THE FEDERALIST PAPERS AND LEGAL INTERPRETATION

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and

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I. INTRODUCTION

Postmodernism emerged in the twentieth century as a controversial response to traditional philosophical concepts owing to its rejection of rational discourse--"metanarratives"--and other analytical methods that formed the basis for the western intellectual tradition for twenty-five centuries. The term itself is confusing and open to a welter of interpretations. At its core, "postmodernism" is a trite, over-used buzzword that describes an eclectic group of thinkers writing at the end of the millennium.[1] What seems to unite this diverse group is the writers' contention that the old methods of interpreting the world are based on strict, dogmatic principles that bear little or no relation to reality. Abstract concepts are thus divorced from the one great truth in life: the need to develop a proper existential perspective. In Nietzsche's words, "[i]t must certainly be conceded that the worst, more durable, and most dangerous of all errors so far was the dogmatist's error—namely, Plato's invention of the pure spirit and the

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1. Thinkers most often identified by the label "post-modern" include Michel Foucault, Jacques Derrida, Jean-Francois Lyotard, and Richard Rorty, although occasionally writers such as Willard V.O. Quine, Jurgen Habermas, Roland Barthes, and Ludwig Wittgenstein (especially his later work) are lumped into this category. The writings of these theorists are so diverse that labels seem woefully inadequate and, in some cases, outright misleading. Rorty, for example, is more properly called a "neopragmatist," while Habermas is probably the last great modern philosopher in the Kantian tradition, not strictly a postmodernist. Wittgenstein's work also seems remarkably resistant to labeling, owing to differences between his early linguistic analyses and his later efforts to revise his thinking about the nature of language. *See also*, J. MICHAEL MARTINEZ & KERRY R. STEWART, "ETHICS, VIRTUE, AND CHARACTER DEVELOPMENT," IN ETHICS AND CHARACTER: THE PURSUIT OF DEMOCRATIC VIRTUES 41-44 (William D. Richardson, J. Michael Martinez, and Kerry R. Stewart, eds., 1998); JAMES C. EDWARDS, ETHICS WITHOUT PHILOSOPHY: WITTGENSTEIN AND THE MORAL LIFE (1982).

good as such."[2]

Some writers have praised postmodernism as a creative, brave, and daring approach to thinking that will open many new doors to intellectual pursuits because it reconfigures western man's approach to perennial intellectual problems. Others have rejected postmodernism's "anti-philosophy philosophy," dismissing it as "a ruthless tautology" that is as silly and nonsensical as it is trendy.[3] Whatever else it has done, however, postmodernism has forced intellectuals to examine all aspects of rational discourse, including legal interpretation, to determine whether traditional methods are sufficient forms of analysis. This change in heuristics is no mere epistemological exercise; it is a revolution in thinking that continues to reverberate within the halls of academe. As with most revolutions, it is difficult to know precisely how this new perspective will assist in the process of thoughtful analysis, especially in interpreting legal rules.

It is axiomatic that traditional legal interpretation in the American system of jurisprudence relies on the case method—exactly the sort of analysis postmodernists find objectionable. Legislatures initially enact statutes containing rules that govern the behavior of all persons within the jurisdiction. Courts subsequently "fill in the gaps" between statutes by adjudicating conflicts that occur in applying and interpreting those rules in particular cases arising explicitly or implicitly under the statute. Over time, the trend of rules discerned from cases provides guidance to parties on the likely outcome of a particular dispute arising under a general statute.

Looking to prior cases for guidance is objectionable to postmodernists because it elevates certain texts over and above other texts. Moreover, relying on judicial opinions results in stodgy, rule-bound decision-making that stifles creative reasoning. In fact, from the postmodern perspective, assigning deeper meanings to texts penned by non-elected judges (at least in the federal court system) is an artificial exercise, to say nothing of its anti-democratic tendencies. Postmodernism, therefore, is a potent antidote to legal realism, with its emphasis on the law as a judge-made creation. According to postmodernism, it is time to search for other means of interpreting legal materials so that judges and the legal profession are not vested with exclusive control over laws and their application within a regime.

