THE ANTI-FEDERALISTS: FORGOTTEN FOUNDERS OF OUR FREEDOM

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Over the last three decades, the Supreme Court has seen an increase in issues regarding state and individual rights rooted in the Bill of Rights of the United States Constitution. When assessing issues of individual and state rights, members of the Supreme Court frequently look to the intent of the constitutional framers to determine basic models for how each Amendment is to be applied. While Federalist authors are primarily responsible for drafting and supporting the ratification of the United States Constitution, it is often overlooked that the Anti-Federalists are accountable for the inclusion of the first ten amendments to the Constitution. This paper examines the role, if any, that the writings of the Anti-Federalists have on Supreme Court decisions. The purpose of this essay is to examine federalism and anti-federalism in turn and will investigate how each corresponds with contemporary Supreme Court jurisprudence. The research conducted will focus on the discourse of six prominent Federalists and Anti-federalists; John Jay, James Madison, Alexander Hamilton, Robert Yates, Patrick Henry and George Clinton. The main source used for the research conducted herein is Westlaw Legal Database. Additionally, the findings were cross-checked with LexisNexis Academic database. These databases provide records of all state and federal judicial opinion which date back to the ratification of the Constitution. These legal databases allow for control variables to be set to

examine both a period of time and particular individuals. The frequency that each figure is cited will be examined comparatively and ultimately will be used to assess the influence of the anti-federalists on modern Supreme Court opinions. Further, this paper will construct a model for the frequency of Supreme Court justices' citation of federalist and anti-federalist discourse in majority, concurring, and dissenting opinions over the last thirty years.

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Introduction:

In a contemporary society that revolves around basic unalienable rights and freedoms, it is difficult to imagine the United States Constitution without the fundamental framework known as the Bill of Rights. In modern politics there is a sharp divide between two conflicting political parties, Democrat and Republican, which focuses strongly on issues regarding state and individual rights rooted in the Bill of Rights of the United States Constitution. Over two hundred years ago, at the time of the ratification of the Constitution a similar divide existed between two conflicting ideological parties, the Federalists and the Anti-Federalists. In the two years that passed between the first draft of the Constitution and the document that was ratified in 1789, these conflicting ideologies emerged. The Federalists and Anti-Federalists were strongly divided in a battle over the formation and sustainability of a national government. This ideological conflict is primarily responsible for producing a national constitution which has withstood the test of over 200 years.

The United States Constitution is a comprehensive body of work formed from the compromises and cooperative statesmanship of many remarkable minds.[1] The Constitution is the highest law of the land: neither political leaders, states, nor individuals stand above it. This document serves

[1] "Constitution of the United States." Charters of Freedom: "A New World is at Hand"

as a strong reminder for all Americans of the countless sacrifices and concessions that were made during the formation of the United States of America. The first ten amendments to the United States Constitution provide an added dimension of individual and state rights and freedoms that protect citizens and states from a tyranny of what the Anti-Federalists feared would become a powerful centralized government.[2] Herbert Storing, in his introduction to The Anti-Federalist succinctly states, " the United States Constitution was framed by a numerous and diverse body of statesmen, sitting for over three months; it was widely, fully, and vigorously debated in the country at large; and it was adopted by (all things considered) a remarkably open and representative procedure."[3] Federalists and Anti-Federalists alike played an essential role in the founding of this country for without either, this country would likely appear entirely different today.

Over the last three decades, the Supreme Court has heard numerous cases which deal with issues regarding state and individual rights rooted in the Bill of Rights of the United States Constitution. While Federalist authors are primarily responsible for drafting and supporting the ratification of the United States Constitution, it is often overlooked that the Anti-Federalists are accountable for the inclusion of the first ten amendments to the Constitution.[4] When assessing issues of individual and state rights, members of the Supreme

[2] "Bill of Rights." Charters of Freedom: "A New World is at Hand"
[3] Storing, Herbert. The Anti-Federalist: Writings by the Opponents of the Constitution. p.1
[4] Carey, George. "Bill of Rights." The New Book of Knowledge®. Grolier Online

Court frequently look to the intent of the constitutional framers to determine basic models for how each Amendment in the Bill of Rights is to be applied. Because the writings and speeches of the Federalists and Anti-Federalists were presented publicly, these works provide an excellent source for justices to use in the interpretation of the Constitution. Political and legal scholars frequently look to the founders writings, speeches, and other works to determine the purpose and intent to determine not only the context in which the Constitution was written but a framework that can be followed today. This examination of founding intent has led to a closer look into Federalist and Anti-Federalist discourse to better understand the document that has shaped our political society over the last two hundred years.

This paper will examine the role, if any, that the writings of the Anti-Federalists have on Supreme Court decisions. The purpose of this essay is to examine federalism and anti-federalism in turn and will investigate how each corresponds with contemporary Supreme Court jurisprudence.

The research conducted will focus on the discourse of six prominent Federalists and Anti-federalists; John Jay, James Madison, Alexander Hamilton, Robert Yates, Patrick Henry and George Clinton. Further, this paper will construct a model for the frequency of Supreme Court justices' citation of federalist and anti-federalist discourse in majority, concurring, and dissenting opinions over the last thirty years.

Before examining Supreme Court jurisprudence with particular focus on the works for the Federalists and particularly the Anti-Federalists, it is fitting to first understand the basic units of analysis for this research; the Federalists and Anti-Federalists, who they were, and their role in the formation of the Constitution with particular focus on the Bill of Rights.

Federalists and Anti-Federalists:

To gain a proper understanding of the Federalists and Anti-Federalists it is appropriate to first examine their core beliefs and relationship to one another. During the ratification process, thousands of essays, speeches, and letters were circulated in both support and opposition to the Constitution.[5] A Federalist, simply, is a supporter of a federal system of government; federalism. Federalism has been defined in several different ways however simply defined, federalism, is a" system of government in which power is divided between a central authority and constituent political units."[6] A federal system is typically enumerated by a written constitution which defines a power structure between central and sub-central levels of government. Prominent leaders of the Federalist Party include the authors of the Federalist Papers; John Jay, James Madison, and Alexander Hamilton.

