

MAN, MORALITY, AND THE UNITED STATES CONSTITUTION

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INTRODUCTION

The United States Constitution, in popular consciousness, is often treated as though it miraculously sprang up from the minds of a group of enlightened statesmen. Although this conception of the founding of the United States government works well as a foundational myth, it does not accurately characterize the deep level of debt the Framers of the Constitution owed to the intellectual traditions of the previous two centuries. Hundreds of years of philosophical inquiry into the nature of man conditioned their perspectives on these issues. Indeed, the Framers' views on moral philosophy were influential in the crafting of the structure of the new American republic. The greatest intellectual traditions that guided the Framers' views on morality and politics were the developments in natural law theory and Scottish Enlightenment thought.

This Comment is an investigation into the moral theories that influenced the Framers in crafting the structural elements of the United States' federal republic. Part I will explore the deep link between the natural law theorists, Scottish Enlightenment philosophers, and the Framers. Part II will delve deeper into natural law theory and Scottish Enlightenment thought. Part II.A, of this section, will examine the relevant key tenets of sixteenth and seventeenth century natural law theory, with special attention paid to the works of Hugo Grotius, Samuel Pufendorf, and John Locke. Part II.B will examine the key tenets of Scottish Enlightenment philosophy, primarily exploring the works of Francis Hutcheson, Thomas Reid, and David Hume. Part III will focus on the incorporation of these philosophical insights on morality and human nature into the United States Constitution. This section will involve the discovery of important fissures between the Framers on their conception of man. Framer James Wilson's and the authors' of *The Federalist* (John Jay, James Madison, and Alexan-

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der Hamilton) theories of man and government will be explicated to illuminate crucial differences. The final section, Part IV, will center on the implications of these differences for an American jurisprudence that places great weight on originalism.

I. SOURCES OF EARLY AMERICAN THOUGHT

The Framers of the Constitution were influenced immensely by the intellectual world in which they were born. The political writings of the colonists reveal they were well versed in a variety of sources from classical antiquity to contemporaneous developments. Ancient Greek and Roman sources cited by the colonists included Homer, Plato, Aristotle, Vergil, Seneca, and Cato.¹ These theorists provided the conceptual lense for how the colonists viewed their condition. For the colonists, their time was one of encroaching tyranny. Just like the enlightened statesmen of Rome, they were witnessing the destruction of a land once “full of virtue: simplicity, patriotism, integrity, a love of justice and of liberty”² Similar in establishing the paranoid mindset of the colonists, and even more influential in driving the logic of the American Revolution, was the Whig Party in England.³ The colonists took seriously the Whigs’ conspiracies and false prophecies of tyranny and enslavement that would soon befall Britain.⁴ English common law and American Puritanism were also influential sources of American colonial thought.⁵ In structuring the government, however, the two most intellectually important influences were natural law theory—the idea that man-made law and moral principles share a deep connection⁶—and Scottish Enlightenment thought.⁷

The Framers of the United States Constitution were versed in natural law theory and early Enlightenment rationalism. Their exposure to natural law theorists came while they were young men. Young colonial men were introduced to theorists like Locke and Pufendorf in their boyhood, teenage years, and again in university as part of their

1 See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 24 (1967).

2 *Id.* at 25–26.

3 *Id.* at 34.

4 *Id.* at 34–54.

5 *Id.* at 30–32.

6 See BAILYN, *supra* note 1, at 26–27; see also KNUD HAAKONSEN, *NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* 312 (1996).

7 See James J.S. Foster, *Introduction to SCOTTISH PHILOSOPHY IN AMERICA*, at i (James J.S. Foster ed., 2012).

teachings in moral philosophy.⁸ While in university, men of the Framers' generation would be subjected to lectures based around support or refutation of "Christian utilitarian principles."⁹ Training in natural law theory was an important and pervasive part of American colonial education. This education in the natural law tradition is reflected in the political writings of the colonists.¹⁰ The pamphlets the colonists used to disseminate their political messages are filled with citations to natural law theorists.¹¹ As Bernard Bailyn notes, "[T]he American writers cited Locke on natural rights and on the social and governmental contract . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government."¹² Though the citations were frequent, they were not always used in a philosophically robust manner.¹³ Mostly, around the time of the Revolution, the sources were interpreted broadly enough to be used by both loyalists and revolutionaries in denouncing each other's positions.¹⁴ The works of the natural law theorists are even found in the libraries of the Framers.¹⁵ It is estimated that the most popular book in American colonial libraries was Locke's *An Essay Concerning Human Understanding*.¹⁶ An estimate by David Lundberg and Henry F. May suggests that 45% of personal libraries contained Locke's *Essay*.¹⁷ By the time the Revolutionaries became the Framers, they had been long immersed in the language of natural law theory and English rationalism.

The Framers were also intimately associated with the work of the philosophers of the Scottish Enlightenment. Scottish Enlightenment philosophy was another integral part of American colonial education. Scottish immigrants filled the faculties and administration of colonial institutions like Harvard, Yale, Princeton, Penn, and William and Mary.¹⁸ Thomas Jefferson was tutored by a Scottish teacher at William and Mary, while Madison attended Princeton during the presidency of Scotsman John Witherspoon.¹⁹ Witherspoon turned Princeton in-

⁸ HAAKONSEN, *supra* note 6, at 323.

⁹ *Id.* at 324.

¹⁰ BAILYN, *supra* note 1, at 26; HAAKONSEN, *supra* note 6, at 325.

¹¹ BAILYN, *supra* note 1, at 27.

¹² *Id.*

¹³ *Id.* at 28.

¹⁴ *Id.* at 29.

¹⁵ See Robert A. Rutland, *Madison's Bookish Habits*, 37 THE Q. J. OF THE LIBR. OF CONG. 176, 181, 183 (1980).

¹⁶ See MARK G. SPENCER, DAVID HUME AND EIGHTEENTH-CENTURY AMERICA 12 (2005).

¹⁷ *Id.*

¹⁸ Foster, *supra* note 7, at 2.

¹⁹ *Id.*

to a repository of Scottish Enlightenment thought and introduced young, eager minds—like that of James Madison—to the major Scottish Enlightenment thinkers.²⁰

Some of the Framers had personal connections to Scottish Enlightenment figures. Framers James Wilson is an example of this connection. Wilson was born in Scotland and was educated at the University of St. Andrews during the height of the Scottish Enlightenment.²¹ Wilson continued to study the Scottish Enlightenment philosophers after he graduated from St. Andrews before he eventually immigrated to the United States and became a lawyer.²² Benjamin Franklin also had a personal connection to the Scottish Enlightenment. A good deal older than most of the Framers, Franklin was approximately the same age as Scottish Enlightenment figures David Hume and Thomas Reid. Franklin struck up a personal relationship with Hume, visiting him twice in Scotland in 1759 and 1771.²³ The two kept a correspondence back and forth discussing matters of science, politics, and religion.²⁴

The men who would structure the government of the United States were well connected to the intellectual climate surrounding them. They were taught the great intellectual icons of natural law, Grotius, Pufendorf, and Locke, and they were more directly versed in the nearly contemporary intellectual developments going on in eighteenth century Scotland.