Like much of postmodern thought, this endeavor sounds promising at the outset. Throwing off the shackles of traditional legal analysis has a certain appeal to academicians. This is especially true for those seeking to improve the legal system by making it more responsive to the needs of citizens traditionally ill-served by the legal profession, particularly ethnic

2. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 3 (Walter Kaufmann, trans; 1966).

3. MARTINEZ & STEWART, *supra* note 1, at 44. *See also* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1982).

minorities and women. If traditional legal interpretation were changed to accommodate the needs of diverse peoples, the argument suggests, the much-touted equity inherent in democratic political systems would become a reality. Racial, ethnic, cultural, and gender biases embedded within the American legal system could be overcome and the results would benefit all of society.

The problem with the postmodern enterprise, however, is that it replaces comparatively clear, concrete legal rules of interpretation with more nebulous concepts that are maddeningly vague. Nonetheless, the exercise of anchoring legal interpretation in something other than cases, statutes, and regulations may yield insights into the efficacy, or lack thereof, of traditional legal interpretation. Thus, to explore the possibilities afforded by postmodernism, we decided to substitute a single text in the place of traditional legal precedents to determine whether attempts to "dethrone" rule-bound thinking could result in a workable method of legal interpretation.

If postmodernism is taken at face value, any text or series of texts (or no text at all) could be substituted for traditional legal materials. Rather than search for materials far removed from legal interpretation, however, here we examine The Federalist Papers, primarily because this is a source that is afforded great weight in the American regime and because the essays have been cited many times in legal cases. We hope to demonstrate that, despite the text's revered place within the American political system, it cannot serve as a means of interpreting legal rules. The Federalist Papers undoubtedly lends historic, and perhaps philosophical, context to many constitutional provisions, but that is far different than serving as a precedent for applying specific rules in the context of legal cases and controversies. By extension, if The Federalist Papers fails as a means of legal interpretation, other texts, or the lack of other texts, are likely to be ineffective as well, for their relevance to textual interpretation is even more tenuous.

We undertook this analysis in the face of a second "revolution" in American government during the 1980s and 1990s, namely the advent of "New Federalism." During this period, the concept of state sovereignty as a viable, substantive doctrine emerged from the pages of American constitutional history to assume a central role in discussions of public policy. This resurgence of state authority was most famously illustrated by the "Republican Revolution" reflected in the 1994 elections, as well as U.S. Supreme Court opinions handed down in cases such as *United States v. Lopez*[4] and *Printz v. United States*,[5] among others. In light of these de-

4. 514 U.S. 549 (1995). *See also* KENNETH T. PALMER & EDWARD B. LAVERTY, THE IMPACT OF UNITED STATES V. LOPEZ ON INTERGOVERNMENTAL RELATIONS: A PRELIMINARY ASSESSMENT, 26 PUBLIUS 109 (1996).

5. 521 U.S. 898 (1997). *See also* Rosemary O'Leary and Charles R. Wise, *Public Managers, Judges, and Legislators: Redefining the "New Partnership,"* 51 PUBLIC ADMINISTRATION

velopments, prognosticators who pronounced the states an impermissible locus of political power in previous years have been forced to revise prior assessments.

These recent developments confirm that federalism and states' rights questions have never completely disappeared from American politics. How could they? In a political system where sovereignty always has been suspect, a unitary political system was never a viable consideration. This essentially left two choices for the Founders: create a government with a weak national government and strong sub-units, or create a government with a strong national government and comparatively weak sub-units. The Articles of Confederation demonstrated the problems inherent in the former approach. By default, the latter approach became the preferred structure of the government created by the U.S. Constitution. As a result, a federalist division of power between a national government and sub-units ensured that conflict between the levels of government would ensue. In the twentieth century, this meant that states' rights did not disappear, they merely lay dormant after the rise of reform liberalism during the New Deal and the apogee of big government in the Great Society programs of the 1960s.[6]

As Americans awoke to the revitalization of state-centered federalism, commentators coined terms such as "New Federalism," "reinventing government," "devolution," and "public entrepreneurship" to denote the decentralization of authority. In a climate where citizens demand a lower tax burden, a smaller federal bureaucracy, less government intrusion into individual affairs and more accountability by public officials, the American regime seems to be in the midst of fundamentally changing the rhetoric, if not the meaning, of federalism. One need only examine events since the mid-1990s to appreciate the fundamental changes that have occurred in federal-state relations. An example of this profound change is the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).