The Federalist Papers are a collection of eighty-five essays and articles written by Jay, Madison, and Hamilton to promote the ratification of the

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[5] Lowi, Theodore J., Ginsberg, Benjamin, Shepsle, Kenneth A. American Government: Power and Purpose. W.W. Norton & Co. 2002. p. 54

[6] "Federalism" West's Encyclopedia of American Law.

Constitution.[7] The Federalist Papers promoted the Federalist sentiment that the Articles of Confederation created an insufficient governmental system.[8] Written under the pen name Publius, Jay, Hamilton, and Madison imitated the writing styles of each other in the attempt to appear that all were written by a single author.[9] In the opening essay, Federalist No. 1, Hamilton introduces the Federalists contentions for the ratification of the Constitution. In this persuasive essay, Hamilton contended that there would be substantial threats to the safety and welfare of each state if the states failed to ratify and establish the Constitution and a federal system.[10] These essays were issued in New York newspapers and letter circulated to the thirteen colonies in the attempt to encourage ratification. In Federalist No. 45, James Madison promoted the federal system by stating,

> "The powers delegated by the Constitution to the federal government are few and defined. Those which are to remain in state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. ... The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the states."[11]

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[7] Jay, John., Madison, James., Hamilton, Alexander., The Federalist Papers
[8] Lowi, Theodore J., Ginsberg, Benjamin, Shepsle, Kenneth A. American Government: Power and Purpose. W.W. Norton & Co. 2002. p. 54
[9] Ball, Lea. "The Federalist – Anti-Federalist Debate Over States Rights." Rosen Publishing Group, 2004. p. 18
[10] Hamilton, Alexander. "Federalist No. 1"
[11] Madison, James. "Federalist No. 45" The Federalist Papers

Many Federalists felt that there was not a need for a Bill of Rights because the powers designated to the federal government were well defined and limited. While the Federalists did not argue against the inclusion of the Bill of Rights, they reasoned that a Bill of Rights was unnecessary because the Constitution provided adequate checks and balances on the federal system that would be created.[12] Particularly, Alexander Hamilton spoke against the necessity of the inclusion of a Bill of Rights reasoning that,

> "bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? ... I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."[13]

Not only did Hamilton find the Bill of Rights to be unnecessary, he also warned that they could promote a potential abuse of power. Madison also postulated against the necessity for a bill of rights stipulating, "[t]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The

[12] "Federalist, The." Reviewed by Richard B. Morris. *The New Book of Knowledge®*. Grolier Online
[13] Hamilton, Alexander. "Federalist No. 84." The Federalist Papers

different governments will control each other, at the same time that each will be controlled by itself."[14] The Federalists were concerned with abstaining from any unnecessary restrictions on government.

Despite the Federalists contention that a Bill of Rights was unnecessary, many States agreed to ratify the Constitution only in the event that adequate protections and undeniable rights were expressly provided to individuals and states. This is due in large part to the considerable movement by the Anti-Federalists for the inclusion of a Bill of Rights in the Constitution.

While the public sentiment for the ratification of the Constitution was strong, the Anti-Federalists had several concerns which led to their strong political dissent of the Constitution in its current form. The Anti-Federalists opposed the Constitution and preferred a system of government that was decentralized leaving a majority of the power to sovereign states.[15] Despite the strong contentions made by the Federalists, the Anti-Federalists remained cautious of the proposed federal system. Strong political figures such as George Clinton, Patrick Henry, and Robert Yates countered the arguments of Jay, Madison, and Hamilton's' Federalist Papers and circulated their disdain and concerns over the proposed Constitution through a series of their own essays and speeches. Clinton and Yates are believed to be the authors that

[14] Madison, James. "Federalist No. 51." The Federalist Papers
[15] Lowi, Theodore J., Ginsberg, Benjamin, Shepsle, Kenneth A. American Government: Power and Purpose. W.W. Norton & Co. 2002. p. 52

used the pen names Cato and Brutus, respectively.[16] Henry, governor of Virginia, led the fight against ratification through a series of speeches opposing the ratification of the Constitution known collectively today as the Patrick Henry Speeches.[17] The Anti-Federalist movement however did not gain strength because of a lack of unified position to which they all agreed. All Anti-Federalists were not opposed to the proposed Constitution.[18] Many favored the Constitution however, would only ratify the document if adequate state and individual protections were added in the form of amendments.

A primary fear that the Anti-Federalists presented was that the proposed Constitution provided strong enough protections for the states and individuals. The Anti-Federalist contended that the national government would become too powerful and threaten state and individual sovereignty under the proposed Constitution. Patrick Henry, at the Virginia Ratifying Convention cautioned the constituency about the inadequate protections for states and individuals stating:

> "This proposal of altering our Federal Government is of a most alarming nature" Make the best of this new Government – say it is composed by any thing but inspiration – you ought to be extremely cautious, watchful, jealous of your liberty; for instead of securing your rights you may lose them forever. If a wrong step be now made, the Republic may be lost forever. If this new

[16] Storing, Herbert J., The Complete Anti-Federalist. New York: University of Chicago Press, 1998.
[17] Padover, Saul K. "Henry, Patrick." The New Book of Knowledge. Grolier Online
[18] Storing, Herbert J., The Complete Anti-Federalist. New York: University of Chicago Press, 1998.

> Government will not come up to the expectation of the people, and they should be disappointed – their liberty will be lost, and tyranny must and will arise."[19]

Henry, a state's rights advocate, also posited that denying power to the states would ultimately take power away from the people. Other Anti-Federalist's, including Robert Yates addressed other concerns over the Constitution. Responsible for some of the most provoking Anti-Federalist essays, Yates was believed to be the author who used the pen name Brutus. The essays by Brutus were issued in response to the Federalist Papers and consisted of several essays which were published in the New York Journal from 1787 to 1788.[20] Yates, a prominent New York judge aligned himself with New York governor George Clinton and other Anti-Federalists feared that the Constitution granted too much power to the executive branch. Fearful that the President would be afforded nearly limitless power, the Anti-Federalists were critical of the Constitution because they feared there were inadequate safeguards against tyranny placed on the executive branch.

