

Contemporary Visions of the Early Federalist Ideology of James Madison: An Analysis of the United States Supreme Court's Treatment of *The Federalist No. 39*

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INTRODUCTION

The theory of “New Federalism” was one of the dominant themes guiding Republican politics throughout the 1980s and 1990s.¹ In retrospect, it should have come as no surprise that four of the Justices appointed to the Supreme Court by Presidents Reagan and George H.W. Bush have proven to be rigid advocates of state sovereignty.² Headed by Chief Justice Rehnquist, a Republican appointee,³ the current Court's conservative majority⁴ has been the most aggressive

* J.D. 2004, Washington University School of Law. I would like to thank Professor Theodore Ruger for his invaluable input and enthusiasm on the subject matter of this Note and Professor Conrad Weiler for his insightful comments on earlier drafts. This Note is dedicated to my mother, whose fight with cancer has inspired me in more ways than she could imagine.

1. See Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 290–91 (1996). “New Federalists” advocate a novel shift in the balance of power from the national government to the state. Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and Original Understanding*, 94 MICH. L. REV. 615, 626 (1995).

2. Justices O'Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist appropriately have been described as “anti-federalists” because they harbor strong views that the Constitution imposes strict limitations on the national government. Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 741 (2000). Professor Chemerinsky concisely summed up the Rehnquist Court's view of federalism as follows: “[t]he first principle that explains many of the Rehnquist Court's decisions is that in conflicts between the federal and state governments, state governments win.” Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999).

3. President Nixon nominated Chief Justice Rehnquist in 1971. President Reagan selected Rehnquist for Chief Justice.

4. See Chemerinsky, *supra* note 2, at 41 (arguing that a majority of Justices on the Rehnquist Court pursue a decisively conservative agenda).

Supreme Court in history in terms of shifting the balance of power from the national government to the states.⁵

While the current conservative majority has embarked upon an unprecedented campaign to restrict the power of the national government,⁶ several Justices have adhered rigidly to the “textualism,” or “originalism,”⁷ school of constitutional thought.⁸ Under this interpretive regime, the Justices have attempted to base their holdings on the original meaning of the Constitution.⁹

In seeking to discern the original intent of the Constitution’s Framers, adherents to the textualism viewpoint rely heavily upon the language of the Constitution, writings of the Framers, and various other records believed to shed light on the Framers’ beliefs and intentions.¹⁰ A dramatic increase in citations to the writings of the more influential Framers, especially those of James Madison and Alexander Hamilton, has accompanied the Rehnquist Court’s shift to textualism.¹¹ The *Federalist* papers recently have emerged as a particular favorite.¹²

Among the Rehnquist Court’s decisions that have expanded state power, one of the most commonly cited works is *Federalist* 39,¹³

5. See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1718 (2002) (analyzing the activist trend of the Rehnquist Court’s conservative majority); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002) (noting that the Court has found ten federal acts unconstitutional on “grounds involving federalism” since Justice Thomas’s appointment in 1991, whereas the Court had found only one federal statute in violation of “principles of constitutional federalism” during the previous fifty years).

6. See *supra* notes 3–5 and accompanying text.

7. The terms “textualism” and “originalism” as used in this Note are synonymous and refer to the theory that, for the purpose of Constitutional interpretation, the precise meaning of the words is controlling. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997).

8. Most notably, Justices Rehnquist, Scalia, and Thomas have demonstrated a consistent commitment to originalism in interpreting the Constitution. CHRISTOPHER WOLFE, *HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER* 176 (1996).

9. See *supra* note 7.

10. See SCALIA, *supra* note 7, at 38 (showing that Justice Scalia relies on the *Federalist* papers and other related works because such “informed” writings demonstrate how the Constitution was originally understood).

11. See *infra* note 53.

12. See *id.*; discussion *infra* note 53.

13. THE FEDERALIST NO. 39 (James Madison) [hereinafter FEDERALIST 39].

authored by James Madison. The Court has cited this piece in eight decisions since 1985.¹⁴ While it is clear that a majority of Justices on the current Court believe that Madison would have endorsed their unprecedented expansion of the sphere of state power,¹⁵ it is unclear how this belief actually comports with Madison's early federalist ideology.¹⁶

This Note will examine the current Court's vision of Madison's early federalist ideology. It will analyze the eight Supreme Court cases that have cited *Federalist* 39 by looking at the way the Court has used the essay, and by examining its language in the context of Madison's other writings. The aim of this Note is to portray how Madison might have responded to the Court's use of his essay as definitive authority for its expansion of the powers of the states vis-à-vis the national government. It will conclude that during the framing of the Constitution and the subsequent composition of *Federalist* 39, Madison was a fervent nationalist who would never have advocated

14. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002); *Bush v. Gore*, 531 U.S. 98, 142 n.3 (2000) (Ginsburg, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 714–15 (1999); *Printz v. United States*, 521 U.S. 898, 920–21 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 188 (1992); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

15. See *Fed. Mar. Comm'n*, 535 U.S. at 751–52 (Thomas, J., dissenting) (citing *Federalist* 39 for the proposition that, in ratifying the Constitution, the states “entered the Union ‘with their sovereignty intact’”); *Alden*, 527 U.S. at 714–15 (Kennedy, J.) (asserting that Madison’s statement that the states would retain a “residual and inviolable sovereignty” indicates Madison’s belief that states “retain the dignity, though not the full authority, of sovereignty”); *Printz*, 521 U.S. at 919–22 (Scalia, J.) (asserting that Madison and the Framers intended to create a system of dual sovereignty, which would not empower the national government to regulate the conduct of states or its officials); *Garcia*, 469 U.S. at 582–83 (O’Connor, J., dissenting) (claiming that Madison believed the division of power between the state and national governments under the Constitution would produce a system in which the states would bear significant authority at the expense of the powers of the national government).

16. The focus of this Note is limited to the original meaning of *Federalist* 39. The analysis centers upon Madison’s early federalist ideology, his viewpoint during the period between his first term as a national legislator under the Articles of Confederation in 1780, and the ratification of the Bill of Rights in 1791. This Note contends that during this time, Madison was a fervent nationalist who tirelessly advocated for an expanded national government. Notably, persuasive evidence suggests that after this time, Madison underwent an ideological shift and became more friendly to a restrictive national government. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 294 (1995). However, Madison’s beliefs during his later years had no impact on the composition of *Federalist* 39 or on the drafting of the Constitution and, therefore are outside the scope of this Note.

the pro-state position that the majority of the Rehnquist Court has taken. However, because of the nature and ambiguities of the *Federalist* papers, Madison's broad and general statements, when isolated from accompanying text, other writing, and from the context of his ideology, can be cited to support either state sovereignty or strong national power; however, when viewed alongside his other essays, letters, and records, Madison's true nationalist ideology emerges.

Part I of this Note examines the history of the composition and publication of *Federalist* 39, including a textual analysis of the essay, an account of the circumstances under which it was written and published, a discussion of Madison's attitudes regarding the Constitution and his participation in its framing, and a survey of the Supreme Court's treatment of *Federalist* 39. Section II presents an analysis of the Supreme Court's use of the essay. Finally, section III concludes that the current Court has corrupted Madison's writings to support a federalist ideology inconsistent with Madison's own.

I. HISTORY

A. James Madison: Legislator, Delegate, Advocate, Author

James Madison served as a national legislator for his home state, Virginia, under the Articles of Confederation, and his experience in this capacity convinced him that the governing structure of the Articles was deeply flawed.¹⁷ Madison's core criticism of the Articles was that state governments enjoyed far too much sovereignty, rendering the national government virtually powerless¹⁸ and enabling

17. JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 45 (1990) [hereinafter RAKOVE, *MADISON AND THE CREATION*].

18. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 47–50 (1997) [hereinafter RAKOVE, *ORIGINAL MEANINGS*]; see also JAMES MADISON: *WRITINGS* 69–80 (Jack N. Rakove ed., 1999) [hereinafter RAKOVE, *WRITINGS*]. In April, 1787 Madison drafted a memorandum, *Vices of the Political System of the United States*, in which he articulated twelve specific criticisms of the governing structure of the Articles of Confederation. *WRITINGS*, *supra*, at 69. Of the twelve “vices” that Madison listed, nine related directly to his belief that the states enjoyed far too much sovereign authority under the Articles: 1) the failure of the states to comply with constitutional requisitions; 2) the encroachment by the states upon the national government; 3) the propensity of the states to encroach upon each others' rights; 4) the need for uniformity in the law, unattainable under the Articles; 5) the

the states to oppress the rights of minority interests within their borders.¹⁹ Madison attempted to work within the Articles of Confederation to fortify the national government against the states' reckless abuse of their sovereignty. He believed the vesting of "coercive powers" within the national government was necessary for its proper operation.²⁰ Madison believed this concentrated power could mitigate the disturbances by states which threatened to impede the proper functioning of the young Union.²¹

Madison set this belief into motion during the first congressional assembly under the Articles when he drafted an ill-fated amendment authorizing the national legislature to employ armed forces to compel reluctant states to comply with national directives.²² Frustrated by his thwarted attempts to empower the national government against the states, Madison became an outspoken advocate of orchestrating a convention for the purposes of drafting a new structure of national governance.²³ After one unsuccessful attempt, Madison and his colleagues successfully organized the Constitutional Convention of 1787 ("the Convention"), held in Philadelphia.²⁴

inability of states to prevent internal violence; 6) the multiplicity of laws within the states; 7) the mutability of state laws; 8) the injustice of state laws; and 9) the impotence of state laws. *Id.* at 69–80.