II. THE PHILOSOPHICAL FOUNDATION OF THE FRAMERS

In order to completely understand the manifestation of the European intellectual traditions reflected in the United States government, those traditions must be examined in greater detail. Since natural law theory and Scottish Enlightenment thought were equally influential in shaping the generation of men who would establish the United States government, the following section is a general survey of the relevant ideas of both of these intellectual movements.

²⁰ *Id.* at 3; *see also* JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 3 (3d ed. 2007).

²¹ LIBRARY OF SCOTTISH PHILOSOPHY, *SCOTTISH PHILOSOPHY IN AMERICA* 55 (James J.S. Foster ed., 2012); *see* William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 902 (2008).

²² Ewald, *supra* note 21, at 903–04.

²³ SPENCER, *supra* note 16, at 53–54.

²⁴ *Id.* at 54–62.

A. *Natural Law Theory*

Although natural law theory has ancient and medieval roots, the strand that most influenced the American Framers developed and matured in the time directly preceding the Enlightenment and its early stages.²⁵ The seventeenth century is often referred to as “the century of genius” primarily for the large change in gestalt that occurred.²⁶ While the late seventeenth century is often pegged as the starting point of the Enlightenment, the work done by Francis Bacon, Isaac Newton, John Locke, as well as the natural lawyers in the early part of the century, paved the way for the latter movement.²⁷ These thinkers forever changed how people view phenomena, shifting explanation away from the use of tradition and towards the use of reason.²⁸ Early Enlightenment thinkers were motivated by a “systematic spirit.”²⁹ No endeavor, be it practical or theoretical, escaped their quest to produce rational and systematic explanations of the world around them.³⁰ The natural law theorists, Hugo Grotius, Samuel Pufendorf, and John Locke, extended this quest to morality. They sought to understand morality and God’s role in moral laws in a legalistic way consistent with new, Protestant ideas about God and his role in the affairs of man.³¹ Furthermore, they sought a systematic account of how positive law, the laws of men, fit with the laws of morality.³²

1. *Reason and Moral Epistemology*

The natural law theorists of the seventeenth century placed a strong importance on human reason and the ability to figure out moral truths. This shift toward reason was the result of the shift away from a god who was directly involved in human and earthly affairs.³³ The Protestant God was a god who was with disconnected from man.

²⁵ HAAKONSSEN, *supra* note 6, at 15.

²⁶ See LEONARD KRIEGER, *KINGS AND PHILOSOPHERS 1689–1789* (1970) (noting that enlightenment thinkers tried to explain the world by use of rationality rather than appeals to religious traditions).

²⁷ *Id.* at 138–39.

²⁸ *Id.* at 139.

²⁹ *Id.* (internal quotation marks omitted).

³⁰ *Id.* at 142.

³¹ See T. J. HOCHSTRASSER, *NATURAL LAW THEORIES IN THE EARLY ENLIGHTENMENT* 2–3 (2000) (suggesting that the German Protestants recognized distinctive spheres of divine law and human natural law and debated over how to reconcile the two).

³² *Id.* at 4.

³³ HAAKONSSEN, *supra* note 6, at 25.

The link between man and God was through human reason.³⁴ It was through reason that man could ascertain the right and wrong actions to take.³⁵ There were two different views on the method of reasoning to arrive at God's law. Grotius favored an inductive method to arrive at natural law. On the Grotian account, in order to arrive at the natural laws an examiner needed to explore the positive laws and customs of various countries.³⁶ Later successors, Pufendorf and Locke, would reject this inductive methodology and seek to explain knowledge of natural law and moral principles through deductive reasoning.

Pufendorf endorsed a program that Locke would later develop in a more thorough manner.³⁷ Locke argued in *An Essay Concerning Human Understanding* that morals were capable of demonstration. Locke stated:

I suppose, if duly considered, and pursued, afford such Foundations of our Duty and Rules of Action, as might place Morality amongst the Sciences capable of Demonstration: wherein I doubt not, but from self-evident Propositions, by necessary Consequences . . . the measures of right and wrong might be made out, to any one that will apply himself³⁸

Locke believed that morality works like a geometric proof. In figuring out the morally right action, all one needs to do is to reason from axiomatic truths. This has two implications for the Lockean picture of morality. First, the knowledge of moral duties and rules of action are not innate in humans.³⁹ This position is consistent with his arguments against innatism in the earlier part of *Essay* and his famous *tabula rasa* doctrine.⁴⁰ Second, morality is beyond the realm of sensation, which contrasts with his empiricist program for other sources of knowledge.⁴¹

For the natural law theorists, natural law and morality were, like mathematics, supposed to be derived through human reason. Ra-

³⁴ *Id.*

³⁵ *Id.*

³⁶ HOCHSTRASSER, *supra* note 31, at 53.

³⁷ HAAKONSSEN, *supra* note 6, at 52.

³⁸ I JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 351 (Alexander Campbell Fraser ed., n.d.) (emphasis omitted).

³⁹ See HAAKONSSEN, *supra* note 6, at 53 (discussing how culture plays a role in establishing customs and laws); see also J. B. SCHNEEWIND, *Locke's Moral Philosophy*, in THE CAMBRIDGE COMPANION TO LOCKE 200 (Vere Chappell ed., 1994) (describing how Locke specifically denied that morality has innate characteristics).

⁴⁰ See LOCKE, *supra* note 38, at 37 (arguing against the idea that there are innate principle in mind, referred to as his *tabula rasa* or black slate argument).

⁴¹ See DAVID OWEN, HUME'S REASON 30 (1999) (stating that Locke thought that we are able to form beliefs that extend beyond the senses or memory through probable reasoning).

tionality was the hallmark of humanity and was supposed to allow man to understand the desires of a god who was no longer directly interacting in earthly affairs.

2. *Rights and Duties*

For natural law theorists, the starting point for the substantive account of natural rights and duties was with individuals. Grotius shifted the discussion of natural law away from perfectionism and law directed at how man should act to achieve the highest good, to a theory of individual rights.⁴² On the Grotian picture, individuals' rights were prior to all positive law. Another crucial element was that all individuals had these rights.⁴³ In constructing society, on Grotius's account, individuals cede some rights but retain others in order to function in a community. Thus, positive law is created to protect those rights which man did not give up.⁴⁴ For Grotius the primary natural law was not to violate others' rights.⁴⁵ Violations of these rights were ultimately subject to a sanction by God.⁴⁶

Pufendorf and Locke both make an important split with Grotius. In their natural law theories, God has a much more direct role than a mere giver of sanctions. On the Pufendorfan account, God created a world that was both physical and moral.⁴⁷ Both parts of the world God created are self-contained and distinct. Whereas value is objective in the physical world, in the moral world, value is created by humans. Though man creates value in this world, his creation of value is derived from God's natural law.⁴⁸ Thus, rights and duties are not derived from the agreements of men but ultimately from natural laws.⁴⁹ Both Locke and Pufendorf hold that natural rights are "powers to fulfill the fundamental duty of natural law."⁵⁰ The core focus of natural law for both theorists was to promote self-preservation and the preservation of humanity.⁵¹

42 SCHNEEWIND, *supra* note 39, at 209; HAAKONSSEN, *supra* note 6, at 28.

43 SCHNEEWIND, *supra* note 39, at 209–10.

44 *Id.*

45 *Id.*

46 *Id.*

47 HAAKONSSEN, *supra* note 6, at 38.

48 *Id.* at 38–43.