Anti-Federalists also criticized the federal judicial system that was proposed by the Constitution. Robert Yates contended that the federal courts "in themselves, totally independent of the states, deriving their authority from the United States, and receiving from them fixed salaries; ... will swallow up

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[19] Henry, Patrick. Edited by Storing, Herbert. "Speeches of Patrick Henry in the Virginia State Ratifying Convention: 4 June 1788." The Complete Anti-Federalist. New York: University of Chicago Press, 1998, p. 296

[20] Roland, Jon. "Brutus" Constitution Society. ONLINE

all the powers of the courts in the respective states."[21] Brutus furthered his argument by posturing his concern for the immensity of the federal judicial system by stating, "I wonder if the world ever saw . . . a court of justice invested with such immense powers, and yet placed in a situation so little responsible."[22] The threat of tyranny, particularly in a judicial arena was a substantial source of criticism for the Anti-Federalists.

Another concern for the Anti-Federalists was the power that was granted to Congress to lay and collect taxes.[23] Yates, as Brutus, criticizes the authority of the federal government to lay and collect taxes, contending that the ability to do so would "totally destroy all the power of the state governments."[24] Yates worried that the separate states would be burdened by Congress and thus would lose the ability to impose taxes, particularly on imports and exports.

Of all of the criticisms presented by the Anti-Federalists of the Constitution, the lack of a Bill of Rights was the most effective. The Anti-Federalists demanded that a bill of rights be added to the Constitution. They reasoned that without a bill of rights there would be a substantial risk to the sovereignty over the states. Yates wrote in "Essays of Brutus" No. 9 that,

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[21] Brutus. Edited by Storing, Herbert. "Essays of Brutus," The Complete Anti-Federalist. New York: University of Chicago Press, 1998, p. 112

[22] Brutus. Edited by Storing, Herbert. "Essays of Brutus," The Complete Anti-Federalist. New York: University of Chicago Press, 1998, p. 114

[23] Ketcham, Ralph. "The Anti-Federalist Papers and the Constitutional Convention Debate" Signet Classic. 2003, p. 16

[24] Brutus. Edited by Storing Herbert. . "Essays of Brutus," The Complete Anti-Federalist. New York: University of Chicago Press, 1998, p. 139

"[t]here are certain rights which mankind possess, over which government ought not to have any controul, because it is not necessary they should, in order to attain the end of its institution."[25] Yates furthered his stance on the necessity for a Bill of Rights by contending, "[t]here are certain things which rulers should be absolutely prohibited from doing, because, if they should do them, they would work an injury, not a benefit to the people."[26] Popular sentiment among the Anti-Federalists for the necessity of protections for fundamental civil liberties grew.

As the Anti-Federalists gained support for a bill of rights, the Federalists soon realized that ratification of the Constitution would come with the cost of a key concession; the Bill of Rights. To calm fears over the newly formed government, the Federalists conceded and included ten amendments to the Constitution. These were the first ten amendments to the U.S. Constitution which defined basic civil liberties. Drafted by James Madison, the Bill of Rights was introduced to Congress in 1789 and later took effect in December of 1791.[27] Many of the fears that the Anti-Federalists had regarding individual rights and state sovereignty were calmed after the Bill of Rights took effect.

Included in the Bill of Rights were ten amendments to the original Constitution. The first amendment placed several limits on the regulatory

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[25] ibid. p. 153
[26] ibid.
[27] Edwards III, George C., Wattenberg, Martin P., Lineberry, Robert L. Government in America: People Politics and Policy 7 ed. Pearson Education, Inc. 2004. p.

nature of the federal government by stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[28] The first amendment provided individual protections against the federal legislature. The second through fourth amendments limit the power of the executive branch of the national government. The executive branch is not to infringe on the right of the people to keep and bear arms," may not require soldiers to "quartered in any house, without the consent of the Owner," is not engage in an "unreasonable searches and seizures" and requires that probable cause must be present for the issuance of a warrant.[29] Amendments five though eight enforce limits over the judiciary requiring trial by jury for criminal offenses, a right to a speedy trial, immunity from providing testimony that would incriminate oneself, protection against double jeopardy, as well as protections against excessive bail or punishment.[30] The final two amendments incorporated in the Bill of Rights provide protections to individuals and states, respectively, against the national government. The tenth amendment states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

[28] United States Constitution, Amendment I.
[29] United States Constitution, Amendments II - IV
[30] United States Constitution, Amendments V - VIII

respectively, or to the people."[31] The civil liberties included in the Bill of Rights amended several of the Anti-Federalists reservations for the newly founded federal system. With regards to the Bill of Rights, the Anti-Federalists won. It is in large part to them that Americans enjoy the basic freedoms that are protected under the Bill of Rights of the United States Constitution.

Now that the movements of the Federalist and Anti-federalist figures have been introduced, it is important to understand the six prominent Federalist and Anti-Federalists chosen for this research. A look at the biographies, achievements, and careers of these six men will aid in an understanding of their contributions to the Federalist and Anti-Federalist movements.

Biographical Information:

John Jay:

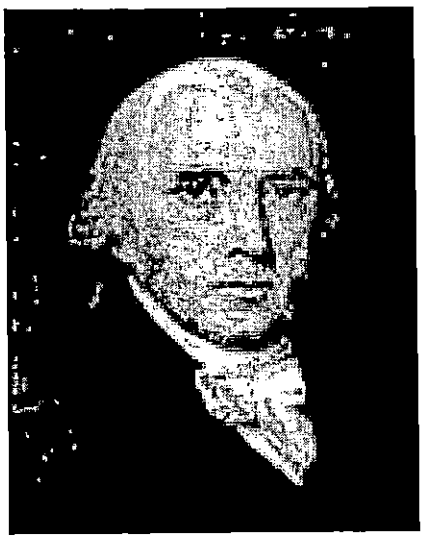
John Jay was a Federalist founder who served as the first Chief Justice for the United States Supreme Court. Prior to that, Jay served as Secretary of Foreign Affairs under the Articles of Confederation and eventually became involved in the push to ratify the Constitution.