PRWORA, signed into law in August 1996, replaced the Aid to Families with Dependent Children (AFDC) program, and others, with a new Temporary Assistance to Needy Families (TANF) program that allows states to exercise greater control in designing public assistance and training programs for needy families with children. Since 1995, Congress repeatedly has considered proposals to convert Medicaid, welfare, child care, child protective services, and other social welfare programs into flexible block grants for the states. This has led to an increased emphasis

REVIEW 316 (1991); Charles Wise, *Judicial Federalism: The Resurgence of the Supreme Court's Role in the Protection of State Sovereignty*, 58 PUBLIC ADMINISTRATION REVIEW 95 (1998).

6. PAUL PETERSON, FEDERALISM AND THE GREAT SOCIETY, CLASSIC READINGS IN AMERICAN POLITICS (Pietro S. Nivola and David H. Rosenbloom, eds., 1990). *See also* PAUL PETERSON, THE PRICE OF FEDERALISM (1995).

on local and state government control over political issues.[7] This emphasis, in turn, invites a re-examination of questions about the proper relationship between local, state and federal control through that most fundamental of commentaries on constitutional distributions of power, The Federalist Papers.

II. THE ROLE OF THE FEDERALIST PAPERS

The literature in political science, history and law is filled with theories and methods for judges and policymakers to decide cases based on positivist legal principles (that is, legal principles promulgated by an authoritative, recognized, duly-constituted, governmental body). Rational choice, collective action, mainstream economic analysis, the use of legislative histories, and plain meaning theories all represent bona fide methods for addressing constitutional and statutory questions. Commentators have defended these approaches literally hundreds of times, but the radically reconstructed world of postmodernism suggests that more creative approaches are ripe for exploration. One such approach involves an attentiveness to relevant documents of the past as appropriate guides to the postmodern present. Consulting the works of the Founding Fathers is hardly an original or sagacious enterprise. Commentators on the American political tradition often have looked to The Federalist Papers for assistance in identifying the underlying principles of the republic, especially on questions of federalism. It is, however, an exercise that should be repeated periodically in order to help clarify the connections between foundational principles of the past and present legal rules.

From their first appearance in New York newspapers in the fall of 1787, the 85 essays authored by the pseudonymous Publius[8] were recog-

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7. THE URBAN INSTITUTE, THE URBAN INSTITUTE RESEARCH RECORD 1996 10-12 (1996).

8. PLUTARCH, LIVES 203-206 (A.H. Clough, ed. and trans., 1899). In his Life of Publicola, the ancient historian Plutarch once recounted a tale, perhaps apocryphal, of the Roman statesman Publius Valerius Publicola parading through the streets of the city, celebrating his victory over the tyrant Tarquinius and the Etruscans. Triumphant in the wake of defeating an obdurate, elitist foe, the "Great Democrat" demonstrated decidedly plebeian sentiments in sharing his success with the masses of Rome, an uncommon gesture of magnanimity in an aristocratic age. *Id.* By contrast, the ancient historian described Julius Caesar's ostentatious return from North African battles in 46 BCE with the unrestrained, vituperative prose usually reserved for a polemicist's pen. *Id.*

These distinct literary treatments of Publicola and Caesar arguably owe more to Plutarch's attitude concerning the two public figures than to differences in the historical record. *Id.* Regardless of the negative connotations generally accorded commoners in the ancient world, Publicola appeared as an heroic populist, the quintessential "public man," the torchbearer of the democratic tradition—a man who directed that the slave Vindicius be freed and admitted to the tribe of his choice. *Id.* The patrician Caesar, on the other hand, was portrayed as an enslaver of free peoples, a destroyer of democratic regimes, a man for whom political power was an end in itself. *Id.* Despite the questionable accuracy of Plutarch's Life of Publicola, the biography successfully elevated the historical Publius from his stature as a mediocre, mid-level bureaucrat into a mythical symbol of democratic values, the antithesis of the totalitarian Caesar and his progeny. *Id.*