Madison elaborated on many of his criticisms of the state governments under the Articles in a letter to George Washington dated April 16, 1787. *Id.* at 80. In this letter, Madison claimed that the state governments routinely invaded the national government's jurisdiction and persistently harassed each other with frivolous actions motivated in large part by the states' self-interest. *Id.* at 81.

19. WRITINGS, *supra* note 18, at 81. In his letter to George Washington, Madison claimed that an extended national government was needed to act as a disinterested mediator in impassioned conflicts between majority and minority interests within the states. *Id.* Madison observed that within the states, majorities have the ability to render binding policy decisions, and often have an interest in abusing this ability at the expense of minority interests. *Id.*

20. *Id.* at 13 (letter to Thomas Jefferson dated April 16, 1781).

21. *Id.*

22. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 37.

23. RAKOVE, MADISON AND THE CREATION, *supra* note 17, at 40. Though Madison originally believed it best to make changes within the Articles of Confederation, he eventually embraced the idea of a constitutional convention and became one of its chief supporters. *Id.* at 39–40.

24. The first Constitutional Convention, held in Annapolis, Maryland in 1786, had a limited agenda relating to commerce policy under the Articles of Confederation. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 28. Delegates from only five of the thirteen states attended. *Id.* at 32. At this meeting, the delegates agreed to disband without adopting any substantive national policy changes and recommended that an immediate general convention

Madison believed that the purpose of the Convention was to draft a Constitution that would significantly enlarge the power and authority of the national government, and at the same time reduce the power of the states as much as possible.²⁵ Ideologically, many schisms emerged at the Convention. Two of the most pressing arose between the large and small states²⁶ and between federalists and anti-

involving all states take place in Philadelphia to revise the Articles. *Id.* at 32.

25. *See, e.g.*, WRITINGS, *supra* note 18, at 64; discussion *supra* note 19 and text accompanying notes 20–21. In a letter to Thomas Jefferson dated March 19, 1787, Madison claimed that his first goal at the convention was to establish a national government under a Constitution which would be “clearly paramount” to the state governments. WRITINGS, *supra* note 18, at 64. Continuing to elaborate on his vision of the proper national government, Madison claimed that beyond the power to regulate trade and any other matter where “uniformity is proper,” the national government should be armed with the power to veto acts of the state legislatures “in all cases whatsoever.” *Id.*

In a note to Edmund Randolph dated April 8, 1787, Madison also expressed his belief that the power of the new national government should be expanded dramatically. He claimed, “in framing a system, no material sacrifices ought to be made to local or temporary prejudices.” 2 THE WRITINGS OF JAMES MADISON 337 (Gaillard Hunt ed. 1901). Madison claimed that the national government should possess “positive and complete authority in all cases where uniform measures are necessary, as in trade” *Id.* at 338.

In a letter to George Washington dated April 16, 1787, Madison made clear the general theme underlying his view of federalism, stating:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be *subordinately useful*.

Id. at 344–45 (emphasis added).

26. The dispute between the large and small states centered primarily around the question of whether representation in the new legislature should be based on population (the system used in the current House of Representatives) or a scheme of equal representation among the states (as used in the current Senate). RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 60–61. Debate along these lines focused on the infamous Virginia and New Jersey Plans. *Id.* at 61–63.

Madison helped draft the Virginia Plan. *Id.* at 59. The Virginia Plan represented the position of the large states and proposed a significant expansion of the power of the national government at the expense of the states. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 165 (Max Farrand ed., Yale University Press 1937) (1911) [hereinafter RECORDS]. Discussing the Virginia Plan’s legislative veto provision, Madison claimed that a chief function of the new national government would be to control states which, without a strong national government, would “continually fly out of their proper orbits and destroy the order & harmony of the political system.” *Id.* In carrying out this goal, the Virginia Plan called for representation in the national legislature to be based on the number of free inhabitants of a given state, rather than giving each state equal representation, as in the Articles. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 60–61. Madison believed that a system of equal representation in the legislature would frustrate the national government and enable minority factions to exert undue influence over national policy. *Id.* at 64.

federalists.²⁷ Madison was an advocate of the position taken by the large states and, unlike many of his Virginia colleagues (most notably George Mason²⁸), was also a strong nationalist (or federalist).²⁹ Throughout the course of the Convention, Madison fought aggressively against anti-federalist attempts to restrict the power of the national government, and simultaneously advocated tirelessly for expansive language and for power to be conferred upon the national government in the Constitution.³⁰

Early in the Convention, Madison established the foundation of his position on federalism, the idea that under the new Constitution,

The small states present at the convention responded to the Virginia Plan with the New Jersey Plan, which in many ways resembled the Articles of Confederation, and demonstrated the fear among the small states of an expanded national government. *Id.* at 63. The New Jersey Plan demanded equal representation among the states in both houses of the legislature, in accordance with the system under the Articles. *Id.*

Madison viewed the New Jersey Plan as a threat to the proper expansion of the national government's power. *Id.* at 64. Madison criticized the New Jersey Plan because (1) it did not go far enough to prevent state intrusion upon the national government's power, (2) it would not prevent states from trespassing upon each other, and (3) it did not protect minority interests within the states themselves. 1 RECORDS, *supra*, at 314–22.

After weeks of debate, the two sides reached a compromise; they agreed upon representation in the House of Representatives (the lower chambers of Congress) under a scheme of proportional representation based upon population, and representation in the Senate (the upper chambers of Congress) under a scheme of equal representation among the states, regardless of population. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 70. Madison did not support this compromise. *Id.* at 68. He believed that even if the legislature were divided in this way, factions within the Senate would be able to derail legitimate exercises of national policy approved in the House of Representatives. *Id.*

27. The debate between the federalists and anti-federalists centered upon the extent of power of the national government under the new Constitution. The federalists, led at the Convention by James Madison and Alexander Hamilton, took the position that the national government's power should be expanded dramatically. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 525 (W.W. Norton & Co. 1993) (1969). The anti-federalists, led by George Mason, Elbridge Gerry, and Virginia Governor Edmund Randolph, were leery of the impact an expanded national government would have upon the sovereignty of the individual states. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 112–13. Mason, Gerry, and Randolph subsequently refused to sign the final draft of the Constitution and embarked upon a well-publicized national campaign aimed at dissuading the states from ratifying the Constitution they had helped draft. *Id.* at 106–07, 113.

28. Unlike Madison, who feared that the power wielded by the state governments under the Articles was extremely dangerous to the proper operation of the national government, Mason expressed his concern at the Convention that the states should have “means of defending themselves [against] encroachments of the [National Government].” RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 62.

29. See WOOD, *supra* note 27.

30. See 1 RECORDS, *supra* note 26, at 356–58.

the more extensive the national government in relation to the states, the “greater [the] probability of duration, happiness and good order.”³¹ Elaborating on this position, Madison advanced the view that the state governments were *inherently subordinate* entities, beneficial only because it would be inconvenient for the national government to regulate all areas of the Union.³² During the Convention, Madison went so far as to claim that if it were practicable for the national government to absorb the state governments completely, “no fatal consequence could result.”³³

Central to Madison’s nationalist arguments during the Convention was his opinion regarding the power dynamic that existed between the states and the national government under the Articles. Madison claimed that the national government was far less likely to encroach upon the states than the other way around, and that the consequences of encroachment by the states would be much more fatal to the Union than the risks posed by the national government.³⁴ Madison was a firm advocate for the vesting of a veto power in the national legislature, which would allow for the invalidation of any state law deemed “improper.”³⁵ Madison saw the veto as absolutely essential to preventing the self-interested states from continuing to frustrate national government objectives.³⁶

31. *Id.* at 141.

