").

216. *Heller*, 554 U.S. at 655 (emphasis in original).

217. *Id.*



material eventually causes courts to accept such sources and treat them as authoritative, even if such authority is unwarranted. As described above, the Court's Anti-Federalist jurisprudence has undergone its own form of snowballing: until the publication of Storing's volume in 1981, only three Anti-Federalist authors were cited. However, the citation of more marginal Anti-Federalist Papers has steadily increased over time and has become self-reinforcing. As discussed further below in the case of unpublished opinions, the snowballing process eventually leads to acceptance of previously-unavailable material as authoritative merely because they are being cited, not because they deserve to be.

#### VI. THE DANGERS OF AVAILABILITY IN OTHER CONTEXTS: REVENUE RULINGS AND UNPUBLISHED OPINIONS

While the Anti-Federalist Papers present a vivid illustration of the dangers of availability, such dangers are not limited to the Anti-Federalist Papers. Rather, the dangers posed by availability pose a potential problem for any source which experiences a dramatic increase in availability. With modern databases, such increased availability is becoming a commonplace phenomenon. This Part examines two other instances of the dangers of availability: the cherry-picking of private revenue rulings and the snowballing of unpublished judicial opinions.

##### *A. Cherry-Picking Private Revenue Rulings*

Consider another instance where contemporary availability has blurred the issue of authority: private letter rulings. A private letter ruling is a statement by IRS in response to the inquiry of a particular taxpayer. Prior to 1952, the IRS published only a handful of private letter rulings; such rulings were generally accessible only to the taxpayer to whom the ruling was issued, and anyone with whom that taxpayer chose to share the information.<sup>218</sup> However, in 1952, Congress sought increased transparency in the tax assessment process,<sup>219</sup> and the IRS announced that it would, henceforth, publish all rulings which concerned "substantive issues of tax law."<sup>220</sup> These rulings would be published in the Internal Revenue Bulletin (IRB), and would be of "precedential value."<sup>221</sup> On its face, this was a workable solution: only those revenue rulings "published in the IRB were

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218. Gerald G. Portney, *Letter Rulings: An Endangered Species?*, 36 TAX LAW. 751, 752 (1983). This article was of great help in describing the history of Revenue Rulings which follows.

219. *Id.*

220. *Id.*; see also Rev. Rul. 2, 1953-1 C.B. 484.

221. Portney, *supra* note 218.

intended to have any precedential value,<sup>222</sup> and non-precedential private letters were not published.

This system—publication of only precedential rulings—persisted for two decades, until the Freedom of Information Act (FOIA) upset the IRS's system. In 1974 and 1975, the D.C. and Sixth Circuits both ruled that all private letter rulings were subject to disclosure under FOIA.<sup>223</sup> In response, the Tax Reform Act of 1976 mandated the public disclosure by the IRS of all private letter rulings.<sup>224</sup> While Congress mandated the disclosure of all private letter rulings, it confirmed the preexisting arrangement regarding precedential value; disclosure was not intended to make the previously unpublished private rulings binding precedent.<sup>225</sup> Those letter rulings not published in the IRB would “bind the agency only with respect to the particular taxpayer to whom they are issued.”<sup>226</sup> Thus, Congress, in the Internal Revenue Code, made clear that private letter rulings not published in the IRB “may not be used or cited as precedent.”<sup>227</sup>

However, once private letter rulings became available through online databases, so did their perceived interpretive legitimacy, even against the express will of Congress. As one commentator described, “faced with thousands of publicly disclosed rulings, practitioners find themselves in a position akin to that of the child in the candy shop. The temptation [to cite non-precedential rulings] is nearly irresistible.”<sup>228</sup> This “kid in the candy shop” phenomenon, cherry-picking, led advocates to cite rulings that were favorable to their positions, even if they were not of historical authority. In turn, courts began to reference private letter rulings as indicative of the IRS's thinking, or to point out inconsistencies in IRS positions as expressed in private letter rulings.<sup>229</sup> Eventually, notwithstanding the statutory

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222. *Id.*

223. *Freuhauf Corp. v. IRS*, 522 F.2d 284 (6th Cir. 1975), *vacated*, 429 U.S. 1085 (1977); *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974). *See also* Portney, *supra* note 218, at 753 (describing the facts of these two cases).