49 *Id.* at 40.

50 *Id.* at 55.

51 *Id.*

B. *Scottish Enlightenment Philosophy*

The second major source of philosophical influence was the philosophy of the Scottish Enlightenment. This intellectual movement occurred during the mid-to-late parts of the eighteenth century. The major developments of the movement were contemporary with the lives of the Framers. Though there were agreements between the natural law theorists and the Scottish Enlightenment philosophers, the latter produced their own very influential philosophy. Some of the themes in the Scottish Enlightenment explored here include (a) moral epistemology, (b) theory of humans as social animals, and (c) theory of action.

1. *Moral Epistemology*

Within the Scottish Enlightenment thinkers there were two major contrasting views on how man could discover moral truths in the universe. David Hume and Thomas Reid presented vastly different pictures of the moral world. David Hume's philosophy is known for its empiricism and skepticism. Contra natural law theorists, Hume was skeptical of all systems of morality and argued against the idea that morals could be derived at through reason. Moral propositions, for Hume, were very different than the natural law theorists before him. In *A Treatise of Human Nature*, he describes morality in the following way:

An action, or sentiment, or character is virtuous or vicious; why? because its view causes a pleasure or uneasiness of a particular kind To have the sense of virtue, is nothing but to feel a satisfaction of a particular kind from the contemplation of a character. The very feeling constitutes our praise or admiration. We go no farther; nor do we enquire into the cause of the satisfaction. We do not infer a character to be virtuous, because it pleases: But in feeling that it pleases after such a particular manner, we in effect feel that it is virtuous. The case is the same as in our judgments concerning all kinds of beauty, and tastes, and sensations. Our approbation is imply'd [sic] in the immediate pleasure they convey to us.⁵²

Moral propositions, for Hume, were not statements of an objective truth but rather were statements of subjective feelings. On the Humean account, when one speaks of an action being "bad" or a "vice," one is only really saying that the action causes discomfort or pain. The deductive certainty of Locke's moral world does not exist

⁵² DAVID HUME, *A TREATISE OF HUMAN NATURE* 303 (Norton & Norton, eds., 2005) (1738) (emphasis omitted).

in the Humean picture.⁵³ It follows that Hume's moral epistemology is based not on reasoned deduction but rather on a psychological empirical investigation into the causes of pleasures and pains for humans.

Hume argues that his empiricist program works for political truths as well. Hume envisioned politics as a science.⁵⁴ Propositional statements on the governmental structures necessary for society were to be arrived at empirically.⁵⁵ In order to arrive at these truths, agents need only investigate the historical record.⁵⁶ On the Humean picture, political scientists can look through history, and look at the actions of men in history, to devise political truths. Hume's political truth that man cannot be trusted with unlimited power is not ascertainable from natural laws, but rather from the accumulation of historical facts that all men who have had absolute power became tyrants.⁵⁷

Thomas Reid provides a different view of morality. Reid argues that moral judgments relate to propositions about what is actually right and wrong and not merely what one feels.⁵⁸ Reid continues to lay out an almost intermediary account between rationalism and empiricism on moral truths. Reid posits that there exists a moral sense.⁵⁹ This moral sense produces moral judgments gathered from evidence.⁶⁰ William C. Davis reconstructs Reid's moral psychology and epistemology as involving "(a) formulating conceptions of an agent and her action, (b) the moral sense determining the moral relation sustained by the agent-action pair, and (c) the faculty of judgment being convinced by the unhesitant testimony of the moral sense."⁶¹ Also available for understanding one's moral duties, on the Reidian

53 See FRANCIS SNARE, *MORALS, MOTIVATION AND CONVENTION: HUME'S INFLUENTIAL DOCTRINES* 14 (1991) (stating that Hume claims moral judgments are not rationally derived by deduction or other modes of inference).

54 MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 19–20 (1987).

55 *Id.*

56 *Id.*

57 See *id.* at 19 (pointing to historical records as "collections of experiments" that can be studied scientifically); see also RUSSELL HARDIN, *DAVID HUME: MORAL AND POLITICAL THEORIST* 108–11 (2007) (stating that history evidences how power derives from increasing fitness, or "coordination," and that power expands as it is used).

58 Keith Lehrer, *Reid, the Moral Faculty, and First Principles*, in *REID ON ETHICS* 25, 29 (Sabine Roeser ed., 2010).

59 *Id.* at 25; see Alexander Broadie, *Reid Making Sense of Moral Sense*, in *REID ON ETHICS* 91, 91 (Sabine Roeser ed., 2010).

60 Broadie, *supra* note 59, at 91; see Lehrer, *supra* note 58, at 25.

61 WILLIAM C. DAVIS, *THOMAS REID'S ETHICS: MORAL EPISTEMOLOGY ON LEGAL FOUNDATIONS* 95 (2006).

picture, are certain morally self-evident principles.⁶² It is through appeals to these principles that individuals sharpen and fine-tune their moral sense and moral judgments of the right course of action.⁶³ The moral sense helps individuals apply general moral truths to particular situations.

Reid developed his moral philosophy from the works of early Scottish Enlightenment philosopher Francis Hutcheson and English philosopher Bishop John Butler.⁶⁴ Both Hume and Reid's moral philosophies, though vastly different, reflect the commitment that the Scots had for empiricism and the experiential gathering of knowledge.

2. *Man as a Social Animal*

Also prevalent in Scottish Enlightenment philosophy was an argument against psychological egoism. The psychological egoism argued against by most of these philosophers was devised by Thomas Hobbes. The Scottish Enlightenment philosophers took the Hobbesian man to be purely self interested.⁶⁵ The first element in the refutation of this conception of man was an argument against the state of nature hypothetical.⁶⁶ Rather than abstracting from the hypothetical man in hypothetical situations, these philosophers examined actual men and actual societies.⁶⁷ From their empiricism, they argued that man, at his core, is a social creature and that this sociality cannot be reduced to mere egoism. Most of the theorists agree that there are three general reasons that explain the sociality of man. First, many of the philosophers explain that man has an instinct for society.⁶⁸ This instinct for society is best demonstrated by his development of language to communicate with other members of his society.⁶⁹ Second, Scottish Enlightenment philosophers pointed to the family as an explanation of the sociality of man.⁷⁰ Humans have natural inclinations

⁶² *Id.* at 110.