Eighteen centuries later, Plutarch's contrasting views of Caesar and Publicola influenced the

nized even by critics as the most authoritative, contemporaneous explanation of the meaning of the Constitution, albeit they were hardly free from controversy.[9] Modern political scientists continue to analyze the often self-serving, occasionally contradictory arguments advanced in The Federalist Papers. Yet, despite its flaws, the compilation remains the most authoritative source for understanding the political ideas of at least some of the Founders, namely the victorious Federalists.[10] Even Thomas Jefferson, a states' rights champion and hardly a proponent of a large, powerful, centralized government, proclaimed The Federalist Papers as, "the best commentary on the principles of government which ever was written."[11] In *Calder v. Bull*,[12] Chief Justice Samuel Chase praised Publius, "for his extensive and accurate knowledge of the true principles of Government."[13] Political scientists and judges to this day continue to sing the praises of Publius's seminal work in American political thought.[14]

Founding Fathers of a nation embittered by an arduous struggle against a distant, authoritarian regime. Of those founders, Alexander Hamilton, in particular, understood the symbolism associated with Publius, Plutarch's man of the people. As a prominent lawyer and the "acknowledged leader of the most talent-laden bar in the United States," Hamilton took note of the poor reception accorded a newspaper editorial authored under the pseudonym "Caesar" (which he himself may have authored) and offered in support of ratifying the new American Constitution. CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966). Thus, when he and fellow statesmen James Madison and John Jay authored their essays arguing in favor of the Constitution during late 1787 and early 1788, they adopted the pen name "Publius" to signify their theoretical commitment to democratic principles. *Id.*

9. KENNETH M. DOLBEARE, AMERICAN POLITICAL THOUGHT 96 (1984). The Federalist Papers was published in book form in 1788. It was almost 40 years later before The Debates in the State Conventions to the Adoption of the Federal Constitution (sometimes called Elliott's Debates) were published. Madison's papers were published posthumously in 1840 and, similarly, Hamilton's papers first were published long after his death, in 1851. James G. Wilson, *The Most Sacred Text: The Supreme Court's Use of The Federalist Papers*, 1985 B.Y.U. L. REV. 65, at 73-74.

The first volume of Max Farrand's notes was not published until 1911. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., 1937). Consequently, The Federalist Papers became the most authoritative source of primary material on the intentions of the Founders, despite the partisan, hence suspect, origins of the essays.

10. Charles Beard, an early member of the revisionist school of American history, contended that Publius and other prominent Founders of the American republic were inspired by economic motives in organizing the new government. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913). In other words, the veneration of the Framers of the Constitution was misplaced. They were not men driven by noble philosophical principles to create a new regime. They wanted to ensure that the new system of government protected the privileged class, namely themselves. Owing to his influence on subsequent political scientists and historians, who either argued for or against his economic interpretation of the Constitution, Beard became an important critic of the Founders. *See also*, JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT (1960); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1948); VINCENT OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC (1987); ELMER ERIC SCHATTSCHNEIDER, PARTY GOVERNMENT (1942); and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969).

11. QUOTED IN THE FEDERALIST CONCORDANCE xi (Thomas S. Engeman, Edward J. Erler, and Thomas B. Hofeller, eds., 1988).

12. 3 U.S. 386 (1798).

13. *Id.* at 391.

14. *See e.g.*, Martin Diamond, *Democracy and The Federalist: A Reconsideration of the*

Philip Abbott of Wayne State University has suggested that Publius's storytelling abilities were, among other things, "a kind of artillery for surrender to his theoretical innovations."[15] In other words, his skillful use of language—especially picturesque narratives and colorful metaphors—was responsible in no small measure for his ultimate success in articulating regime principles that resonate with much authority to this day. While this insight is fairly persuasive, and the importance of The Federalist Papers is well documented, the question arises whether Publius can be counted on in modern times for more than providing historical context for the founding of the American republic. Despite The Federalist Papers' well-deserved stature as what Abbott calls the "ur-text of the polity," the question remains whether Publius's work is a valuable resource in addressing contemporary problems of law and justice.[16] In other words, the issue examined in this article is whether constitutional principles defended by The Federalist Papers can provide assistance in resolving modern disputes, especially in the context of interpreting legal rules contained in statutes and cases, for a nation poised on the brink of a new millennium in the aftermath of the postmodern revolution in philosophy.[17]

Framers' Intent, 53 AMERICAN POLITICAL SCIENCE REVIEW 52 (1959); DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); *Charles W. Pierson, The Federalist in the Supreme Court*, 33 YALE L.J. 728 (1924); John P. Roche, THE FOUNDING FATHERS: A REFORM CAUCUS IN ACTION, AMERICAN GOVERNMENT: READINGS AND CASES 55-78 (Peter Woll, ed., 1969); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); and GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981).