[31] United States Constitution, Amendments IX - X

Born in New York City, New York on December 12, 1945, John Jay showed signs of a promising political career at a very young age. At the age of 14, Jay entered Kings College (now Columbia University).[32] After completing his studies at Kings College, Jay went on to study law and was admitted to the New York Bar Association in 1768.

As an author of several of the Federalist papers, Jay contributed to the political discourse which led to the ratification of the Constitution. Jay also issued "An Address to the People of New York" which addressed the strong opposition to ratification by New York Anti-Federalists.[33]

James Madison:



James Madison is best known for his contributions to the founding of the United States. Often referred to as the Father of the Constitution, Madison also went on to serve four terms in Congress, eight years as Secretary of State under Thomas Jefferson, and two terms as President of the Untied States.

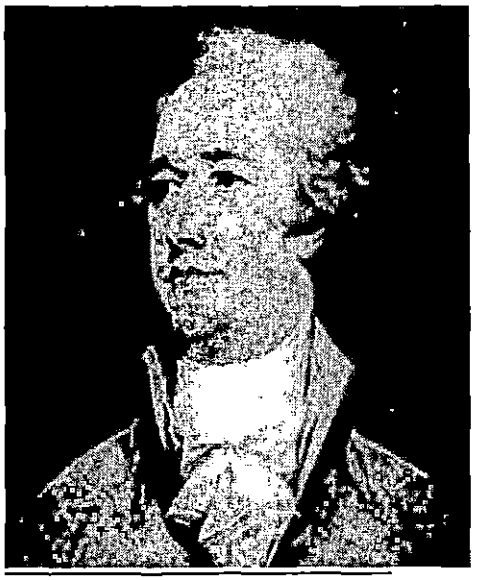
Born in 1751 in Port Conway Virginia, Madison was the oldest of twelve children. At the age of eighteen, Madison entered the College of New Jersey (now Princeton University) and completed

[32] Ketcham, Ralph. "Jay, John." *Grolier Multimedia Encyclopedia.* Grolier Online http://gme.grolier.com/cgi-bin/article?assetid=0152790-0

[33] ibid

the requirements for degree in two years.[34] After graduation, Madison continued to pursue governmental and legal studies. Madison enlisted for duty in the Revolutionary War however was unable to serve due to physical incapacities. After the war, Madison was sent as a delegate to the Philadelphia Constitutional Convention where he served as one of the most influential figures in the drafting of the Constitution and the founding of the United States.[35] Madison joined Alexander Hamilton and John Jay to author the Federalist Papers to sway public sentiment over ratification of the Constitution. Shortly after the ratification of the Constitution, Madison drafted and proposed the Bill of Rights. James Madison's contribution to the drafting and proposal of the Constitution and founding of the United States were unparalleled.

Alexander Hamilton:



As a primary author of the Federalist Papers, Alexander Hamilton is also a prominent Federalist figure. His influential essays published in The Federalist were a defining feature of the Federalist movement for ratification of the Constitution.

[34] Bradford, M.E. A Worthy Companion. Plymouth Rock Foundation Inc. 1982
[35] ibid

Hamilton, born in January 1755, experienced an unstable family life early in his childhood. By the time he turned thirteen, Hamilton was abandoned by his family and living on his own.[36] Although he experienced great hardships early in life, Hamilton went on to attend King's College (now Columbia University) in New York. After the conclusion of the Revolutionary War, Hamilton became an active member of the Federalist movement and has been credited with penning nearly two-thirds of the Federalist Papers.[37] Hamilton was an important figure in the founding era and undoubtedly shaped public sentiment regarding the ratification of the Constitution.

George Clinton:

George Clinton was an Anti-Federalist from New York. Clinton served as the Governor of New York and was a delegate to the Constitutional Convention. As a politician and lawyer, Clinton was an opponent of the efforts to ratify the Constitution.

Born on July 25, 1739, George Clinton was the son of Charles Clinton, a judge, military officer and surveyor.[38] The Clinton family played a large role in New

[36] ibid
[37] Ketcham, Ralph. "Hamilton, Alexander." *Grolier Multimedia Encyclopedia*. Grolier Online http://gme.grolier.com/cgi-bin/article?assetid=0130920-0
[38] "Clinton (family)." *Grolier Multimedia Encyclopedia*. Grolier Online http://gme.grolier.com/cgi-bin/article?assetid=0065290-0

York politics early in its statehood. George Clinton got his start in politics at a young age and was an exceptional politician. Clinton was elected Governor of New York seven times between 1777 and 1804 and was a strong opponent to the ratification of the Constitution.[39] Clinton is believed to have used the name Cato to publish Anti-Federalist reactions and contentions to the proposed Federal system. After the ratification of the Constitution, Clinton went on to serve as Vice-President under both James Madison and Thomas Jefferson.

Patrick Henry:

Patrick Henry was one of the most prominent Anti-Federalists and was a stark opponent of ratification. Henry, a lawyer, is well known for his engaging speeches and particularly for his strong dissent at the Virginia Ratifying Convention.

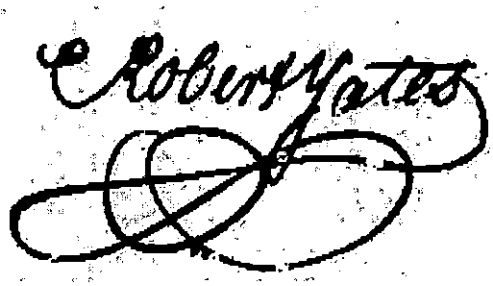
Patrick Henry was born on May 29, 1736 in Hanover County, Virginia. While he was unsuccessful early in life he found his niche in the law and was admitted to the Virginia Bar at the age of twenty-four.[40] Henry became involved in politics and was an avid opponent to the ratification of the proposed

[39] ibid
[40] Ammon, Harry. "Henry, Patrick." *Grolier Multimedia Encyclopedia.* Grolier Online http://gme.grolier.com/cgi-bin/article?assetid=0136160-0

Constitution. He led the fight against ratification in Virginia and declined to attend the Constitutional Convention of 1787.