⁶³ *Id.*

⁶⁴ For discussions of pre- and early Scottish Enlightenment thinkers, see generally FRANCIS HUTCHESON, *ON HUMAN NATURE: REFLECTIONS ON OUR COMMON SYSTEMS OF MORALITY ON THE SOCIAL NATURE OF MAN* (Thomas Mautner ed., 1993) and TERENCE PENELHUM, BUTLER (1985).

⁶⁵ See CHRISTOPHER J. BERRY, *SOCIAL THEORY OF THE SCOTTISH ENLIGHTENMENT* 30–31 (1997).

⁶⁶ *Id.* at 24.

⁶⁷ *Id.*

⁶⁸ *Id.* at 25.

⁶⁹ *Id.* at 27.

⁷⁰ *Id.*

to produce children and have relations with the opposite sex, according to the philosophers, which necessitate social relationships.⁷¹ Finally, humans have bonds of friendship and loyalty which are both strong and transcend self-interest.⁷² The ability for man to risk his life out of loyalty or friendship was a capacity that a reductive account of psychological egoism could not explain.⁷³

3. *Theory of Action*

Though the general consensus was against philosophical egoism, there were divergent views on the role of self-interest and rationality in motivating man to act. Hume's theory of action relies on his earlier theory of the passions and will. On the Humean picture, the passions of man (i.e., emotions and desires) are primarily divided into direct and indirect passions.⁷⁴ Direct passions are those which arise immediately from the actions of good or bad and pain or pleasure.⁷⁵ An example of a direct passion is aversion. If a child gets shocked by an electrical socket they will avert that feeling. Indirect passions are more complex in that they require both the feeling and an idea.⁷⁶ One of the examples of an indirect passion, for Hume, is pride.⁷⁷ Hume argues that it is these passions, both direct and indirect, that control how men act.⁷⁸ Reason alone does nothing. When a man is burned when touching a hot stove, it is not reason alone that provides him with the motivation to act, it is the passion of aversion produced by the stimulus that causes his action. Reason may, on the Humean account, direct action or guide judgment but it alone is never sufficient to cause human actions.⁷⁹ The causal inefficacy of reason alone is what grounds Hume's famous statement: "Reason is, and ought only be the slave of passions"⁸⁰

Reid presents a different picture of human action. On his account there are three principles of action. These principles are mechanical principles, animal principles, and rational principles of ac-

71 *Id.*

72 *Id.* at 28e

73 *Id.*

74 HUME, *supra* note 52, at 335.

75 *Id.*

76 *Id.* at 335–36.

77 *Id.* at 335.

78 *Id.* at 318.

79 *Id.* at 318.

80 *Id.*

tion.⁸¹ By mechanical principles, Reid means those acts taken without the use of will. These are best thought of as instincts or habits.⁸² Animal principles are those with intentional properties that do not presuppose the use of reason. Reid considers passions, desires, and appetites to be animal principles.⁸³ Finally, rational principles require judgment, meaning that they require reason.⁸⁴ He argues, contra Hume, that certain ends can only be conceived of through the use of reason. These ends that require the use of reason are conceptions of the good, which in turn are sufficient to produce action.⁸⁵ It is this ability to form general principles that produce rational principles of action that separate man from brutes only focused on particular present objects.⁸⁶

In summation, Scottish Enlightenment moral and political theory took a step back from the rationalism of the previous century. Whether it was the decentralization of reason by Hume in his quest to create the “science of man,” or his foe Thomas Reid’s common sense philosophy, both eschewed a moral philosophy based in pure reason. Hume and Reid (as well as the other Scottish Enlightenment thinkers) laid down a fertile soil for intellectual debate and for men across the Atlantic Ocean to craft a constitution.

III. THE PHILOSOPHY OF THE AMERICAN FRAMERS

Much has been written about the philosophical traditions in *The Federalist*, whereas less has been written about the philosophical traditions found in James Wilson’s *Lectures on Law*. Though by all accounts Wilson was one of the most theoretically sophisticated Framers, he has largely been forgotten. Despite his obscurity, Wilson was one of the most influential individuals at the Constitutional Convention, contributing vigorously to the debates as well as to the document produced.⁸⁷ Thus, it is important to carefully analyze the traditions found in both *The Federalist* and Wilson’s *Lectures on Law* to arrive at a true picture of the philosophical commitments of the most influential Framers.

81 See Nicholas Wolterstorff, *Reid on Justice*, in REID ON ETHICS 187, 187 (Sabine Roeser ed., 2010).

82 *Id.*

83 *Id.* at 188.

84 *Id.*

85 *Id.* at 189.

86 Wolterstorff, *supra* note 81, at 190.

87 See Ewald, *supra* note 21, 901–02 (discussing how James Wilson had many accomplishments for which he did not receive recognition).

A. *The Philosophy of The Federalist*

The Federalist represents an amalgamation of the philosophical traditions of the preceding centuries. There is a mix of natural law moral insights as well as Scottish Enlightenment theory. Particularly, David Hume's arguments were very influential in crafting the argument in Madison's *Federalist No. 10*.

1. *The Moral Epistemology of The Federalist*

In addition to Thomas Jefferson's rhetoric in the Declaration of Independence, Publius⁸⁸ also endorses a Reidian epistemology regarding moral and political truths. Hamilton opens *Federalist No. 31*, a continuation of the defense of the power of taxation found in the Constitution, with a discussion of truth. Hamilton states:

In disquisitions of every kind there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry Of the same nature are these other maxims in ethics and politics And there are other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common-sense⁸⁹

He goes on to argue that moral and political principles, though less certain as those principles of geometry and mathematics, work in the same way.⁹⁰ Consistent with Reidian thought, Hamilton argues that, in the realm of morality and politics, people often let their passions and biases cloud their common sense analysis of axiomatic principles.⁹¹ Hamilton then goes on to derive the power of the government to tax citizens from these common sense axiomatic moral truths.⁹² This move allows Hamilton to argue that the individuals who oppose the Constitution are blinded by their passions and have failed to be guided by reason.

88 "Publius" was the pseudonym under which Madison, Jay, and Hamilton published THE FEDERALIST. *Introduction to THE FEDERALIST*, at vii (Clinton Rossiter ed., 2003). When referring to all three authors I will use "Publius."

89 THE FEDERALIST NO. 31 at 189 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

90 *Id.* at 190.

91 *Id.*

92 *Id.* at 190–91.

This section shows Publius's (or at least Hamilton's) commitment to Scottish common sense moral epistemology. Like in Lockean theory, Publius treats certain moral and political truths as axiomatic principles. But consistent with Reid and Common Sense Scottish philosophy, those axiomatic principles are attained through introspection on common sense principles.

2. *The Moral Psychology of The Federalist*

While *The Federalist* may endorse a Common Sense and, perhaps, Lockean understanding of moral epistemology, the authors' understanding of man's nature and moral psychology is much more indebted to David Hume. The two places in which the arguments about human nature do the most work are in *Federalist No. 10* and *Federalist No. 51*.