224. Tax Reform Act of 1976, Pub. L. No. 94-455, § 6110, 90 Stat. 1520, 1660–67 (1976) (codified as amended at I.R.C. § 6110 (2006)).

225. *Id.*; *see also* STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 309 (“[T]he Act codifies the prior administrative rules by providing that determinations which are required to be made open to public inspection are not to be used as precedent.”).

226. Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1047 (1995).

227. I.R.C. § 6110(k)(3) (2006).

228. Portney, *supra* note 218, at 754.

229. *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 261 n.17 (1981) (noting a “series of private rulings from 1954 to 1965 further reveals that S.S.T. 302 remained a source of inquiry and confusion for the Service and employers well after the re-enactment of the Internal Revenue Code in 1954” and providing that “[a]lthough these rulings have no precedential force, . . . they are evidence that S.S.T. 302 did not merely lie dormant on the books.”); *see also* *Estate of Blackford v. Comm’r*, 77 T.C. 1246, 1252 n.12 (1981) (“Oddly enough the [IRS Commissioner], in a very recent private ruling

warning to the contrary, the Sixth Circuit declared that, “in the absence of any Treasury Regulations directly on point, we view [private letter rulings] as evidence.”<sup>230</sup> Ultimately, even the IRS recognized the reality: “[N]otwithstanding *Internal Revenue Code Section 6110(j)(3)* [declaring that private letter rulings have no authority beyond for their individual addressee], letter rulings are in fact deemed persuasive authority by the Service.”<sup>231</sup>

The case against the authority of such rulings is strong: private letter rulings are not vetted through the IRS hierarchy, whereas agency opinions published in the IRB are the products of a more prolonged process. Thus, private letter rulings undergo less review than do the published and precedential revenue rulings found in the Internal Revenue Bulletin.<sup>232</sup>

Nevertheless, availability overwhelmed authority with respect to private IRS letter rulings, driven by the cherry-picking of taxpayers’ advocates. Even though the private rulings were expressly designated as having no precedential authority, once disclosure was mandated and the rulings became widely available, first via print and then through electronic databases, the aggressive process of cherry-picking private letter rulings started a process which has culminated in the acceptance of these rulings as definitive, despite the minimal review they receive within the IRS.

### *B. Snowballing Unpublished Opinions*

The history of courts’ use of unpublished opinions demonstrates availability-based snowballing. As a result of snowballing born of electronic databases, courts, scholars, and practitioners treat unpublished opinions as authoritative, though courts writing these opinions consistently warn that they are not.<sup>233</sup>

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letter . . . took a position which supports our holding and is contrary to the position he asserts herein.”); *Ogiony v. Comm’r*, 617 F.2d 14, 17–18 (2d Cir. 1980) (Oakes, J., concurring) (“It is my view that consistency over time and uniformity of treatment among taxpayers are proper benchmarks from which to judge IRS actions.”). For more on the standards Courts apply when reviewing private letter revenue rulings, see Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse*, 28 N. KY. L. REV. 50 (2001).

230. *Wolpaw v. Comm’r*, 47 F.3d 787, 792 (6th Cir. 1995).

231. Rubin, *supra* note 229, at 55 (emphasis added).

232. *See id.* at 50–52 (“The individuals who participate in the formulation of Treasury regulations also draft and review revenue rulings. Rulings are prepared by attorneys in the Office of the Chief Counsel and approved by the Chief Counsel, Commissioner of Internal Revenue and Assistant Secretary (Tax Policy). Revenue rulings are considered interpretive rules for purposes of the Administrative Procedure Act . . . .”) (footnotes omitted).