15. Philip Abbott, *What's New in The Federalist Papers?*, 49 POLITICAL RESEARCH QUARTERLY 525 (1996). Abbott's argument that "Publius' success in winning the debate over oldness/newness can be most vividly discerned in terms of his excellence as a storyteller of the new for it is from this perspective that we can see how he captures the new and becomes its authority" is similar to James M. McPherson's account of the Union's triumph in the Civil War in his splendid essay, "How Lincoln Won the War with Metaphors." *Id.* at 528. According to McPherson, "Here lies one of the secrets of Lincoln's success as a communicator: his skill in the use of figurative language, of which metaphor is the most common example." JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1991). Linguists no doubt derive immense satisfaction from Abbott's and McPherson's insights that language plays an integral role in shaping the history of ideas.

16. Abbott, *supra* note 15, at 525.

17. Make no mistake here. The question is not framed as a hackneyed appeal to Publius and other Founding Fathers for guidance on strictly construing constitutional or statutory language. *See e.g.*, JOHN PATRICK DIGGINS, "RECOVERING 'FIRST PRINCIPLES'": CRITICAL PERSPECTIVES ON THE CONSTITUTION AND THE FATE OF CLASSICAL REPUBLICANISM, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION (Neil L. York, ed., 1988) and THOMAS C. GREY, "THE ORIGINAL UNDERSTANDING AND THE UNWRITTEN CONSTITUTION," in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION (Neil L. York, ed., 1988). Asking the question "what would Publius say about electronic bugging devices?" or similar ruminations on modern technological innovations or recent legal developments adds little, if anything, to the debate about positivist legal rules. *Id.* Laurence Tribe, among others, has attempted to puncture the myth of strict constructionism. LAURENCE H. TRIBE, "THE MYTH OF THE STRICT CONSTRUCTIONIST: OUR INCOMPLETE CONSTITUTION," in AMERICAN GOVERNMENT: READINGS ON CONTINUITY AND CHANGE (Robert Harmel ed., 1993). Instead, the question becomes: What abstract principles did Publius articulate that can be used as a foundation for examining concrete legal rules of this day? In other words, the analysis ideally should not focus on what Publius might say about particular legal rules, but what he did say about general constitutional principles, and how his views on government can assist lawyers in the modern age in interpreting legal rules.

III. THE FEDERALIST PAPERS, CONSTITUTIONAL PRINCIPLES AND LEGAL RULES

The propensity of judges and lawyers to cite Publius's essays in interpreting positivist laws makes the work an important text in American political and legal thought. Even a cursory examination of U.S. Supreme Court decisions shows frequent citations to Publius, although individual judges sometimes have used his words to illustrate points unsupported by a faithful reading of The Federalist Papers.[18] Justice William Johnson wrote in *Fletcher v. Peck*[19] that the "letters of Publius" are "entitled to the highest respect."[20] Chief Justice John Marshall cited The Federalist Papers several times in his opinions, notably in *McCulloch v. Maryland*[21] and *Cohens v. Virginia*.[22] In the latter case, he wrote that, "[t]he opinion of The Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth."[23] In *Printz v. United States*,[24] Justice Antonin Scalia cited The Federalist Papers extensively in his majority opinion, which struck down a portion of the Brady Handgun Violence Prevention Act that required local law enforcement officers to perform background checks on prospective handgun purchasers.[25]

Despite the importance of Publius's essays in understanding the origins of the American republic, the validity of citing a source other than prior legal cases and controversies remains suspect. As early as 1831, Justice Henry Baldwin expressed concern about citing philosophical and rhetorical principles to resolve matters of positivist law. "We can thus expound the constitution without a reference to the definitions of a state or nation or by any foreign writer, hypothetical reasoning, or the dissertations of The Federalist," he wrote in *Cherokee Nation v. Georgia*.[26]