32. *Id.* at 357.

33. *Id.* at 358.

34. *Id.* at 356. An ardent scholar of ancient history, Madison observed that the State governments of ancient confederacies throughout history had never faced danger of the destruction by intrusion of the national government. *Id.* at 367.

35. *Id.* at 162, 164. Madison’s second justification for the legislative veto was that it was necessary to prevent instability and injustice in the legislation of the state governments. WRITINGS, *supra* note 18, at 146. Madison was concerned that without the veto, majority factions within the states easily would be able to oppress the rights of minority interests within their borders. *Id.* at 150. Though he did concede that majority factions could form at the national level, Madison viewed these factions as much more dangerous when operating within the states. *Id.*

Madison incorporated the veto power into the Virginia Plan alongside another provision which would have conferred upon the federal government the power to use military force to coerce reluctant state governments into compliance with national directives. *See* 1 RECORDS, *supra* note 26, at 164–66; 2 RECORDS, *supra* note 26, at 27–28; RAVOKE, ORIGINAL MEANINGS, *supra* note 18, at 60.

36. WRITINGS, *supra* note 18, at 64.

When it became clear that he could not build enough support to implement the veto provision, Madison suggested an alternative plan which would have empowered the national legislature to directly enact temporary laws within the states themselves.³⁷ Despite his efforts, the Convention chose not to adopt the national veto power or the national authority to enact state law provisions. Upon defeat, Madison shifted his attention to the drafting of the Supremacy and Necessary and Proper Clauses, which he believed would serve as definitive and expansive statements of the national government's power.³⁸

After the Convention was over and the Constitution finalized, Madison returned to Congress, then located in New York City, and continued his advocacy for a strong national government through his writings and his representation of Virginia in the ratification effort.³⁹ During this time, Madison drafted his contributions to the *Federalist* papers⁴⁰ at the bidding of Alexander Hamilton, a delegate and native of New York, who believed the ratification effort in his state was in danger of failing.⁴¹

Even after the Constitution was ratified, the debate over its contents and the state/national power dynamic was far from over. Many states had attempted to condition their ratification upon the

37. 2 RECORDS, *supra* note 26, at 28.

38. RAKOVE, ORIGINAL MEANINGS, *supra* note 18, at 180; *see also* THE FEDERALIST NO. 44, at 320–23 (James Madison). While Madison was heartened by the firm language of the Supremacy and Necessary and Proper Clauses, he continued, even after the Convention closed, to advocate for the national veto. WRITINGS, *supra* note 18, at 148 (letter to Thomas Jefferson dated October 24, 1787).

39. RAKOVE, MADISON AND THE CREATION, *supra* note 17, at 70, 74.

40. *Id.* at 71.

41. THE FEDERALIST: BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY 7 (Benjamin Fletcher Wright ed., MetroBooks 2002) (1961) [hereinafter THE FEDERALIST]. While twelve of the thirteen states were represented at the Convention (Rhode Island did not send delegates), the Constitution needed the ratification of only nine states. U.S. CONST. art. VII. Upon ratification by the requisite nine states, the Articles of Confederation would be dissolved and the Constitution binding upon the states that agreed to ratify. ORIGINAL MEANINGS, *supra* note 18, at 104.

The ratification process itself was centered around a series of conventions at which advocates and opponents of the Constitution voiced their arguments. Though the votes in many states were very close, the Constitution was officially ratified with the vote of the ninth state, New Hampshire, on June 21, 1788. *Id.* at 121–22. Rhode Island was the last state to join the new Union when it voted to ratify in May, 1790. *Id.* at 128.

immediate drafting of a bill of rights to be included within the Constitution,⁴² or upon an amendment specifying that the powers not enumerated in the Constitution would be reserved to the states.⁴³ After the Constitution was ratified, much of the debate during the first meetings of Congress under the centered around the language of the proposed reserved powers amendment, which would eventually become the Tenth Amendment. Anti-federalists looking to limit the powers of the national government drafted versions that used the term “expressly” and “clearly” to communicate that Congress’s powers were restricted to those specifically enumerated in the Constitution.⁴⁴ Madison believed that the inclusion of these limiting terms posed a grave threat to what he viewed would be one of the most critical sources of the new national government’s authority, *implied powers*.⁴⁵ Madison was eventually successful in excluding the

42. Massachusetts, New Hampshire, and Virginia, the eighth, ninth, and tenth states to ratify, rejected efforts by anti-federalists to condition ratification on the adoption of amendments. ORIGINAL MEANINGS, *supra* note 18, at 120–24. In the alternative, the states offered “recommended” amendments alongside their ratification. *Id.* New York took a different approach. It offered a series of amendments and classified some as “explanatory.” *Id.* at 125. Although New York did not technically condition its ratification upon the adoption of the amendments, those that it labeled as “explanatory” served to explain how New York believed the Constitution would work. *Id.* at 125–26. North Carolina and Rhode Island, the last two states to ratify, also offered “recommended” amendments. *Id.* at 128.

43. Five states—New York, Virginia, Massachusetts, South Carolina, and New Hampshire—insisted on an amendment reserving power to the states. James B. Staab, *The Tenth Amendment and Justice Scalia’s “Split Personality”*, 16 J.L. & POL. 231, 240 (2000).

44. Of the five states that proposed a reserved powers amendment, only Virginia’s proposal did not include the terms “expressly” or “clearly.” *Id.*

45. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 683 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]. Debating the language of the Tenth Amendment in Congress, Madison objected to a motion to include the term “expressly” in the reserved powers amendment. *Id.* Madison claimed that “there must necessarily be admitted powers by implication, unless the [C]onstitution descended to recount every minutiae.” *Id.* Relying on his extensive knowledge of the history of ancient confederacies, Madison went on to claim that “no government ever existed which was not necessarily obliged to exercise powers by implication.” *Id.* Madison believed that for the new national government to be successful, it needed to rely upon what he called “The Doctrine of Implication.” THE FEDERALIST NO. 44 (James Madison). Madison believed that the Necessary and Proper Clause of the Constitution allowed the national government to wield implied powers where necessary to secure ends authorized under its enumerated powers. *Id.*

Significantly, while Madison endorsed the Doctrine of Implication, he recognized that the Constitution placed limits on its use. In a speech delivered to Congress on Feb 2, 1791, Madison argued that the national government lacked the constitutional authority to establish a national bank. He argued that the national government lacked the constitutional authority and

restrictive terms from the Tenth Amendment, and in this victory he secured for the national government the authority to wield implied powers in administering national directives.⁴⁶

B. The Federalist Papers: Pulp Journalism or Definitive Authority?

Alexander Hamilton, James Madison, and John Jay did not intend the *Federalist* papers to be philosophical treatises or roadmaps to constitutional interpretation.⁴⁷ Rather, they wrote the essays with the clear intent to publish them in a public forum, and their sole purpose was to persuade undecided citizens in New York to vote to ratify the Constitution.⁴⁸ Their mission, simple and effective, was to directly address the arguments of the anti-federalists, critics of the Constitution, who were publishing articles attacking the Constitution and advocating the principles embodied in the Articles of Confederation.⁴⁹ The anti-federalists' chief concern was the loss of state sovereignty under the Constitution, sovereignty expressly preserved under the Articles.⁵⁰

Although the authors did not intend them as treatises,⁵¹ within the last century the *Federalist* papers have come to be regarded as some of the most important writings of early American history.⁵² One peculiar upshot to their rise in academic popularity has been the

cautioned against a broad interpretation of the Doctrine of Implication. WRITINGS, *supra* note 18, at 486. He made clear his belief that the implied powers legitimately wielded by the national government must be merely means to attain a constitutionally authorized, or enumerated, end. *Id.* Madison believed that if the means were not sufficiently related to the enumerated ends, the national government would overstep its constitutional authority. *Id.*

46. *See supra* note 45.