233. This Part is agnostic regarding whether unpublished opinions *should* be treated as equally authoritative to their published brethren; it focuses instead on the reason *why* unpublished opinions were treated identically to published opinions, the availability heuristic.

In the mid 1960s, the legal world was drowning in ink. The proliferation of opinions made legal research increasingly difficult, and the physical burden imposed by growing mountains of case law placed significant resource strains on legal libraries.<sup>234</sup> In response, the Judicial Conference recommended publication of “only those opinions which are of general precedential value.”<sup>235</sup> The details of differentiating between published and unpublished opinions were left up to each circuit, but the Judicial Conference’s guidance was clear: in order to help judges and lawyers sort through the morass of information being generated by the courts, only those items of “precedential value” should be widely disseminated.<sup>236</sup> By the Conference’s express guidance, there were to be two types of cases: published opinions which were of “precedential value,” and unpublished opinions, which were not.

The subsequent invention of the personal computer, which organized and stored immense amounts of data easily, did more to stem the tide of opinion overflow than the creation of unpublished opinions ever did. Modern data processing allowed lawyers, judges, and their clerks to efficiently sort through the previously opaque morass of judicial output. Nevertheless, the courts of appeals continued to maintain the dichotomy between precedential, published opinions and non-precedential, unpublished opinions.<sup>237</sup> Indeed, the number of unpublished opinions rose dramatically following in recent times.<sup>238</sup> By early 2006, 80% of all federal appellate court decisions were deemed to be unpublished.<sup>239</sup>

However, as the number of unpublished opinions grew, online databases increased the availability of these nominally unpublished opinions. The widespread availability of online research tools such as Westlaw and Lexis made “unpublished” and “published” opinions equally easy to access. Their availability increased their authority.<sup>240</sup>

As unpublished opinions became more widely available, first via microfiche and then through the internet, they were increasingly treated by

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234. See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1964). See also Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 546–47 (1997).

235. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 234, at 11.

236. *Id.*

237. *Id.*

238. See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 207–10 (2001).

239. See Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 223 (2006).

240. See Hannon, *supra* note 238, at 199 (“Due to the very large number of cases found in West’s *Federal Reporter*, in specialty reporters, and on Westlaw and LEXIS, some legal researchers may assume that all cases decided by federal courts are published.”).

lawyers and the courts as authoritative, even if they are classified by a circuit as un-citable.<sup>241</sup> Judges and advocates have implicitly recognized unpublished materials as authoritative because they are “fully accessible to the public at a reasonable cost by way of computers.”<sup>242</sup> One colorful story recounts a judge declaring mid-argument, “Well, the appellate court ruled the other way in this unpublished opinion I have in my desk drawer.”<sup>243</sup>

The widespread availability of unpublished opinions has overridden the courts’ express instructions that the unpublished opinions not have “precedential value.” The presence of these documents in easily available databases has proved irresistible. The availability of these opinions has trumped their judicially mandated lack of authority. The Judicial Conference and the Supreme Court have acknowledged as much. Recognizing that availability has caused these documents to acquire precedential value, the Court changed the rules to make future opinions all citable. Specifically, in 2006, the Supreme Court approved (and Congress allowed to enter into force) the Judicial Conference’s proposed change to the Federal Rules of Appellate Procedure, mandating that a “court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and issued on or after January 1, 2007.”<sup>244</sup> Although the rule was technically prospective in nature, applying only to unpublished opinions handed down after the rule’s enactment, the message was clear: unpublished opinions are legitimate sources in the judicial process.<sup>245</sup> Unpublished opinions, expressly designed in 1964 to be of no “precedential value” and not to be cited, were pushed into the judicial arena via snowballing, as increased availability through online databases made it impossible for the courts to resist the avalanche of these materials being cited in the courts.