Henry went on to serve as the Governor of Virginia, was a member of the Continental Congress, and was a Delegate to the Virginia State Ratifying Convention.

Robert Yates:



Robert Yates was a recognized leader of the Anti-Federalist party. Authoring under the pen name Brutus, Yates published a series of letters in The New York Journal which warned of the dangers of ratifying the Constitution. Yates opposed any concessions of power to the federal government and feared that the new Constitution imposed on state sovereignty.

Robert Yates was born in Schenectady, New York, on January 27, 1738. He attended college in New York City and later went on to study law with William Livingston.[41] Yates was later admitted to the New York Bar in 1760. By 1977, Yates was appointed to the New York Supreme Court and served as the Chief Justice from 1790 to 1798.[42] Yates was an Anti-Federalist delegate to the New York Ratifying Convention. Robert Yates also served as a member

[41] Bradford, M.E. A Worthy Companion. Plymouth Rock Foundation Inc. 1982
[42] ibid

of the New York Constitutional Convention and the Philadelphia Constitutional Convention.

Methods of Analysis:

After a comprehensive overview of the works of the Federalists and particularly the Anti-Federalists, it is fitting to describe the research process and methods of analysis for this paper. Six prominent figures of the Federalist and Anti-Federalist movements were chosen to examine the role of their works in the Supreme Court decision-making process. Three federalist, Jay, Madison, and Hamilton, and three anti-federalists, Clinton, Henry, and Yates, were chosen to illustrate a perceived lack of appreciation and acknowledgment for anti-federalist contributions to the ratification of the Constitution. Six figures were chosen to provide a manageable yet comprehensive examination of Supreme Court jurisprudence surrounding the Bill of Rights. In addition to the works of the six figures chosen, this paper will examine the frequency that the terms "Federalist," "Anti-Federalist," and "Bill of Rights" were cited in Supreme Court decisions from 1979 through 2009. The time period selected is a thirty year span, beginning February 15, 1979 and ending February 15, 2009. A thirty year span covers the Burger Court (partial), Rehnquist Court, and the Roberts Court (to date) and includes opinions from eighteen different justices. The thirty year span will also show any patterns in citation that may arise.

The main source used for the research conducted herein is LexisNexis Legal Database. Additionally, the findings were cross-checked with Westlaw Legal database. These databases provide records of all state and federal judicial opinion which date back to the 1790. These legal databases allow for variables to be set to examine both a period of time and particular individuals. The LexisNexis Legal Database in particular allows for searches between certain dates and provides a "required terms" search. The first and last names of the Federalist and Anti-Federalist figures were used in the "required terms" search engine in order ensure that the correct figure was cited.

The frequency that each figure is cited will be examined comparatively and ultimately will be used to assess the influence of the federalists and anti-federalists, comparatively, on modern Supreme Court opinions. Further, this paper will construct a model for the frequency of Supreme Court justices' citation of Federalist and Anti-Federalist discourse in majority, concurring, and dissenting opinions over the last thirty years.

Results:

The results section of this thesis will illustrate the findings of the citation of Federalist and Anti-Federalists, Jay, Madison, Hamilton, Clinton, Henry, and Yates, by Supreme Court justices. These results show the number of times that the Federalist and Anti-Federalist founders were cited in Supreme Court majority opinions, concurring opinions, and dissenting

opinions. Further, the results will be illustrated based on a break down of citation by the Burger, Rehnquist, and Robert Courts.

Table 1 **Federalist and Anti-Federalist Citation in Supreme Court Opinions 1979 - 2009**

	Federalists	Cited	Cited in Majority Opinion	Cited in Concurring Opinion	Cited in Dissenting Opinion
	John Jay	9	6	1	2
	James Madison	102	72	8	22
	Alexander Hamilton	46	21	6.5	18.5
Totals:		157	99	15.5	42.5
	Anti-Federalists				
	George Clinton	1	1	0	0
	Patrick Henry	15	4	2	9
	Robert Yates	1	1	0	0
Totals:		17	6	2	9

The data shown above indicates the number of Supreme Court cases in which the relevant Federalist and Anti-Federalist leaders were cited from 1979

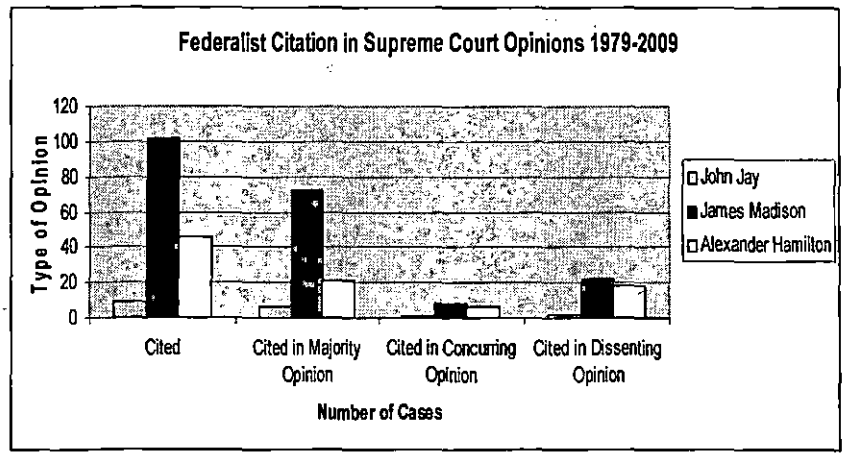
to 2009. A general overview of the findings will be illustrated followed by a more in depth look at each founding father and a representative sample of the cases in which they were cited.