In *Federalist No. 10*, Madison argues for the extended republic.⁹³ In arguing for the extended republic, he argues against Montesquieu, who stated that only small territories could house republican governments, by advancing a thoroughly Humean argument.⁹⁴ The major problem for a democratic republican form of government, for Madison, was the faction.⁹⁵ Madison believed that the faction served as an immense threat to liberty and the well being of the country. Madison defines the faction as:

[A] number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁹⁶

As Morton White notes, this definition puts Madison in line with Hume's writings on factions.⁹⁷ Hume and Madison believe that the

⁹³ THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

⁹⁴ See WHITE, *supra* note 54, at 96; see also Daniel C. Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 502, 507-08 (1987).

⁹⁵ THE FEDERALIST NO. 10, *supra* note 93, at 71-72.

⁹⁶ *Id.* at 72.

⁹⁷ WHITE, *supra* note 54, at 97-99. Hume himself in *Of Parties in General*, states:

Real factions may be divided into those from *interest*, from *principle*, and from *affection*. Of all factions, the first are the most reasonable, and the most excusable. Where two orders of men, such as the nobles and people, have a distinct authority in a government, not very accurately balanced and modelled, they naturally follow a distinct interest; nor can we reasonably expect a different conduct, considering that degree of selfishness implanted in human nature. It requires great skill in a legislator to prevent such parties; and many philosophers are of opinion, that this secret, like the *grand elixir*, or *perpetual motion*, may amuse men in theory, but can never possibly be reduced to practice.

DAVID HUME, *Of Parties in General*, in 3 THE PHILOSOPHICAL WORKS OF DAVID HUME 54, 58 (1854).

problem with factions are that they are self-interested on particular goods, while not interested in the greater societal well being.⁹⁸ This focus on the good of the particular group maximizes the good of that group at the expense of the whole community, which in turn produces tyranny.

After providing a Humean definition of factions, Madison goes on to solve the problem. Madison states that the problem can be solved either by controlling the “causes” or “effects” of factions.⁹⁹ One such cause of factions is liberty. Liberty to associate and form groups is a necessity for faction formation. Madison easily rejects the idea of eliminating liberty to control factions as absurd.¹⁰⁰ The second cause of factions is differences in opinions, passions, and interests. In order to eliminate this cause of factions, the state would have to give “to every citizen the same opinions, the same passions, and the same interests.”¹⁰¹ In response to this solution, Madison declares that men will naturally have different opinions, passions, and interests:

As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests.¹⁰²

Madison continues on to explain how differences in skill, property, and religion will always produce a diversity of passions, opinions, and interests.¹⁰³ This pessimistic note concludes Madison’s discussion on the causes of factions. On the Madisonian picture, factions cannot be erased by their causes and thus are an innate part of any society that values liberty.

Madison’s solution to the problem comes in controlling the effects of factions. Controlling the effects of minority factions is not a problem in a democracy. Minority factions will be controlled by a democratic check.¹⁰⁴ Essentially, Americans have recourse against minority factions through outvoting their interests. Controlling the effects of larger factions however is a problem. Majority factions are to be kept in line by the extended republic because the expansive scope of the republic creates a space with more interests, passions,

98 See WHITE, *supra* note 54, at 109.

99 THE FEDERALIST NO. 10, *supra* note 93, at 72.

100 *Id.*

101 *Id.* at 72–73.

102 *Id.* at 73.

103 *Id.*

104 THE FEDERALIST NO. 10, *supra* note 93, at 75.

and opinions and thus, more factions.¹⁰⁵ Since there will be more factions and those factions will occupy more space, they will ultimately keep each other in check and fight against other factions' attempts to gain power and impose tyranny.

Federalist No. 51 also provides this same type of argumentation for checks and balances and federalism. Madison famously states: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."¹⁰⁶ This is a statement that man in his nature can be self interested and power seeking to the point of the destruction of liberty. Thus, liberty preservation requires two additional checks on this nature of man. The first check is to control the powers of the ruler. This check on the ruler's power is through dividing the functions of government among distinct minimally dependent branches.¹⁰⁷ The second security against tyranny is the division of power between the federal government and state governments.¹⁰⁸ Madison states: "Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."¹⁰⁹

While it is clear the extended republic argument and the arguments on governmental power ultimately derive from Hume and Montesquieu, there is some argument that the moral psychology is based actually in Reidian philosophy.¹¹⁰ Though there may be some truth to that position, the argument for the extended republic cannot succeed without a Humean moral psychology. The reason why factions are problematic and why their causes cannot be controlled is because they are influenced by what White calls "particular passions" and these passions cannot be made the same.¹¹¹ Individuals in factions focus on their own self interest, desires, and passions and not those of the aggregate whole. This conception of factions requires that passions are stronger than reasons. Further, Madison states in *Federalist No. 55*, "[P]assion never fails to wrest the scepter from reason."¹¹² Madison believed that it would be futile to try to use reason

105 *Id.* at 78.

106 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

107 *Id.*

108 *Id.* at 320.

109 *Id.*

110 See Howe, *supra* note 94, at 489–90 (discussing how Publius adopted aspects of the "human faculties" described by Thomas Reid, including "passions," "affections," and "self-interest").

111 WHITE, *supra* note 54, at 109.

112 THE FEDERALIST NO. 55, at 340 (James Madison) (Clinton Rossiter ed., 2003).

to motivate men in factions to act for the good of the whole of the country. Man's own selfish interests and particular passions motivate his actions and causally move him. Since reasons are slaves to passions, interests, and desires, the only way to solve the problem of the faction is to extend the republic.

The follower of a Reidian moral psychology would need a different argument to extend the republic. For Reid, a reasoned conception of the good is an essential part of human motivation. Sure, there are animalistic principles of motivations and passions, which cloud his conception of the general good, but those can all be regulated by appeals to common sense principles of morals attainable to all men. On the Reidian picture it must be the case that men in factions can be morally educated to see those common sense moral principles and thus, as rational agents, motivate themselves to work toward the benefit of the whole. For Reidians, particular conceptions of the good of one faction, as the expense of the common good, will dissipate as one's understanding of the common sense moral principles strengthen. If Madison was a Reidian he would need a stronger argument as to why giving everyone the same reasons and understandings of the moral principles of the world could not motivate their behavior to work for the common good of the country. Madison does not provide this argument, what he instead says is that differences in interests and essentially innate and unchangeable. Madison's argument in *The Federalist* needs a self-interested man whose conception of the common good is causally weak in order to craft out their structures of dispersing power.

B. *The Philosophy of James Wilson's Lectures on Law*

James Wilson has been noted as one of the most philosophically developed of the Framers. His *Lectures on Law*¹¹³ of 1791–1792 represent a comprehensive treatment of American jurisprudence. The work stands as theoretically sophisticated because of its reliance on moral and political philosophy.¹¹⁴ Wilson builds his distinctly American jurisprudence from a theory of man and natural law.