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241. See Paul Marcotte, *Unpublished but Influential: With Technology, Opinions Not in the Law Books Can Be Misused, Critics Charge*, A.B.A. J., Jan. 1991, at 26 (“The Lake Geneva, Wis., lawyer is concerned that such opinions are being used as de facto authority in his state by those with access to them through legal publishing services, on microfiche at the state’s law library and via computer data bases such as Mead Data’s Lexis and West Publishing’s Westlaw.”). See also Shuldberg, *supra* note 234, at 563–67.

242. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 (1999). See also Shuldberg, *supra* note 234, at 551 (noting that “[u]npublished [d]oes [n]ot [m]ean [u]nimportant” for judges and advocates, regardless of circuit rules).

243. Marcotte, *supra* note 241.

244. FED. R. APP. P. 32.1.

245. Admittedly, the Federal Rules do not mandate that precedent be given to these citations by the court, but the very recognition that they must be allowed into briefs suggests that there is value to their inclusion.

## VII. RECOMMENDATIONS FOR AVOIDING THE DANGERS OF AVAILABILITY

The dangers of availability will pose an increasing challenge as sources continue to become more comprehensive and accessible, particularly via searchable online databases. Sensitivity to the dangers of availability is needed to insure that authority, not availability, dictates which sources courts, practitioners, and scholars follow. This Part proposes three initial steps that can help guard against the dangers of availability: heightened sensitivity, avoidance of creating non-precedential material, and authority descriptors.

The first and most important step in guarding against the dangers of availability is the widespread recognition of such dangers' existence. Further research is needed on the impact of availability on authority in the legal world. Additionally, judges should keep the potential dangers in mind and carefully assess newly available sources to determine whether they have interpretive legitimacy. The story of the Anti-Federalist Papers is a cautionary tale.

Similarly, scholars should also pay careful attention to newly available material. Regardless of whether the mechanism is flattening, cherry-picking, or snowballing, increased awareness of the dangers of availability is the first step to ensuring that availability does not improperly drive authority.

Second, courts and agencies should recognize the difficulty of creating non-precedential material in a world of modern databases, since cherry-picking, snowballing, and flattening can all drive the authority of such materials, despite the courts' and agencies' intentions to the contrary. Whenever possible, courts and agencies should create documents of precedential value, since it is better to produce precedential documents from the start rather than having the dangers of availability—flattening, snowballing, and cherry-picking—create precedential authority out of materials which were not carefully reviewed because they were not intended to have precedential effect.

Third, to avoid flattening, new online databases should employ authority descriptors. Instead of merely tagging materials which have been scanned, databases should place hyperlinks prominently at the top of the material, containing information about the relative authority of the information. For historical material, such descriptors could describe some additional background of the material reproduced and provide some context regarding the information.

But in the final analysis, the best guard against the availability heuristic is for judges, scholars, and lawyers to be aware of its presence.

## VIII. CONCLUSION

The Anti-Federalist Papers are a case study on the dangers of availability. The Anti-Federalist Papers are a diverse and heterogeneous group of documents, but the uncritical approach to the Papers resulting from Storing's volume flattened the papers. Courts and advocates cherry-picked them for support, and increasing citations have snowballed the authoritativeness of all of the Papers despite their heterogeneity. In the future, the Court should distinguish between Anti-Federalist papers of different authority instead of treating the Anti-Federalist Papers as indiscriminately alike. In determining the relative authority of an Anti-Federalist paper, the Court should consider three factors: presence of the author at the Constitutional Convention, prominence of the author at a state ratifying convention, and the contemporary circulation of the writing as measured by the number of reprintings.

However, the dangers of availability are a larger issue than just the Anti-Federalist Papers. The three dangers of availability identified in this article are widely present in the modern legal world. Such dangers will continue to pose a growing challenge as more information becomes easily available in electronic databases. As information becomes increasingly available, courts, scholars, and practitioners must take particular care not to confuse availability with authority. Further research is needed to understand the impact of contemporary availability on perceived authority.