47. THE FEDERALIST, *supra* note 41, at 11. The fact that neither Madison nor Hamilton made any attempt to save their drafts or original manuscripts is evidence that they intended the essays to have limited scope. *Id.* at ix. Moreover, the authors did not identify who had written each essay until well after publication. *Id.* at 9–10. In fact, historians today still debate the true identity of each author. *Id.* at 8. Madison did not even offer support in assembling the first complete publication of the essays in 1788. *Id.* at ix–x.

48. *Id.* at 11, 14. The essays, each written under a pen name, first appeared in New York newspapers after the conclusion of the Convention, and continued throughout New York's ratification process. The first appeared on October 27, 1787, and the last was published on April 4, 1788, just a few months before New York's ratification process concluded. *Id.* at 3.

49. *Id.* at 6–7.

50. ORIGINAL MEANINGS, *supra* note 18, at 146.

51. *See supra* note 47.

52. THE FEDERALIST, *supra* note 41, at xiv.

Supreme Court's dramatically increased use of the essays as legal authority.⁵³ Many of the Framers, including Madison, recorded voluminous notes and essays concerning the drafting and intended operation of the Constitution.⁵⁴ Additionally, various participants of the convention, including Madison compiled lengthy records from the Convention itself.⁵⁵ Despite the existence of these records, the Supreme Court has chosen to cite the *Federalist* papers with increasing, and some might say disturbing, frequency.⁵⁶

Traditionally, many legal scholars labeled the authoritative value of the *Federalist* papers as dubious at best, because of the modest intentions of the authors and the fact that the essays were written so hastily.⁵⁷ Despite some valid criticism of their use, it is clear that the *Federalist* papers have become integrated and woven into the very fabric of modern constitutional jurisprudence.

C. *Federalist* 39: *The Language*

James Madison composed *The Federalist No. 39* under the pen name "Publius."⁵⁸ *Federalist* 39, entitled *Republicanism, Nationalism, Federalism*, addresses the nature of the proposed structure of governance under the Constitution and its planned separation of powers between the state and national governments. *Federalist* 39 is divided into two parts. The first portion is devoted to defining and exploring the structure of the republican government

53. From 1990 through 1998 the *Federalist* papers were cited in sixty Supreme Court decisions, which amounts to more than any other decade in the Court's history and twice as many as any decade prior to 1980. Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1327–28 (1998). Between 1980 and 1998 the Court cited the *Federalist* papers in 116 cases, totaling more than the number of cases citing the essays during the 169 years between 1790 and 1959. *Id.*

54. See, e.g., NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, REPORTED BY JAMES MADISON (W.W. Norton & Co. 1987) (1966).

55. See *id.*

56. See *supra* note 53 and accompanying text.

57. See, e.g., John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998). Madison cautioned against the uncritical use of the *Federalist* papers stating, "the authors might be sometimes influenced by the zeal of advocates." 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 436 (1865) (letter from James Madison to Edward Livingston dated April 17, 1824).

58. Madison first published the essay in *The New York Journal* on January 16, 1788. See WRITINGS, *supra* note 18, at 217.

under the Constitution.⁵⁹ The second portion addresses the nature of the Constitution as it acts upon and through the national and state governments.⁶⁰

In *Federalist* 39, Madison directly addressed the character of the Constitution and the government it created, focusing specifically on the question of whether the Constitution created a “national” or a “federal” government.⁶¹ Madison concluded that it created neither; rather, it blended federal and national characteristics.⁶² To arrive at this conclusion, Madison analyzed five elements of the constitutional republican government: 1) the *foundation* of its establishment, 2) the *sources* of its power, 3) the *operation* of its powers, 4) the *extent* of its powers, and 5) the *authority to change* the Constitution.⁶³

Looking first at the *foundation* of the Constitution’s authority, Madison found that authority was established by a federal act that established a federal constitution.⁶⁴ He based this finding on two observations. First, Madison cited the fact that the Constitution would be ratified by unanimous consent of the states as sovereign entities under the existing Articles of Confederation, not by a majority of the people acting through a national vote.⁶⁵ Second, Madison observed that, in the context of ratification, each state is considered a sovereign, independent body, bound by its voluntary act.⁶⁶ Madison concluded that through this mode of establishment, the Constitution would be a federal, rather than a national, Constitution.⁶⁷

Second, Madison found that the *sources* of power of the new government reflect both national and federal characteristics.⁶⁸

59. THE FEDERALIST, *supra* note 41, at 280–82. This portion of *Federalist* 39 is primarily devoted to defining the concept of a “republican government,” which Madison explains is a government that derives its power from its citizens and is administered by individuals holding temporary, voluntary office during good behavior. This portion also explains why the Constitution creates a republican government and compares the structure of the Constitutional government with the governments of the states and other nations. *Id.* at 281–82.

60. *Id.* at 282–86. This Note focuses on the second portion of *Federalist* 39.

61. *Id.* at 282.

62. *Id.* at 286.

63. *Id.* at 282–83.

64. *Id.* at 283.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 283–84.

Madison reached this conclusion by examining the selection process of the two houses of the legislature.⁶⁹ Madison found that because the House of Representatives derives its power from the people of the nation, proportionately represented, the government is national.⁷⁰ However, focusing on the Senate, Madison claimed that because it derives its power from the states and is divided on terms of equal representation among the states, this element of government is federal.⁷¹ Madison characterized the executive election process as partly federal and partly national.⁷²

Third, Madison concluded that the new government *operates* as a national government.⁷³ Madison based this conclusion on the observation that a national government would act directly upon individual citizens comprising the nation while a federal government would act upon the political bodies constituting each sovereign state.⁷⁴

Madison then focused on the *extent* of the new government's power and concluded that it was primarily federal.⁷⁵ He arrived at this conclusion by defining a "national government" as one that possesses *indefinite supremacy* over all individuals and objects within its sphere of authority.⁷⁶ Observing that the jurisdiction of the new government extended only to those powers enumerated in the Constitution, leaving all other powers to the states, Madison concluded that the Constitutional government could not be classified as exclusively national.⁷⁷

69. *Id.*

70. *Id.*

71. *Id.* at 284. The Seventeenth Amendment, adopted in 1913, changed the election system of the Senate, conferring the ability to choose Senators upon the citizens of the representative states. U.S. CONST. amend. XVII, § 1. Madison would have viewed this change as creating a national characteristic because it transferred the power to select Senators from the states to the public. THE FEDERALIST, *supra* note 41, at 283–84. However, the retention of the principle of equal representation in the Senate would represent a federal characteristic to Madison. *Id.* at 284.

72. THE FEDERALIST, *supra* note 41, at 284.

73. *Id.*

74. *Id.*

75. *Id.* at 284–85 (quoting FEDERALIST 39 (“[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.”)).

76. *Id.* at 284.

77. *Id.* at 285.

Finally, Madison looked to the *procedure for amending* the Constitution and found that it contains elements properly characterized as both federal and national.⁷⁸ Madison observed that by requiring ratification by more than a majority of states, rather than individuals, the amendment process bore a federal quality.⁷⁹ However, by requiring less than a unanimous vote of the states, the amendment process had a national quality as well.⁸⁰ Madison ultimately concluded that the government under the Constitution was not purely national or federal, but a combination of both.⁸¹

D. Use of Federalist 39 by the United States Supreme Court as Authority on Issues of Federalism

Since 1985, the year it was first cited in a Supreme Court opinion addressing federalism, *Federalist 39* has been cited as authority in eight cases and ten opinions authored by seven different Justices.⁸² In each of these cases, *Federalist 39* was used in the context of questions regarding the proper balance of power between the national and state governments.

The eight cases citing *Federalist 39* can be divided into two groups: Tenth Amendment cases and Eleventh Amendment cases. While the legal issues underlying the two types of cases are different, the arguments employing *Federalist 39* are analytically similar.

1. Eleventh Amendment Cases

Federalist 39 is cited as authority in three Eleventh Amendment cases through which the Supreme Court has successively expanded the states' sovereign immunity even beyond the language of the

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 286.

82. See *Fed. Mar. Comm'n v. South Carolina State Port Auth.*, 535 U.S. 743, 751 (2002); *Bush v. Gore*, 531 U.S. 98, 142 n.3 (2000) (Ginsburg, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 714–15 (1999); *Printz v. United States*, 521 U.S. 898, 920–21 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring); *id.* at 846 (Thomas, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239; *New York v. United States*, 505 U.S. 144, 188 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550, 570 (1985) (Powell, J., dissenting).