Federalist founding fathers and their works, essays, and political theories were referenced in 157 Supreme Court cases during the last three decades. Of the 157 references to federalist authors, James Madison accounted for over 64.5% of those citations while Alexander Hamilton represented close to 30% and John Jay was responsible for 5% of the 157 Federalist citations. The Anti-Federalist founding fathers were cited a total of seventeen times in thirty years. The speeches by Patrick Henry accounted for 88% of the Anti-Federalist citation in Supreme Court cases and were cited fifteen times. The works of George Clinton and Robert Yates were each cited only once in the last three decades.

Comparatively, these figures are astounding. Federalist founding fathers were cited nearly ten times more frequently than Anti-Federalist founding fathers. The charts below show the magnitude of the difference in citation. The next method for analysis examined, of each of the individual founders, the number of times each were cited in majority opinions, concurring opinions, and dissenting opinions of the Court.

The data table (Table 1) first examines John Jay. John Jay was cited in nine Supreme Court cases. Of those nine cases, Jay was referenced six times in majority opinions, once in concurring opinions, and twice in dissenting

opinions. As would be expected, James Madison was cited in 102 cases. Of the 102 cases in which Madison in was cited, 72 cases (70%) were majority opinions. Alexander Hamilton was cited in 46 cases. Hamilton was cited in

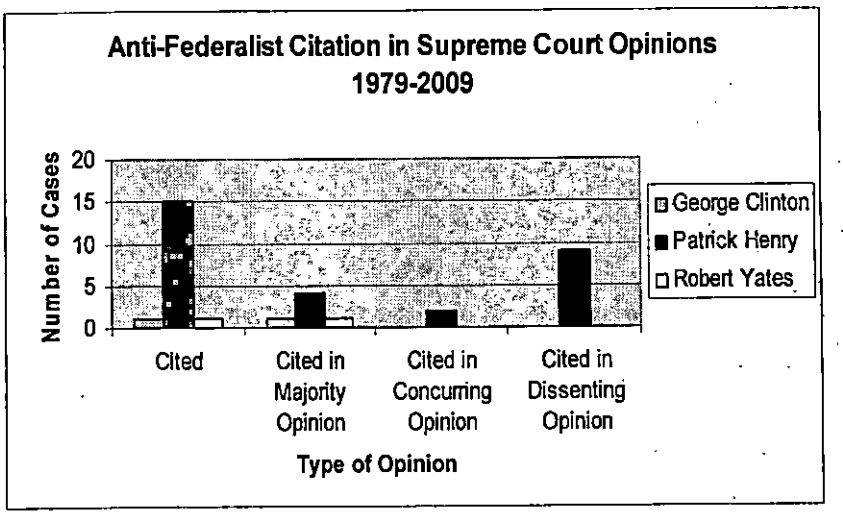


21 majority opinions, six concurring opinions, and eighteen dissenting opinions. Hamilton was also cited in an opinion which concurred in part and dissented in part.[43] Overall, Federalists were cited in 99 majority opinions (63%), fifteen concurring opinions (9.5%), and 42 dissenting opinions (27%), with one opinion which concurred in part and dissented in part. Federalist founders were largely cited in majority opinions.

Table 1 also examines the frequency that the Anti-Federalist founders were cited in Supreme Court opinions. George Clinton was cited only once in thirty years of Supreme Court jurisprudence. The only citation was in a majority opinion. Patrick Henry was cited in a total of fifteen cases. Of the fifteen cases in which Henry was referenced, only four were majority

[43] The table notates 6.5 concurring opinions and 18.5 dissenting opinions to account for citation of Hamilton in an opinion which concurred in part and dissented in part with the majority.

opinions. Subsequently, Henry was cited in nine dissenting opinions and two concurring opinions. Robert Yates was cited in only one case as well and he was referenced in the same majority opinion as George Clinton. Combined, the three Anti-Federalists were cited in six majority opinions (35%), two concurring opinions (11%), and nine dissenting opinions (53%).



Again, the difference is remarkable. Of the cases in which the Federalists were cited, 63% were majority opinions compared to the 35% of majority opinions in which Anti-Federalists were cited.[44] Comparably, of the opinions in which the Anti-Federalists were cited in 53% were dissenting opinions compared to the Federalists being cited in only 27% of dissenting opinions. This research will later examine the context in which each of the Federalists and Anti-Federalists were used in several Supreme Court opinions.

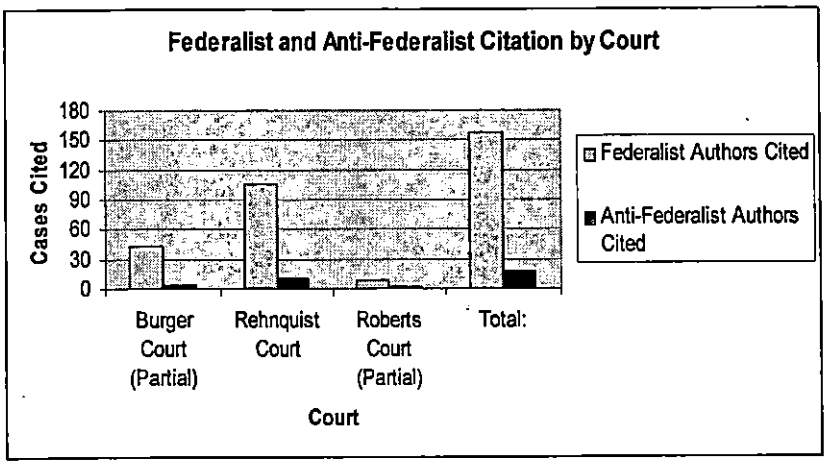
[44] Majority opinions are standing case law. Based upon the doctrine of *stare decisis*, decisions made by the high courts are considered to precedent and are to be followed by all inferior courts.

In addition to an examination of the overall citation of Federalists and Anti-Federalists in Supreme Court decisions, this study also examined the frequency in which each founder was cited in cases based on the Burger, Rehnquist, and Roberts Courts.