Justice Baldwin's comment raises two sets of questions that may arise in using foundational principles to interpret positivist legal pronouncements. First, can a source that is not used to establish authoritative legal rules embodied in statutory enactments or case law legitimately be used to explain the "deeper" meaning as well as the applications of those rules—even if that source is arguably the "ur-text of the polity"? Second, if a source that explains constitutional principles can be used legitimately to clarify legal rules, should The Federalist Papers be that source? Thus,

18. *See* Wilson, *supra* note 9, at 66.
19. 10 U.S. 87 (1810).
20. *Id.* at 144.
21. 17 U.S. 316 (1819).
22. 19 U.S. 264 (1821).
23. *Id.* at 419.
24. 521 U.S. 898 (1997).
25. *Id.* at 2365.
26. 30 U.S. 1, 40-41 (1831).

were Publius's admirers justified in uttering such laudatory references to his work? Because the second set of questions can be addressed with ease compared to the question of whether an extralegal work can be an appropriate source of legal interpretation, let us consider the issues in reverse order.

A. THE FEDERALIST PAPERS AS A SOURCE OF CONSTITUTIONAL PRINCIPLES

The motivations and intentions of the authors of the Constitution and The Federalist Papers have been debated for more than two centuries.[27] Moreover, Publius's continued vitality, or lack thereof, has been debated at great length. Martin Diamond, a twentieth century authority on the Founders, summarized the debate succinctly. "What is the relevance of the political thought of the Founding Fathers to an understanding of the contemporary problems of liberty and justice? Four possible ways of looking at the Founding Fathers immediately suggest themselves," he wrote. "First, it may be that they possessed wisdom, a set of political principles still inherently adequate, and needing only to be supplemented by skill in their proper contemporary application. Second, it may be that, while the Founding Fathers' principles are still sound, they are applicable only to a part of our problems, but not to that part which is peculiarly modern; and thus new principles are needed to be joined together with the old ones. Third, it may be that the Founding Fathers have simply become antiquated; they dealt with bygone problems and their principles were relevant only to those old problems. Fourth, they may have been wrong or radically inadequate for their own time. Each of these four possible conclusions requires the same foundation: an understanding of the political thought of the Founding Fathers."[28]

Even if one accepts the best-case scenario articulated by Diamond—that the political principles articulated by the Founders remain "inherently adequate" (high praise indeed!)—the question remains as to why the political philosophy of the Federalists should be studied as opposed to that of the Antifederalists or other early American thinkers such

27. *See e.g.*, FRANK DONOVAN, MR. MADISON'S CONSTITUTION: THE STORY BEHIND THE CONSTITUTIONAL CONVENTION (1965); DORIS FABER & HAROLD FABER, WE THE PEOPLE (1987); FRED RODELL, FIFTY-FIVE MEN (1936); HERBERT J. STORING, "THE FEDERAL CONSTITUTION OF 1787: POLITICS, PRINCIPLES, AND STATESMANSHIP," in THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION 12 (Ralph A. Rossum and Gary L. McDowell, eds., 1981).

28. Diamond, *supra* note 14, at 52. Diamond is widely regarded as one of the most influential commentators on the Founders in general and The Federalist Papers in particular. It was Diamond who discussed the legitimacy of analyzing The Federalist Papers as a reasonably consistent work of one author (Publius) in an effort to avoid the never-to-be-resolved Hamiltonian-Madisonian debate over the appropriate role of the federal government in the American regime. MARTIN DIAMOND, "THE FEDERALIST," in 1787-1788, HISTORY OF POLITICAL PHILOSOPHY (Leo Strauss and Joseph Cropsey, eds., 1972). For a modern critique of Diamond's view of the Founders, *see* Alan Gibson, *The Commercial Republic and the Pluralist Critique of Marxism: An Analysis of Martin Diamond's Interpretation of Federalist #10*, 25 POLITY 497 (1993).

as Thomas Paine, Samuel Adams or, for that matter, Thomas Jefferson?[29] The answer, while perhaps not immediately obvious, is conceptually simple. The Federalists' position prevailed, and the American Constitution was created in accordance with their political principles. As influential as other thinkers have been in developing the regime, The Federalist Papers are inextricably linked to the Constitution in a way no other contemporaneous work can purport to be. Moreover, it follows that because subsequent court cases have been decided on the basis of their concordance with the Founders' Constitution, a work that provides guidance on the meaning of the Constitution can help assess the compatibility of a particular law with the general principles (and underlying philosophy) of the regime.