Eleventh Amendment.⁸³ Although the Court had decided Eleventh Amendment issues without referencing *Federalist* 39 for over a century after it was written, the Court cited *Federalist* 39 in an Eleventh Amendment case for the first time in 1985 in *Atascadero State Hospital v. Scanlon*. The *Scanlon* majority held that the Eleventh Amendment's guarantee of sovereign immunity to the states barred federal courts from hearing a private action against the State of California.⁸⁴ In a footnote addressing dissenting Justice Brennan's interpretation of several of the Framers' debates and essays, Justice Powell observed that the Framers never questioned the idea that the Constitution created a system that expressly allocated some authority to the national government and left the remainder to the several states, and Powell cited *Federalist* 39 to support this observation.⁸⁵

Federalist 39 next surfaced in the Eleventh Amendment case *Alden v. Maine*.⁸⁶ The majority expanded the sovereign immunity of the states beyond the language of the Eleventh Amendment, holding that Congress could not subject a state to suit in state court without the state's express consent.⁸⁷ Justice Kennedy based his opinion on the structure of Constitution, presumably because he found no

83. *Fed. Mar. Comm'n*, 535 U.S. 743; *Alden*, 527 U.S. 706; *Atascadero*, 473 U.S. 234. The Eleventh Amendment, adopted in 1798, provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

84. 473 U.S. at 239–40. *Atascadero* raised the question of the ability of states to be sued in federal court under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibited states from discriminating against handicapped persons. *Id.* at 244–46. The Act would have subjected states to the remedies for employment discrimination in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). *Id.* at 245. The Court held that the Eleventh Amendment barred private action against the states unless the language of the Act itself contained an express indication of the intent of Congress to abrogate the states' rights under the Eleventh Amendment. *Id.* at 247. The Court found that since this express intent was absent from the Rehabilitation Act, the Eleventh Amendment prohibited suit. *Id.*

85. *Id.* at 238 n.2.

86. 527 U.S. 706 (1999).

87. *Id.* at 712. *Alden* addressed Congress's ability to subject states to private action under the Fair Labor Standards Act. *Id.* at 711–12 (citing 29 U.S.C. § 201). Despite the fact that Congress had included in the Act an express abrogation of the states' Eleventh Amendment rights, which would have been sufficient to allow federal suit under *Scanlon*, the *Alden* Court held that Congress lacked the constitutional authority to abrogate the states' Eleventh Amendment rights, *id.* at 751. To subject a state to private action, *Alden* required the express consent of the states. *Id.* at 712.

support for his position either in the text of the Eleventh Amendment or elsewhere in the Constitution.⁸⁸ In assessing the Constitution's structure, Justice Kennedy observed that under the Constitution, state governments retain a substantial amount of sovereignty.⁸⁹ Justice Kennedy conceded that the states cannot be considered truly sovereign bodies. However, he claimed that in spite of this fact, the states retain the *dignity* accorded a sovereign body.⁹⁰ Justice Kennedy then claimed that because the states retain this amorphous dignity, the national government cannot subject them to private suit without their consent.⁹¹ To endorse this novel approach, Justice Kennedy quoted extensively from Madison and *Federalist 39*.⁹²

In *Federal Maritime Commission v. South Carolina State Ports Authority*,⁹³ the Court again cited *Federalist 39* as authority to further expand the states' sovereign immunity power under the Eleventh Amendment. In *Federal Maritime Commission*, the Court held that the principle of sovereign immunity precluded a national administrative agency from adjudicating a private party's complaint against a state-run organization.⁹⁴

Like the *Scanlon* and *Alden* Courts, the Court in *Federal Maritime Commission* based its decision not on the language of the Eleventh Amendment, which would not have supported its novel expansion,⁹⁵ but on the concept of dual sovereignty.⁹⁶ Justice Thomas, writing for

88. *Id.* at 712–13 (stating that the insulation of the states from suits prosecuted by individuals does not derive from the text of the Eleventh Amendment, but from the history and structure of the Constitution itself).

89. *Id.* at 714.

90. *Id.* at 715 (arguing that the states are “not mere provinces . . . but retain the dignity, though not the full authority of sovereignty.”).

91. *Id.*

92. *Id.* at 714–15.

93. 535 U.S. 743 (2002).

94. *Id.* at 751–52. In *Federal Maritime Commission*, the Court held that state sovereign immunity barred the Federal Maritime Commission from hearing a private action against a state-run port authority. *Id.* at 747. For purposes of Eleventh Amendment analysis, the Court held that FMC proceedings are analogous to federal adjudications because subjecting states to administrative action would work the same “indignity” on the states as would suit in a federal court. *Id.* at 759.

95. *Id.* at 754. Justice Thomas conceded that the Eleventh Amendment would not support his holding, but justified his position by stating simply, “the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.” *Id.*

96. *Id.* at 753 (finding that an important part of the sovereignty the states retained under

the Court, relied on *Federalist* 39 to support his claim that a key aspect of the sovereignty that the states retained after ratifying of the Constitution was absolute immunity from private lawsuits, despite this power's express exclusion from the Constitution itself.⁹⁷

2. Tenth Amendment Cases

While the three Eleventh Amendment cases that cite *Federalist* 39 are fairly consistent in their use of the essay, the five Tenth Amendment cases cite *Federalist* 39 in a variety of contexts, often to support completely opposing arguments. *Garcia v. San Antonio Metropolitan Transit Authority* was the first Tenth Amendment case in which the Court relied upon *Federalist* 39.⁹⁸ The majority and the dissent both cite *Federalist* 39 to endorse opposing views of the Tenth Amendment.⁹⁹

In *Garcia*, the Court held that a municipal or state agency was not immune from the minimum wage standards of the Fair Labor Standards Act (FLSA).¹⁰⁰ The decision came on the heels of *National League of Cities v. Usery*,¹⁰¹ where the Court had held that the Commerce Clause did not empower Congress to enforce the FLSA against the States.¹⁰² In *Garcia*, Justice Blackmun found that the "areas of traditional government function" test from *National League* was unworkable and had unnecessarily restricted Congress's

the Constitution was their immunity from private suit).

97. *Id.* at 754.

98. 469 U.S. 528 (1985).

99. *Id.* at 550, 570.

100. *Id.* at 530–31. *Garcia* arose out of a declaratory judgment action brought by the San Antonio Metropolitan Transit Authority, which sought judgment that, as a state agency, it was immune under the Tenth Amendment from the minimum wage and overtime pay provisions of the FLSA. *Id.* at 530. *Garcia* held that conferring upon state employees the protections of the FLSA was a proper action under the Commerce Clause and was not destructive of the states' sovereignty. *Id.* at 530–31. As such, the Court found no violation of the Tenth Amendment. *Id.*

101. 426 U.S. 833 (1976).

102. *Id.* at 852. *National League*, decided just eight years before *Garcia*, had held that the Tenth Amendment forbade Congress from making the states, as employers, subject to the FLSA. *Id.* at 836. The Court held that under the Tenth Amendment, the Commerce Clause did not empower Congress to regulate states in "areas of traditional governmental functions." *Id.* at 852. However, the *National League* Court offered no definition of "traditional governmental functions," leaving future courts no way to distinguish between traditional and non-traditional governmental functions. 469 U.S. at 530.

Commerce Clause authority.¹⁰³ Justice Blackmun stated that the proper focus of the law should be Congress's power under the Commerce Clause, not its limitations under the Tenth Amendment.¹⁰⁴ In finding that Congress had not overstepped its Commerce Clause authority, Justice Blackmun noted that state sovereignty is, in fact, limited by the Constitution.¹⁰⁵ Justice Blackmun found that the sovereignty retained by the states was adequately protected by the procedural safeguards existing at the national level, and judicially invented limitations on the national government were not necessary.¹⁰⁶ To support this position, Justice Blackmun cited several of Madison's works, including *Federalist* 39.¹⁰⁷

Ironically, Justice Powell also cited Madison's work, including *Federalist* 39, in his dissenting opinion.¹⁰⁸ Justice Powell argued that Congress lacked authority under the Commerce Clause to impose minimum wage standards on state and municipal governments as employers.¹⁰⁹ Reading the Tenth Amendment expansively, Justice Powell argued that the balance of power between the national and state governments should reside more heavily with the states.¹¹⁰ Justice Powell grounded his decision on the intent of the Framers, especially Madison, who he claimed believed that state governments would come to be more important than the national government.¹¹¹

Justice Powell relied heavily on *Federalist* 39 to support his basic proposition that, because the powers of the national government are enumerated within the Constitution, the Framers intended the Constitution to limit the power of the national government and affirmatively empower state governments.¹¹² Justice Powell's position was that the Constitution's enumeration of the national powers represented a deliberate attempt by the Framers to protect the

103. 469 U.S. at 556–57.