Federalist and Anti-Federalist Citation by Court		Table 2
Court	**Federalist Authors Cited**	**Anti-Federalist Authors Cited**
Burger Court 2/15/1979 - 9/26/1986*	43	4
Rehnquist Court 9/26/1986 – 9/29/2005	105	11
Roberts Court 9/29/2005 – 2/15/2009*	9	2
Total: *Notates Partial term to fit parameters of this research project.	157	17

The data table (Table 2) shows that the Rehnquist Court accounts for 116 of the 174 instances of Federalist and Anti-Federalist citation in Supreme Court cases. The Burger Court cited founding fathers in forty-seven cases while the recently established Roberts Court referenced the framers eleven times. This data skew can be attributed to the large time span that the Rehnquist Court accounted for. The Rehnquist Court accounted for nineteen years in this thirty year study. The newly established Roberts Court has the best ratio of each of the Courts citing Federalist founders only four times more

than the Anti-Federalist founders. This can be compared to the Rehnquist Court, which cited Federalists nearly ten times more frequently than the Anti-Federalists and the Burger Court which also cited the Federalists over ten times more frequently than the Anti-Federalists. Still the common theme remains, the Federalists were cited in Supreme Court decisions much more frequently in comparison to the Anti-Federalists.



The final method of analysis will examine the frequency that the terms "Federalist," "Anti-Federalist," and "Bill of Rights" were cited in Supreme Court decisions from 1979 through 2009. There were over 330 cases involving Bill of Rights issues in the last thirty years. The term "Federalist" was cited in 181 cases while the term "Anti-Federalist" was cited in only sixteen.

Key-Word Citation in Supreme Court Opinions 1979-2009

Terms	# Cases Cited
Federalist	181
Anti-Federalist	16
Bill of Rights	331
Federalist **AND** Bill of Rights	55
Anti-Federalist **AND** Bill of Rights	11

Additionally, when the terms "Federalist AND Bill of Rights" were cross-listed, together they were cited in fifty-five cases compared to the "Anti-Federalists AND Bill of Rights" which were cited only eleven times. The term "Federalist" was cited in five times more cases than the term "Anti-Federalist" when cross referenced with the Bill of Rights. This is surprising because of the considerable role that the Anti-Federalists played in the inception of the Bill of Rights to the Constitution. When considering founding thought, especially with regards to the Bill of Rights, it is disturbing that the intent of the Anti-Federalists was not given greater consideration in these contemporary cases.

Case Analysis:

The results of the above data will now be served by a discussion of several of the cases in which each founder was referenced. Due to the fact that several of the founders were cited in the same cases the case analysis will be examined by looking at John Jay, James Madison, Alexander Hamilton, George Clinton and Robert Yates combined, and Patrick Henry.

John Jay:

It has already been determined that John Jay was cited in a total of nine cases, six of which were majority opinions, two dissenting opinions, and one concurring opinion. John Jay was cited in his capacity as the Chief Justice of the first Supreme Court in six opinions. In *Mistretta v. United States (1989),* Justice Blackmun made reference to Jay in the majority opinion while discussing a provision of the sentencing guidelines for the United States Sentencing Commission which required three commissioners to be judges.[45] The Court found that there was no constitutional bar on extra-judicial service while serving on the bench. In *Mistretta,* Jay was referenced in terms of his extra-judicial functions during his tenure as Chief Justice. During his term as Chief Justice, Jay also served as the Ambassador to England where he negotiated the Jay Treaty.

Jay was cited for his contributions in Federalist No. 4 in the case *Selective Service Systems v. Minnesota Public Interest Group (1984).*[46] The Selective Service case involved the Military Selective Service Act which required men, ages eighteen through twenty-six to register for the draft in order to be considered for financial aid. A group of anonymous students filed suit contending that the provision violated their Fifth Amendment right against self-incrimination. The Court held that the provision did not violate

[45] *Mistretta v. United States* 488 U.S. 361 (1989)
[46] *Selective Service Systems v. Minnesota Public Interest Group* 468 U.S. 841 (1984)

their right against self-incrimination and referenced John Jay in the footnote of the concurring opinion. Jay was cited to support Justice Powell's' concurring opinion that there was a compelling need for national defense. The footnote reference Jay by stating, "

> "The Federalist Papers, the essays arguing in favor of adoption of the Constitution, are replete with emphasis on the need for a national government to provide for defense by raising and maintaining armed forces. In John Jay's prescient Paper, No. 4, he observed: The "safety of the people of America against dangers from foreign forces depends not only on [our] forbearing to give just causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to invite hostility. . . . It is too true, however, disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; [and] absolute monarchs will often make war when their nations are to get nothing by it. . . ."

Justice Powell found that there was strong founding intent for the national government to have the ability to provide for a national defense and found that there was a compelling interest for the draft.

While John Jay has frequently been cited for his contributions as Chief Justice for the Supreme Court his essays in the Federalist Papers have given insight to the intent of the founders for contemporary Supreme Court jurisprudence.

James Madison:

James Madison has been the most frequently cited founder in modern Supreme Court jurisprudence. Madison has been cited in over one hundred cases over half of which were majority or concurring opinions. Most recently, James Madison was cited in the case *District of Columbia v. Heller (2008)*.[47] The *Heller* case dealt with a Second Amendment, right to bear arms, issue. In the *Heller* case, Madison was cited in the dissenting opinion by Justice Stevens for his original draft of the Second Amendment. Stevens reasoned that James Madison's draft of the Second Amendment, showed the intent of the founders that the right to bear arms was reserved for the military only. This shows the weight that the contemporary Supreme Court gives to the works of James Madison. While he was referenced, in this case, in a dissenting opinion, it is extraordinary that Madison's draft of the Second Amendment.

In another Bill of Rights case, *Oliver v. United States* (1984), Madison was cited for his draft of the Fourth Amendment protections against illegal search and seizure.[48] In the Oliver case, an open field of marijuana was discovered by federal agents. The respondents contended that the marijuana discovery constituted an illegal search and seizure in violation of their Fourth Amendment rights. The *Oliver* case, relied on Madison's draft of the Fourth

[47] *District of Columbia v. Heller* 128 S. Ct. 2783 (2008)
[48] Oliver v. United States 466 U.S. 170 (1984)

Amendment to conclude that an open field was not protected under the Fourth Amendment. Justice Powell reasoned that a government search of an open field is not unreasonable because an open field does not fall within the scope of "persons, their houses, their papers, and their other property." The Court concluded that a government seizure of an open field was not unreasonable.