113 See generally 1 JAMES WILSON, THE WORKS OF JAMES WILSON (James DeWitt Andrews ed., 1895).

114 JAMES WILSON, *Of Man, As an Individual*, in 1 THE WORKS OF JAMES WILSON 206 (James DeWitt Andrews ed., 1895) [hereinafter *As an Individual*].

1. *Wilson's Moral Psychology*

The main portions of the *Lectures on Law* where Wilson expounds a theory of moral psychology are the "Of Man" sections. These sections work to set the foundation for his justification of the American Constitution and the formation of a new American jurisprudence. Early in *Of Man, as an Individual*, Wilson echoes the Scottish Enlightenment attack on the Hobbesian use of a hypothetical state of nature argument to derive truths about human nature. Wilson, like his fellow Scots, believed truths about man could only be derived through empirical investigation.¹¹⁵

From this point, Wilson continues on to describe man's psychology. He holds that the mind is made up of numerous operations and principles that interact with each other. The mind, for Wilson, contains active and passive principles. Active principles are those of sensation, imagination, memory, and judgment.¹¹⁶ Among those active principles, Wilson calls the senses "the useful and pleasing ministers of our higher powers."¹¹⁷ Even though the senses act as the ministers of the higher powers they must still be regulated by temperance and prudence in order to not turn into vice and pain.¹¹⁸ He breaks down the senses into internal and external senses. External senses are senses focused on objects outside of ourselves. These sensations, for Wilson, are what cause pleasure and virtue in our lives, when placed under proper guidance.¹¹⁹ Internal senses, on the other hand, are those senses that give us information about what goes on in our inner world.¹²⁰ Consciousness is an internal sense.¹²¹ Borrowing from Reid, he argues that these inner states are essentially subjective and gain their proof primarily from the fact there is a sensor and that that sensor has accurate phenomenological access to their inner world.¹²² The proof that an individual is in pain is because the individual feels pain. One cannot, on this picture, prove the existence of an inner world sensation through reason and logic as Cartesian rationalism attempted.¹²³ Wilson uses Descartes' failures to ground his argument

115 *Id.* at 208–09.

116 *Id.* at 214.

117 *Id.* at 218.

118 *Id.*

119 *Id.* at 216–17.

120 *Id.* at 219.

121 *Id.*

122 *Id.*

123 *Id.* at 220.

that there exist first principles that are not the product of reason but rather that all reason must flow from.¹²⁴

2. *Moral Psychology, Society, and Government*

Wilson progresses to apply the insights about man's mind to society and ultimately the United States' system of government. Wilson begins *Of Man, as a Member of Society*, again, with a discussion of psychological egoism much in line with Scottish Enlightenment philosophy. Wilson advances several pieces of empirical evidence to discredit psychological egoism. The first piece of evidence is that human lives are horrid in solitary confinement.¹²⁵ He also notes that humans have social affections that are other-regarding and cannot be reduced to mere self interest.¹²⁶ Humans also have faculties of the mind that are social in nature. Testimony, contract, promises, and language all do not make sense without social interaction.¹²⁷ Wilson paints a picture of psychological development that places sociality as coming before the development of reason.¹²⁸

For Wilson, the sociability of man is the starting point for building the state. Wilson argues that man's happiness is dependent upon society. He states, "Take away society, and you destroy the basis, on which the preservation and happiness of human life are laid."¹²⁹ Essentially, Wilson argues that man in the state of nature is weak. In solitude, humans are weak and are surrounded by danger.¹³⁰ Society provides individuals aid and remedies for disease and allows for the enjoyment of social pleasures innate in the human mind.¹³¹ Since human happiness is accomplished through the interactions with society, the function of society is to produce a system that furthers the societal common good such that it makes the individuals within the system maximally happy. Wilson states:

The wisest and most benign constitution of a rational and moral system is that, in which the degree of private affection, most useful to the individual, is, at the same time, consistent with the greatest interest of the system; and in which the degree of social affection, most useful to the sys-

124 *Id.* at 249–50.

125 JAMES WILSON, *Of Man, As a Member of Society*, in 1 THE WORKS OF JAMES WILSON 258, 254–55 (James DeWitt Andrews ed., 1895) [hereinafter *As a Member of Society*].

126 *Id.* at 255 ("The love of posterity, of kindred, of country, and of mankind—all these are only so many different modifications of [] universal self-love.").

127 *Id.* at 257.

128 *Id.* at 258–59.

129 *Id.* at 266.

130 *Id.* at 265–66.

131 *Id.* at 266–67.

tem, is, at the same time, productive of the greatest happiness to the individual.¹³²

In the Wilsonian picture, this describes man in what he called natural society. Natural society is society prior to the imposition of civil government.¹³³ It is from this natural society where citizens, standing equal to each other, form a government to improve their happiness.¹³⁴ The creation of the union creates a mutual obligation between the collective and the individual.¹³⁵ Since it is citizens who come together and form civil government through popular consent, these citizens are the sovereign in the Wilsonian conception of the state.¹³⁶ This popular sovereignty serves as the ground for government and the law.

3 *On The Extended Federal Republic*

Later in the *Lectures on Law*, Wilson describes four possible ways that the United States government could have been established. The first way that the state could have been constructed was by having a single government; a further possibility was by distinct unconnected states; the third possibility was having two or more confederacies; and the final possibility was one federal republic.¹³⁷ Wilson ends up arguing for the extended federal republic, primarily for practical reasons. He argues that one government presiding over an expansive territory would require a system of despotism to administrate, while separate small states would be subject to war and fall prey to foreign forces. Finally, two large confederacies would similarly cause animosity and almost as much strife as smaller unconnected states.¹³⁸ For Wilson the extended federal republic has two major advantages. First, it is large enough so that it will not be subject to attack or destruction from foreign powers like small commonwealths.¹³⁹ The federal republic, next,

132 *Id.* at 270.

133 *Id.* at 272–73.

134 *Id.* at 272 (“It is from [the] union of wills and of strength, that the state or body politic results.”).

135 *Id.*

136 *See id.* at 280–81 (explaining that people have the power to retain or renounce their right of citizenship).

137 *Id.* at 536.

138 JAMES WILSON, *Of Man, As a Member of a Confederation—A History of Confederacies*, in 1 THE WORKS OF JAMES WILSON 285, 308 (James DeWitt Andrews ed., 1895) [hereinafter *A History of Confederacies*] (“By dividing the United States into two or more confederacies, the great collision of interests, apparently or really different or contrary, in the whole extent of their dominion, would be broken, and, in a great measure, disappear in the several parts.”).