104. *Id.* at 553–54.

105. *Id.* at 548.

106. *Id.* at 552.

107. *Id.* at 550.

108. *Id.* at 570 (Powell, J., dissenting).

109. *Id.* at 572.

110. *Id.* at 570–71.

111. *Id.*

112. *See id.* at 570–72.

sovereignty of the states.¹¹³ He believed the Tenth Amendment was merely evidence of this fact.¹¹⁴

Eight years after the *Garcia* decision, the Supreme Court again cited *Federalist* 39 in a Tenth Amendment case, *New York v. United States*.¹¹⁵ Justice O'Connor, writing for the Court, argued that it is beyond the national government's Commerce Clause authority to compel state governments to carry out an otherwise constitutional act.¹¹⁶ Justice O'Connor relied upon the "residuary and inviolable" passage of *Federalist* 39, which dealt with the extent of the national power, to support her proposition that the Tenth Amendment expressly reserved to the states a significant measure of sovereignty.¹¹⁷

Like Justice Powell's dissent in *Garcia*, Justice O'Connor based her majority opinion on the intent of the Framers and the structure of the Constitution.¹¹⁸ She found that the national government established under the Constitution was designed to act upon individuals directly, not upon states.¹¹⁹ Accordingly, Justice O'Connor found that it is beyond the authority of the national government to compel the states to act under a federal statute.¹²⁰

113. *Id.*

114. *Id.* at 579.

115. 505 U.S. 144 (1992).

116. *Id.* at 149. The provision of the act in question required states to "take title" to any toxic waste generated within its borders which could not properly and safely be disposed. *Id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(c)). This provision would have rendered states liable for any damages caused by such toxic wastes. *Id.* The Court held that, although Congress was within its Constitutional authority to regulate the disposal of toxic waste, the act's "take title" provision constituted an impermissible attempt by Congress to coerce the states into complying with the broad national directive. *Id.* at 188.

117. *Id.* (finding that state governments are not agents of the national government, and as such, retain "residuary and inviolable" sovereignty, a principle articulated in the Tenth Amendment). Recognizing that there are limitations to the states' sovereignty, Justice O'Connor found it would nonetheless be a violation of the state's sovereignty for the national government to compel the States to enforce or enact a national regulatory scheme. *Id.*

118. *Id.* at 156-57.

119. *Id.* at 165-66 (finding that the Framers, unhappy with the inability under the Articles of Confederation of the national government to act upon individual citizens of the states, drafted a Constitution which would enable the national legislature to act directly on individuals, not states).

120. *Id.* at 166.

The Supreme Court again cited *Federalist* 39 in *U.S. Term Limits, Inc. v. Thornton*.¹²¹ The references appear in both the concurring and dissenting opinions.¹²² The majority held that the Tenth Amendment does not permit Arkansas to amend its state constitution to impose term limits upon the service of United States Congressmen representing Arkansas.¹²³ Justice Kennedy based his concurring opinion on his belief that the Framers intended for individuals, not states, to control the national government, and that they designed the national government to act through individuals, not states.¹²⁴ To support his view, Justice Kennedy quoted, from *Federalist* 39, Madison's argument that the United States House of Representatives derives its power from individual citizens.¹²⁵ Justice Kennedy also quoted from Madison's description of the proper operation of the national government in *Federalist* 39 and expressed that the national government should act directly upon individuals, not upon the states.¹²⁶

While Justice Kennedy joined the majority in restricting state power under the Tenth Amendment, his concurring opinion was friendlier to state sovereignty.¹²⁷ Justice Kennedy relied on *Federalist* 39 to support his claim that the Tenth Amendment severely restricts the power of national government.¹²⁸

121. 514 U.S. 779 (1995).

122. *Id.* at 841 (Kennedy, J., concurring); *id.* at 846 (Thomas, J., dissenting).

123. The Amendment at issue, Section 3 of Amendment 73 to the Arkansas Constitution, prohibited the names of Congressional candidates who had served three terms in the House of Representatives or two terms in the Senate to appear on the ballot. *U.S. Term Limits*, 514 U.S. at 784. The Supreme Court rejected Arkansas's Tenth Amendment claim and held that the Qualifications Clause, U.S. CONST. art. I, § 5, cl. 1, and the structure of the Constitution itself prohibited states from imposing requirements in addition to those enumerated in the Constitution's text relating to the qualifications of national legislators. *Id.* at 783.

124. *Id.* at 845 (Kennedy, J., concurring).

125. *Id.* at 839.

126. *Id.* (“[T]he operation of the government upon the people in their individual capacities’ makes it ‘a national government,’ not merely a federal one.”) (quoting *FEDERALIST* 39, at 244–45).

127. *See id.* at 841 (claiming that the Framers saw state power as essential to the balance of powers).

128. *Id.* (citing *Federalist* 39 to support the assertion that “the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal [national] province.”). Justice Ginsburg, in her dissenting opinion in *Bush v. Gore*, 121 S. Ct. 549 (2000) quoted Justice Kennedy's concurrence in *U.S. Term Limits*. *Id.* at 549 n.3 (Ginsburg, J., dissenting) (quoting 514 U.S. at 841–42). The passage that Justice Ginsburg quoted includes Justice

Additionally, Justice Thomas cited *Federalist* 39 in his dissenting opinion. Thomas diverged from Justice Kennedy and the majority in his belief that the source of the Constitution's authority was the consent of the citizens of the individual states, not the consent of all individuals in the nation as a whole.¹²⁹ Justice Kennedy cited *Federalist* 39 to support the position that the power of the national government is derived from the actions of citizens acting as individuals, not as agents of the states.¹³⁰ In contrast, Justice Thomas cited *Federalist* 39 to support the completely opposite view that the powers of the national government are derived from the actions of citizens acting through their respected states.¹³¹ Justice Thomas claimed that under the Tenth Amendment the states retain considerably more power than the majority opinion or Justice Kennedy were willing to concede.¹³²

*Printz v. United States*¹³³ is the last Tenth Amendment case in which the Court cites *Federalist* 39. Based on the concept of dual sovereignty, the Court held that the national government may not command state officials to enforce federal law.¹³⁴ Justice Scalia,

Kennedy's reference to *Federalist* 39 as supporting his proposition that "the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province." *Id.* In her dissent, Justice Ginsburg takes an expansive view of state sovereignty, holding that, under the principles of American federalism, national courts defer to state courts' interpretations of state law. *Id.* at 549. Since Justice Ginsburg's opinion endorsed the expansion of state power over national power, albeit in a limited context, her reference to Justice Kennedy's concurrence in *U.S. Term Limits* supports the notion that Justice Kennedy's position should not be read to support the expansion of national power. Rather, despite Kennedy's support for the outcome of the case, his concurrence should be read as interpreting *Federalist* 39 to restrict national power.

129. 514 U.S. at 846 (Thomas, J., dissenting).

130. *Id.* at 839.

131. *Id.* at 846 (citing *Federalist* 39 to support the claim that the "source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.").

132. *Id.* at 925–26 (arguing that since the Qualifications Clause, which articulates the standards for election to the national legislature, does not expressly limit a state's ability to condition its own qualifications, the power to do so is reserved to the states under the Tenth Amendment).

133. 521 U.S. 898 (1997).