James Madison is the most widely cited founding father in large part for his contributions not only to the ratification of the Constitution but also for his drafts in proposed Amendments to the Constitution which later became the Bill of Rights.

Alexander Hamilton:

Alexander Hamilton is another Federalist that is widely cited in contemporary Supreme Court jurisprudence. Likely the most notable contemporary case, *Kelo v. City of New London* (2005) referenced Hamilton for his contributions at the Philadelphia Convention regarding the limits on government taking of private property for public use.[49] The *Kelo* case dealt with a plan which called for the construction of a waterfront hotel, restaurants, retail stores, residences, and office space. The city authorized an agent to purchase property in the development area or to acquire it by eminent domain. The agent purchased most of the required property, but nine owners refused to sell. The Court found that the development plan served a

[49] *Kelo v. City of New London* 545 U.S. 469 (2005)

public purpose and therefore constituted a public use under the Takings Clause of the Fifth Amendment. Hamilton was cited in the majority opinion because of his contentions at the Philadelphia Convention that adequate protections must be established with regards to the government's ability to take property through eminent domain. The Court relied on Hamilton and his contention that government takings must be for a "public use" and must "provide just compensation the purpose of which is to protect the "security of property."[50] The Kelo case is a landmark case which reestablishes a precedent for the requirements for the government's authority to take property for public use.

George Clinton and Robert Yates:

George Clinton and Robert Yates were each mentioned in one contemporary Supreme Court opinion and it was the same case. In *McIntyre v. Ohio Elections Commission* (1995) the Court addressed a First Amendment issue regarding the protection of free speech.[51] The McIntyre case involves an Ohio statute which prohibits the circulation of anonymous campaign literature. The Court found that the Ohio statute violated the First Amendment by applying a strict scrutiny analysis. The Court found that the statute was not narrowly tailored to serve an overriding state purpose. The Court reasoned that there was a tradition of anonymity in political discourse

[50] ibid
[51] *McIntyre v. Ohio Elections Commission* 514 U.S. 334 (1995)

which dated back to the founding of the United States. In the majority opinion, Justice Stevens noted that there has been "a respected tradition of anonymity in the advocacy of political causes." Within the footnote to that remark, Stevens mentioned Clinton and Yates, and their respective pen names Brutus and Cato, which were used to hide their identities while expressing their opposition to the ratification of the Constitution. Although Clinton and Yates were merely mentioned in this case, an important principle was recognized; the right to remain anonymous with regards to the circulation of anonymous literature is protected by the First Amendment to the Constitution.

Patrick Henry:

In this study, Patrick Henry was the most frequently cited Anti-Federalist. Patrick Henry was most frequently cited for his speeches at the Virginia Ratifying Convention. Most recently, Henry was cited in *Baze v. Rees* (2008) for his contributions to the Eighth Amendment to the Constitution which guards against cruel and unusual punishments.[52] In the *Baze* case, death row inmates asserted that the lethal injection methods that are used in Kentucky, if improperly administered, impose cruel and unusual punishment on the inmate. Henry was referenced in a concurring opinion by Justice Thomas (joined by Scalia), noting his contributions to the inclusion of the Eighth Amendment. Thomas noted Henry's "fear that without adequate

[52] *Baze v. Rees* 128 S. Ct. 1520 (2008)

protections there would be nothing to prevent "tortures or cruel and barbarous punishments."[53] The Court held that the inmates did not show that the risk of pain from maladministration of the alleged humane lethal injection protocol constituted cruel and unusual punishment. The Court also held that if a state refused to adopt an alternative method of execution in the face of "documented advantages that the alternative was feasible, readily implemented," and in fact significantly reduced a "substantial risk of severe pain," without a "legitimate penological justification for adhering to its current method of execution," then that refusal to change would be cruel and unusual under the Eighth Amendment.[54] In the *Baze* case, Justice Thomas relied on the intent of the founders and recognized Patrick Henry's efforts for the inclusion of the cruel and unusual punishment provisions to Eighth Amendment of the Constitution.

In the landmark First Amendment case, Texas v. Johnson, Patrick Henry was recognized in the dissenting opinion for his courageous efforts to fight the ratification of the Constitution. In *Texas v. Johnson*, the majority overturned the conviction of a man charged with desecration of the American flag during a political demonstration.[55] The powerful dissent, written by Justice Stevens, reasoned that ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry." Stevens continued

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[53] ibid
[54] ibid
[55] *Texas v. Johnson* 491 U.S. 397 (1989)

by asserting "[i]f those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration."[56] While mentioned only in the dissenting opinion, Stevens made a legitimate and powerful argument, supporting the efforts of Henry, in a landmark First Amendment case.

Conclusion:

In the debate over the Constitution, a win-lose scenario is often presented; the Constitution was ratified, therefore the Federalists won and the Anti-Federalists lost. With regards to Supreme Court jurisprudence and case analysis, that seems to be the case on its face. However, the research conducted herein seems to suggest otherwise. Over the course of only 30 years of Supreme Court jurisprudence, the Bill of Rights was cited in 331 different cases; A Bill of Rights that likely would not exist today if it weren't for the efforts and contentions of the Anti-Federalists. While the contemporary Supreme Court does not readily recognize the works of the Anti-Federalists, scholars of early American history are quick to point out that without the Anti-Federalist opposition to the Constitution, the Bill of Rights, in its current form would likely not exist. The rights and freedoms in our Constitution that are reserved to individual citizens and states were primarily included based on the perseverance of many Anti-Federalist figures. The

[56] ibid

results of the study however, were clear. The Anti-Federalists, with regards to contemporary Supreme Court jurisprudence are the forgotten founders of the freedoms which are guaranteed by the Bill of Rights.

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