139 *Id.* at 310.

offers the advantage of being easier to administer.¹⁴⁰ The component parts of this federal republic are, of course, states. Wilson conceives of the relationship between the states and the federal government as amicable.¹⁴¹ The states are responsible for their internal regulation while the federal government is responsible for the common good of the whole union.¹⁴² Wilson states, “with regard to those matters, which affect the general interests of the whole union, a confederated republic should be considered and should act as a single government or nation.”¹⁴³

Wilson calls the confederated republic a union of “hearts and affections” and “counsels and interests.”¹⁴⁴ While the component parts in the confederated republic are still focused on the common good, these parts can sometimes become too intensely focused on themselves. This is where the problem of factions enters. On his account, factions are merely grouping where the social operations have become too intense. Wilson states, “[F]action itself is frequently nothing else than a warm but inconsiderate ebullition of our social propensities.”¹⁴⁵ The intense competitive spirit is something that Wilson hopes to capture and use in the republic, rather than crush. Contra Madison, Wilson states that the spirit that animates factions “is of indispensable necessity” and “that it should be regulated, guided, and controlled.”¹⁴⁶ Ultimately, he argues that this spirit could be harnessed into patriotism for the Union rather than the faction.¹⁴⁷ Wilson argues that such an intense patriotism will flow to the union of the states because the union is focused on the common good.¹⁴⁸ In an instance where the state and the union are in conflict, one will focus their patriotism on the entity of the union because of its orientation to the common good and the fact that individuals benefit when the common good is served.¹⁴⁹

140 *Id.* at 312.

141 *See id.* at 312–13.

142 *See id.* (“In this kind of republic, the rights of internal legislation may be reserved to all the states, . . . while the adjustment of [the states’] several claims, the power of peace and war, the regulation of commerce, the right of entering into treaties, the authority of taxation, and the direction and government of the common force of the confederacy may be vested in the national government.”).

143 *Id.* at 315.

144 *Id.*

145 *Id.*

146 *Id.* at 316.

147 *Id.* at 316–17.

148 *Id.* at 318–19.

149 *Id.*

C. Framing Differences

A closer look at the work of James Wilson and the authors of *The Federalist* show that there were at least two different conceptions of human nature at work in the minds of the Framers. Both of these theories of human nature implicate different lines of philosophical tradition and anchor themselves into a greater debate between two titans of the Scottish Enlightenment, David Hume and Thomas Reid. Madison's reliance upon Hume in *Federalist No. 10* leaves him with a more pessimistic view of human nature and a very different conception of factions than Wilson. Humans and groups work for their own interests and passions in the world of *The Federalist*. It is from this fact, and the natural diversity of interests, that factions form and that the threat of tyranny emerges. The solutions to this problem are the extended republic and federalism. The Wilsonian picture of the extended confederate republic is grounded in a more pragmatic defense. This is because his Reidian view of human nature does not involve a conception of man as such an antagonistic creature. The virtue of the confederate republic is that it solves the practical problems of administration without despotism while minimizing the foreign influence and interstate animosities. The problem of factions gets solved incidentally by solving these larger problems. The solution is through a guided focus of the spirit of these factions into patriotism for the United States as a union for the preservation of the common good.

These different views on human nature also produced different conceptions of the relationship between the state and the federal government. Wilson conceived of the relationship as primarily harmonious. The state has domain to conduct its own administration, whereas the national government is responsible for the common good of the nation. On the other hand, *The Federalist* version of federalism is more oriented to viewing the relationship between the states and the national government as essential to adding another check on the threat of despotism.

IV. IMPLICATIONS FOR AMERICAN JURISPRUDENCE

As we have seen in the previous sections, the political principles of the United States derive from a European philosophical tradition. That tradition encompassed both natural law theory and the work of the Scottish Enlightenment philosophers. While the Framers were working within a unified intellectual tradition they had differing views on man's nature. The authors of *The Federalist* seem to be more indebted to the work of David Hume when discussing the structure of

government, whereas James Wilson crucially follows Thomas Reid. These different views on man resulted in different justifications for core features of our governmental system. This core difference hints at a bigger problem for judges focused on the original meaning or intention at the time of the framing of the United States Constitution.

A. *Originalism*

In the 1980s a new movement of constitutional interpretation began to firmly entrench itself in legal academia and practice.¹⁵⁰ This school of interpretation has come to be known as originalism. Originalism developed as a reaction against the expansive constitutional jurisprudence of the Warren Court.¹⁵¹ Since its roots were laid it has developed into a popular, albeit controversial, method of constitutional interpretation.¹⁵² In its most general sense originalism is a method of interpretation which seeks to find meaning through examining the understanding of the constitutional text at the time of its enactment.¹⁵³ This method of interpretation generally focuses on the understanding of the text around the time of the Constitutional Convention.¹⁵⁴ There are two types of originalism that do not always get properly distinguished in popular discourse. The first type of originalism focuses on the original intent of the Framers to resolve constitutional textual ambiguities.¹⁵⁵ The second, and currently the most popular, form of originalism focuses on the original meaning of the constitutional text at the framing.¹⁵⁶ Instead of looking at the subjective intent of the Framers, originalists who focus on original meaning look at the “objectified” intent of the Framers.¹⁵⁷ These originalists examine the language of the text to ascertain what the

¹⁵⁰ See generally Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

¹⁵¹ Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392–93 (2013).

¹⁵² See Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 669–72 (2009) (noting how originalism has expanded to include some prominent liberal adherents).

¹⁵³ See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 661–62 (2009) (describing originalism as “often refer[ring] to the normative constitutional interpretive theory that instructs judges . . . to look primarily to the original understanding of a particular clause’s ratifying generation”).

¹⁵⁴ *Id.* at 689–90 (demonstrating that judges employing originalism often cite to the Convention or state ratifying conventions occurring during the same time period).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 662.

¹⁵⁷ *Id.*

Framers would have expected their language to mean.¹⁵⁸ Keith Whittington describes two conditions of originalism focused on meaning. These conditions are that (1) meaning is fixed at the time that the text is adopted and (2) that the words constrain the meaning of constitutional doctrines.¹⁵⁹ Originalism is justified by its adherents as the theory of interpretation that is most consistent with democratic theory.¹⁶⁰

B. *The Judicial Use of The Federalist*

The Federalist has played a crucial role in the new originalist program of interpretation. Professors Corley, Howard, and Nixon analyzed the use of the original documents in Supreme Court cases in the latter half of the twentieth century. They found that from 1953 to 1984 *The Federalist Papers* accounted for 34% of Supreme Court citations to authority.¹⁶¹ The Court in that time period cited to *The Federalist* 101 times.¹⁶² The next closest source cited was Justice Joseph Story's *Commentary*, accounting for only thirty-six citations.¹⁶³ The use of *The Federalist Papers* has increased dramatically since the 1940s.¹⁶⁴ In a similar study of all non-legal sources of citations used by the Supreme Court, it was found that *The Federalist* alone accounted for 10.3% of citations during the time period from 1989 to 1998, beating out newspaper sources and internet sources while only barely coming in behind law journal articles.¹⁶⁵

The use of *The Federalist* has not been uncontroversial. Research has shown that as Justices get more conservative in ideology they become more likely to cite to *The Federalist*.¹⁶⁶ The citations to *The Federalist* are mostly used in cases involving governmental power and are used as a tactical tool.¹⁶⁷ Originalist Justices have frequently relied on *The Federalist Papers* in their opinions and dissents.¹⁶⁸ Two areas of

158 Whittington, *supra* note 151, at 379.

159 *Id.* at 378.