134. *Id.* at 920. In *Printz* the Court held that the national government lacked the constitutional authority to command state officials to enforce a provision of the Brady Handgun Violence Act. *Id.* at 935 (citing 18 U.S.C. § 922(s)). The provision at issue would have required state and local law enforcement officers to conduct a background check on all prospective handgun purchasers. *Id.* at 902. The Court held that without consent of the states, the national

writing for the Court, cited extensively from Madison and *Federalist 39*,¹³⁵ and even claimed that Madison would never have endorsed the view that the national government could direct employees of the states to enforce national law.¹³⁶

To support his initial argument that the Constitution established a system of dual sovereignty, Justice Scalia quoted from the “residuary and inviolable” passage of *Federalist 39*.¹³⁷ Further establishing the separation of state and national powers, Justice Scalia quoted from the “spheres of authority” passage to support his claim that the function of the separation of the state and national spheres of authority is to ensure a healthy balance of power between the two.¹³⁸ Justice Scalia concluded that the ability of the national government to command state and local officials to execute national law and policy would substantially overstep its sphere of authority.¹³⁹

II. ANALYSIS

The emergence of *Federalist 39* as authority is an interesting feature of the Court’s recent expansion of state power under the Tenth and Eleventh Amendments. Prior to its citation in *Garcia* in 1985, *Federalist 39* had never been cited in a United States Supreme Court decision addressing federalism. Because of its recent popularity and use as authority to support the expansion of state sovereignty, at first blush, it might seem like *Federalist 39* actually represents an affirmation of state power relative to national power. However, after examining the language of *Federalist 39* and the early federalist ideology of James Madison, it is clear that the Court’s use of *Federalist 39* to endorse its expansion of state sovereignty is wholly inconsistent with the essay’s original meaning and with Madison’s early federalist ideology.

government may not enlist state employees to enforce national law. *Id.* at 935.

135. *See id.* at 919–21.

136. *Id.* at 915 (claiming that the idea that the national government could direct state employees to enforce national law has “no clear support in Madison’s writings . . .”).

137. *Id.* at 918–19.

138. *Id.* at 920–21.

139. *Id.* at 935.

The use of *Federalist* 39 in the three Eleventh Amendment cases is fairly consistent. In each case, the majority opinion cites the essay to advocate the expansion of state sovereign immunity. Each case relies upon *Federalist* 39 to support the general argument that an aspect of the “residual and inviolable sovereignty” the states retained through the drafting and ratification of the Constitution is immunity from private suit, except under certain judicially created and enforced conditions.

Even the most liberal reading of *Federalist* 39 or interpretation of the early federalist ideology of James Madison could not begin to support the position that states retain some sort of intangible dignity that entitles them to absolute immunity from congressionally authorized suit in the absence of the states’ express consent to be sued. Such sweeping power is not conferred by the Eleventh Amendment or the rest of the Constitution. Nowhere in the text of *Federalist* 39 did Madison even begin to address questions raised by the Eleventh Amendment. The amendment was not even drafted until years after Madison wrote *Federalist* 39.

The only proposition in the three opinions that *Federalist* 39 even arguably supports is that states retain *some* sovereignty under the Constitution, but the next question that naturally comes to mind is, how much sovereignty did Madison envision that the states would retain under the Constitution? An ancillary question, which is just as important for the purpose of this discussion, is how much sovereignty did Madison feel the states *should* retain under the Constitution? The answer to both questions must be that the states would, and *should*, retain a very limited amount of power.

Among the four Tenth Amendment cases which employed *Federalist* 39, a number of similar interpretative patterns are apparent. First, all of the opinions that cite *Federalist* 39 use it to support the position that the Framers intended the states to retain some measure of sovereignty under the Constitution. While the opinions vary on exactly what amount of sovereignty the states retain, most opinions represent a significant expansion of the states power under the Tenth Amendment. Hence, the critical issue underlying the Court’s use of *Federalist* 39 is the nature of the sovereignty that the Constitution allocates to the states. The language of *Federalist* 39 cited in the Tenth and Eleventh Amendment cases,

interpreted in the context of Madison's writings and debates, makes clear that Madison believed the Constitution allocated a very limited amount of sovereignty to state governments.

By far, the most commonly cited passage from *Federalist* 39 in both the Tenth and Eleventh Amendment cases is the passage in which Madison's discusses the extent of national power under the Constitution, the "residuary and inviolable" passage. The Court has consistently relied upon this passage as a ringing endorsement for the expansion of state power under the Tenth and Eleventh Amendments. Read in isolation, the Court's use and interpretation of this passage is both sound and valid. However, read in the context of *Federalist* 39 as a whole and Madison's other writings, it is not at all clear whether the "residuary and inviolable" passage was intended to be the beacon of state sovereignty that the Court has found it to be.

Within *Federalist* 39, the "residuary and inviolable" passage is embedded in Madison's discussion of the extent of the Constitutional government's power.¹⁴⁰ Having just concluded that the operation of the government's power can be properly designated as national, Madison stated that the extent of the government's power is federal.¹⁴¹ In reaching this conclusion, Madison claimed: "the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a *residuary and inviolable sovereignty* over all other objects."¹⁴² In this light, the "residuary and inviolable" passage seems to be a restatement of the Tenth Amendment.¹⁴³ Looking to Madison's attitudes concerning the Tenth Amendment might shed some light on what Madison meant by the "residuary and inviolable" passage, and might also help to determine if *Federalist* 39 indeed supports the various opinions that cite it as authority in recent Tenth Amendment cases.

Madison was initially an opponent of including the Bill of Rights in the Constitution, and was particularly concerned with the Tenth

140. THE FEDERALIST, *supra* note 41, at 285.

141. *Id.* at 286. Concluding his passage on the extent of the government's powers, Madison merely stated that they are not national. *Id.* at 285.

142. *Id.* (emphasis added).

143. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States"

Amendment.¹⁴⁴ Madison and his fellow federalist advocates of the Constitution agreed to implement a Bill of Rights as a compromise with anti-federalist opponents of the Constitution.¹⁴⁵ When the language that would later become the Tenth Amendment was first proposed to the new Congress, heated debate ensued over whether the amendment should contain the term “expressly,” regarding Congress’s enumerated powers.¹⁴⁶ The version proposed by James Madison and Virginia left the term out, but all other states proposed a version that included “expressly” or some derivation of the word.¹⁴⁷

The addition of the term “expressly” would have had the effect of making the text of the Tenth Amendment read: “The powers not *expressly* delegated to the United States by the Constitution . . . are reserved to the States” This proposed version of the Tenth Amendment strikingly resembled Article II of the former Articles of Confederation, which stated, “[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation *expressly* delegated to the United States”¹⁴⁸ Madison led the fight at the First Congress against the inclusion of “expressly” in the Constitution’s Tenth Amendment.¹⁴⁹ Madison believed that such an addition to the Tenth Amendment would restrict an essential feature of the new Constitution’s government—the ability of the national government to exercise *implied powers*.¹⁵⁰ Madison claimed that “there must necessarily be admitted powers *by implication*, unless the [C]onstitution descended to recount every minutiae.”¹⁵¹

The historical background of *Federalist* 39 may also shed some light on the meaning of the “residuary and inviolable” passage. *Federalist* 39 was first published January 16, 1788, less than a year-and-a-half before Madison introduced his proposed version of the

144. Staab, *supra* note 43, at 240.

145. *Id.*

146. See THE COMPLETE BILL OF RIGHTS, *supra* note 45, at 683.

147. Staab, *supra* note 43, at 240.

148. WOOD, *supra* note 27, at 358 (emphasis added).

149. THE COMPLETE BILL OF RIGHTS, *supra* note 45, at 683; see also *supra* note 45.

150. THE COMPLETE BILL OF RIGHTS, *supra* note 45, at 683; see also *supra* note 45 and accompanying text.

151. THE COMPLETE BILL OF RIGHTS, *supra* note 45, at 683 (emphasis added).

Tenth Amendment to Congress on June 8, 1789. Considering Madison's outspoken opposition to the restriction of the national authority to those powers "expressly enumerated" in the Constitution,¹⁵² one must question Madison's actual meaning in *Federalist 39*'s "residuary and inviolable" passage. Focusing on the language of the passage, Madison notably did not refer to the *power* of the national government, as the Tenth Amendment does.¹⁵³ Rather, he referred to the *jurisdiction* of the national government as extending only to enumerated powers.¹⁵⁴ Examining this distinction in light of Madison's views of the Doctrine of Implication, it seems more than fair to say that Madison felt the jurisdiction of the national government should extend to the enumerated powers only, and also that he believed the national government's power to act within its jurisdiction should not be so limited, but rather that the government's power to supply the means to act within the ends enumerated in the Constitution were implied under the Necessary and Proper Clause. The language of *Federalist 39*, read in the context of Madison's decidedly restrictive position on the Tenth Amendment, presents a clearer picture of the meaning of the "residuary and inviolable" passage, a picture of a framer not at all friendly to the cause of state sovereignty. Madison was not, as Justice Scalia would have us believe in *Printz v. United States*,¹⁵⁵ a framer sensitive to the authority of the states.

Analysis of the "spheres of authority" passage of *Federalist 39*, which both the Tenth and Eleventh Amendment cases also rely upon heavily, further clarifies this image of Madison. Close attention to the actual language of the passage is warranted here, because it is not what Madison says, but what he does not say, that is critical. In comparing the two "spheres of authority" that form the basis of his analysis, Madison describes the two systems as "national" and "local or municipal."¹⁵⁶ Nowhere in the passage does Madison use the term

152. See *supra* note 45.

153. THE FEDERALIST, *supra* note 41, at 285.

154. *Id.*

155. See 521 U.S. 898, 915 (1997) (arguing that while Hamilton might have endorsed the view that the national government could instruct state officials to execute national directives, Madison would not have endorsed such a policy).

156. THE FEDERALIST, *supra* note 41, at 284–85.

“federal” to describe his model governments.¹⁵⁷ Madison only contends that the Constitution does not contemplate the first, “national” system.¹⁵⁸ At no point in Madison’s description of the second, “local” system, in which the governing authority of the national government cannot act, does he call this system “federal,”¹⁵⁹ a term which Madison uses elsewhere in *Federalist* 39 to refer to a system involving strong state governments.¹⁶⁰ Hence, using this passage to describe the respected powers of the states in a contemplated federal system clearly takes the passage far out of context.

However, assuming *arguendo* that Madison actually made a mistake and intended the second described, “local” system to represent his vision, the “spheres of authority” passage still does not draw a clear boundary line between these two spheres. Again, reference to Madison’s debates and writings helps clarify exactly what is meant by the “spheres of authority” passage.

Madison believed that one of the greatest vices plaguing the Articles of Confederation was the states’ persistent encroachment on the national government’s authority.¹⁶¹ Madison carried this belief with him to the Convention where he was an outspoken advocate of a large-scale expansion of the national government.¹⁶² Madison felt the likelihood that state governments would encroach upon the national government was far greater than the likelihood that the national government would intrude upon the states.¹⁶³ Furthermore, Madison believed that the impact of state intrusion upon the national government would be far more detrimental than the impact of the national government’s encroachment upon the states.¹⁶⁴

Madison compared the proper constitutional dynamic between the national and state governments to the existing structure of state and

157. *Id.* at 284.

158. *Id.*

159. *Id.* at 285.

160. *See id.* at 283.

161. WRITINGS, *supra* note 18, at 69; *see also supra* note 18 and accompanying text.

162. *See supra* notes 25–28 and text accompanying notes 25–33.

163. 1 RECORDS, *supra* note 26, at 316 (criticizing Patterson’s New Jersey Plan), 356 (discussing these findings); *see also supra* note 18.

164. 1 RECORDS, *supra* note 26, at 356; *see also supra* note 18.

municipal governments.¹⁶⁵ He reasoned that a grant of indefinite power to the national government would not give the national government an incentive to intrude upon state power.¹⁶⁶ Madison believed that state governments were mere objects of convenience.¹⁶⁷ He objected to the dissolution of state governments entirely, primarily because it would be impractical for the national government to govern all the tasks undertaken by the state and local governments.¹⁶⁸ Madison firmly believed that the state governments were, under the Constitution's design, totally and functionally subordinate to the national government,¹⁶⁹ in stark contrast to Justice Powell's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁷⁰

Another concern underlying Madison's distrust of state governments was the issue of the rights of minorities.¹⁷¹ Madison believed one of the greatest evils of strong state governments was that majority factions easily could form at the state level, trammeling the rights of minority interests.¹⁷² While he recognized that factions could also form on a national level, Madison believed that in small arenas it was much easier for majorities to organize and violate the rights of minorities.¹⁷³ This concern compelled Madison to advocate for absolute veto power over state laws vested in the national legislature.¹⁷⁴ Madison believed that one of the most important responsibilities of the new national government was to control the often radical tendencies of the state governments.¹⁷⁵ He believed that

165. 1 RECORDS, *supra* note 26, at 357.

166. *Id.* at 357–58.

167. *Id.* at 357.

168. *Id.* Madison took the drastic position that “[s]upposing . . . a tendency in the [General] Government to absorb the State [Governments] no fatal consequence would result.” *Id.* at 358.

169. 3 RECORDS, *supra* note 26, at 134 (claiming that the general authority will be derived entirely from the subordinate authorities).

170. 469 U.S. 528, 571 (1985).

171. *See supra* note 19.

172. *See WRITINGS, supra* note 18, at 149 (letter from Madison to Thomas Jefferson dated October 24, 1787); discussion *supra* note 19.

173. *See WRITINGS, supra* note 18, at 151–52 (letter from Madison to Thomas Jefferson dated October 24, 1787).

174. *Id.* at 146.

175. 1 RECORDS, *supra* note 26, at 165 (stating that a central responsibility of the national government must be to “controul the centrifugal tendency of the States”).

without broad power vested in the national government to ensure state compliance with national policy directives,¹⁷⁶ the states would “continually fly out of their proper orbits and destroy the order and harmony of the political system.”¹⁷⁷

Reading the “spheres of authority” passage in the context of Madison’s other writings and debates, it becomes clear that Madison would not support limitations on the scope of national power within its proper sphere, although he certainly would concede that the national government’s sphere of authority extends only over those objects specifically enumerated in the Constitution.¹⁷⁸ Madison’s writings and debates also make clear that he believed that the inherently subordinate and local nature of state governments severely limited their “sphere” of authority. Madison felt an extensive national government would provide the greatest protection for the union and the individual against the dangers of faction and the mischief of the state governments. He even claimed, the more extensive the power of the national government, the “greater the probability of [its] duration, happiness and good order.”¹⁷⁹

Madison’s expressed views regarding the proper balance of power between the national and state governments has had a tremendous impact on the Supreme Court’s use of *Federalist* 39. One of the primary arguments made for the expansion of state power in the Eleventh Amendment cases was that the states retain a “sovereign dignity” under the Constitution which barred nationally authorized suit against them. Considering Madison’s belief that state governments are inherently subordinate and properly exercise authority only where convenient to the national government, it is clear that he would not have endorsed the expansion of state sovereignty under the rationale employed by the Rehnquist Court.

176. Three examples of such powers endorsed by Madison at the Convention were: (1) the national legislative veto over state laws, 2 RECORDS, *supra* note 26, at 27; (2) the power of the national legislature to enact temporary state laws, *id.* at 28; and (3) the power of the national legislature to use force to coerce disobedient states into compliance with national directives, 1 RECORDS, *supra*, at 164.

177. 1 RECORDS, *supra* note 26, at 165.

178. Further evidence supporting this position can be taken from Madison’s opinion regarding the “Doctrine of Implied Powers.” See *supra* note 45; THE FEDERALIST NO. 44 (James Madison).

179. 1 RECORDS, *supra* note 26, at 141.

Rather, Madison likely would have viewed the “dignity” rationale, and the Court’s recent Eleventh Amendment jurisprudence, as a grave threat to both the proper operation of government and the rights of minorities who are now unable to bring federal action to address their grievances against the states. Madison believed that two of the most essential duties of the national government under the Constitution were to ensure that the states (1) would not disrupt the proper function of government by acting in their own self interest and (2) would not trammel the rights of minorities within their borders.¹⁸⁰ The Court’s Eleventh Amendment decisions, stripping the national government of its power to enforce its laws against disobedient states, are clearly inimical to Madison’s core federalist ideology.

The Court’s Tenth Amendment decisions stand in even greater contrast to Madison’s early federalist ideology. Given Madison’s viewpoint on the legislative veto, his belief that implied powers were essential to the proper function of the national government, and his fight for the exclusion of the term “expressly” from the Tenth Amendment, any assertion that Madison would have supported the position that the Tenth Amendment constitutes an “express” limitation of the national government’s power under the Constitution is simply inaccurate.

CONCLUSION

James Madison was arguably our nation’s most influential and important philosopher and politician. His unique ideas about the proper operation of government helped shape our Constitution, and they continue to inspire scholars and leaders around the world. It is unfortunate that members of our nation’s highest Court recently have corrupted Madison’s writings to support a flawed vision of the proper balance of power. It is essential for citizens and scholars to understand and appreciate Madison as he was: a brilliant nationalist visionary who believed that only through an expansive, centralized national government would the Union of States function properly and effectively.

180. See WRITINGS, *supra* note 18, at 151–52 (letter from Madison to Thomas Jefferson dated October 24, 1787); 1 RECORDS, *supra* note 26, at 165.