160 Greene, *supra* note 153, at 665.

161 Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of The Federalist Papers*, 58 POLI. RES. Q. 329, 330 (2005).

162 *Id.*

163 *Id.*

164 *Id.* at 332.

165 John J. Hasko, *Persuasion in the Court: Nonlegal Material in U.S. Supreme Court Opinions*, 94 L. LIBR. J. 427, 432 (2002).

166 Corley et al., *supra* note 161, at 333.

167 *Id.* at 336.

168 *Id.* at 333; *see, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting); *United States v. Morrison*, 529, 638 U.S. 598 (2000) (Souter, J., dissenting); *Printz v.*

constitutional law where *The Federalist* has been cited numerous by the Supreme Court are in the recent developments to both the Anti-Commandeering Doctrine and the Commerce Clause. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court was tasked with deciding whether the San Antonio Metropolitan Transit Authority (“SAMTA”) had to comply with a federal law regulating wage and overtime requirements of employees.¹⁶⁹ The Court ultimately held that SAMTA did have to comply with the law because Congress had the power to regulate such activities under its Commerce Clause power and because it was not “destructive” of state sovereignty.¹⁷⁰ In crafting the majority opinion and the dissent, the Justices made about twenty references to *The Federalist*. The majority opinion authored by Justice Harry Blackmun, primarily used *The Federalist* to argue that “the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.”¹⁷¹ Justice Lewis Powell and Justice Sandra Day O’Connor both authored dissents similarly relying on *The Federalist*. In their dissents though, they used *The Federalist* to argue the opposite conclusion from the majority. Justice O’Connor cited *Federalist No. 51* to suggest that the powers of the state and federal government were to be distinct and separate in order to “produce efficient government and protect the rights of the people.”¹⁷² Justice O’Connor’s majority opinion restricting federal governmental power over states in *New York v. United States* similarly cited *The Federalist*.¹⁷³

Citations to *The Federalist* fill the seminal opinions of the Rehnquist Court’s revival of federalism.¹⁷⁴ The use of *The Federalist* in seminal cases has continued under the Roberts Court. In *National Federation of Independent Business v. Sebelius*, Chief Justice John Roberts, writing for the majority, quoted *The Federalist* when arguing that the regulation of inactivity was not a constitutional exercise of the Court’s Commerce Clause powers. Chief Justice Roberts stated:

United States, 521 U.S. 898, 910 (1997) (Scalia, J.); *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

¹⁶⁹ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985).

¹⁷⁰ *Id.* at 554–56.

¹⁷¹ *Id.* at 552.

¹⁷² *Id.* at 582.

¹⁷³ *See generally* 505 U.S. 144 (1992).

¹⁷⁴ *See generally* *Gonzales v. Raich*, 545 U.S. 2195 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” . . . The Government’s theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”¹⁷⁵

C. *Wilson and the Originalist Project*

The previous investigation into the deeper tradition that created the Constitution revealed a deep philosophical divide between crucial Framers James Wilson and the authors of *The Federalist*. This deep divide between these Framers created three possible implications for originalism and constitutional interpretation. Deep philosophical disagreement can either have skeptical implications, methodological implications, or interpretative implications.

1. *Skeptical Implications*

The existence of deep philosophical divides could be interpreted to cast a shadow of skepticism on the whole originalist venture. The deepness of this problem is exemplified by Wilson’s and Madison’s discussion on factions. On a surface level reading of the *Lectures on Law* and *The Federalist*, it is clear that both Framers used the word “faction” and felt that factions were a problem for democracy. Nonetheless, beyond that surface reading, Wilson and Madison had two very different ideas of what a faction actually was and used the word “faction” to mean very different things. This is not a matter of mere semantics because, as we have seen, these two different conceptions of factions result in different solutions and derive from deeper divisions in political and moral philosophy. This example shows that the Framers, could, and in this case did, assign different meanings to essential concepts of our government. These different meanings thus necessitate different expectations of how the concepts would come to be used. Even for the originalist who focuses on objectified intent this creates a problem. The point of originalism is to preserve the meaning at the time of enactment. Originalism that searches for objectified intent must, when faced with multiple meanings, find the most reasonable meaning. But, in the case where there are multiple deep differences in meaning, the objectified intent will certainly dif-

¹⁷⁵ Nat’l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 2566, 2589, 2590 (2012) (citations omitted) (quoting THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 2003)).

fer from the actual meanings at the time of enactment. The judicial creation of a meaning that was not agreed upon at enactment and the application of that fictional understanding to legislation does not seem to do the work of preserving democratic values that originalist desire.

2. *Methodological Implications*

As Justice Antonin Scalia states, when referring to originalism, “Its greatest defect, in my view, is the difficulty of applying it correctly . . . it is often exceedingly difficult to plumb the original understanding of an ancient text.”¹⁷⁶ Justice Scalia goes on to describe how originalism requires the evaluation of historical documents and sometimes seems “better suited to the historian than the lawyer.”¹⁷⁷ Since the originalists purport to desire to discover the original understanding of the text of the Constitution at enactment, relying so heavily on one source to understand that original meaning is intellectually dishonest. In relying so heavily on *The Federalist*, the originalist judges are ignoring other equally influential Framers of the United States Constitution, like James Wilson, who presented a jurisprudential view arguably more sophisticated than the authors of *The Federalist*. Originalist judges who are genuinely interested in arriving at the original understanding of text, and not of cherry picking their sources in order to further a certain view of governmental power, must take seriously all the sources that could elucidate the original meaning of pieces of the United States Constitution.

3. *Interpretive Implications*

In *Garcia*, Justice Blackmun makes two citations to James Wilson’s speeches at the Constitutional Convention.¹⁷⁸ Wilson’s view of federal and state interactions was far more harmonious than that found in *The Federalist*. James Wilson’s political and legal philosophy was focused on a strong national government.¹⁷⁹ This suggests that individuals who are interested in originalism yet also desire not to support the federalism of the Rehnquist and Roberts Courts may have a friend in James Wilson. A deeper attention paid to the work of Wil-

¹⁷⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

¹⁷⁷ *Id.* at 857.

¹⁷⁸ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985).

¹⁷⁹ See MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798*, at 148 (1997).

son helps dispel the myth that originalists must arrive at conclusions that are restrictive of governmental powers.

CONCLUSION

The United States Constitution stands as a magnificent and monumental document. But, in recognizing its greatness, the fact it was the result of centuries of intellectual thought should not be overlooked. Framers James Wilson, James Madison, Alexander Hamilton, and John Jay shared that intellectual tradition but still had substantive differences. These differences, interestingly enough, still resulted in the production of the same document, though with different justifications. In order to give an accurate picture of our past and where American law can develop, judges committed to seriously looking back at the work of the Framers must not obscure the fact that fundamental differences existed in the ways that the Framers conceived of the state.