Evidence suggests that the U.S. Supreme Court has recognized the value of The Federalist Papers as a tool for discerning the meaning of principles embedded in the Constitution for precisely this reason—because Publius's letters arguably explain the thinking behind the Constitution's aphoristic pronouncements.[30] It is not hyperbolic to posit that, given its prominence in Supreme Court opinions, The Federalist Papers, more than any other single body of work written by the Founders, serves as an explanation for the principles underlying the American regime.[31]

The essays articulate a vision of human nature squarely in line with a post-Machiavellian distrust of the "acquisitive" character of human beings.[32] Gone (or at least greatly modified) was ancient man's notion of

29. *See e.g.*, Christopher M. Duncan, *Men of Different Faith: The Anti-Federalist Ideal in Early American Political Thought*, 26 POLITY 387 (1994); MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 (1963); THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham, ed. 1986); THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., 1987); JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION: 1781-1788 (1961); THOMAS JEFFERSON ON DEMOCRACY (Saul K. Padover, ed., 1939); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

30. In 1924, law professor Charles W. Pierson observed that The Federalist Papers had been cited in numerous Supreme Court opinions since the court's creation. Pierson, *supra* note 14, at 734. Professor Pierson posed a rhetorical question: "What of the future? Will the Publius letters continue to figure in decisions of the Court as they have in the past? Students of our political system will have little hesitation in saying yes. Vital constitutional questions are impending in the United States." *Id.* The professor proved to be remarkably perspicacious. By 1984, the essays had been cited in over 200 Supreme Court cases, albeit sometimes inaccurately or inconsistently. Wilson, *supra* note 9, at 66.

31. While acknowledging the importance of The Federalist Papers in understanding the origins of the American regime, Albert Furtwangler cautioned against relying too heavily on Publius's work to illuminate the entire body of Founding Thought. ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS (1984). Not only are the essays politically partisan—written in the heat of battle, so to speak—but they may not be the clearest articulation of Founding Thought when read outside the context of other writings of the period. *Id.*

32. For a more detailed discussion of American "acquisitiveness," *see also*, MARTIN DIAMOND, "ETHICS AND POLITICS: THE AMERICAN WAY," in THE QUEST FOR JUSTICE: READINGS IN POLITICAL ETHICS 295-315 (Leslie G. Rubin and Charles T. Rubin, eds., 1992); MARC F. PLATTNER, "AMERICAN DEMOCRACY AND THE ACQUISITIVE SPIRIT," in HOW CAPITALISTIC IS THE CONSTITUTION? 1-21 (Robert A. Goldwin and William A. Schambra, eds., 1982); JAMES ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1907). For a general

noblesse oblige. In articulating the principles of a new republic, Publius considered the human heart to be inherently self-interested. Accordingly, the Founders had to control the destructive appetites of citizens if they sought to establish a regime based on the notion of self-governance by the masses. This was Publius's concern in "Federalist No. 10" when he wrote that, "democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."[33] This view of man was not a moral condemnation uttered in despair at the savagery of human beings.[34] Publius possessed a negative view of human nature, but he was not a pessimist in the Hobbesian sense.[35] His view was a theoretically objective understanding of the facts to be reckoned with in designing a popular government. The U.S. Constitution, therefore, was a vehicle for protecting individual and property rights from the passions of the mob, on one hand, and elite, concentrated power, on the other. This objective would be achieved by "institutionalizing the pessimism."[36]

The Founders did not expound on the moral implications of their views on human nature, for a systematic analysis of human psychology was not Publius's purpose in authoring The Federalist Papers. These "men of little faith" took it for granted that their presuppositions on the pathology of man would withstand the scrutiny of their peers and, ultimately, their progeny.[37] In Publius's words:

> The history of almost all the great councils and consultations, held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests, is a history of factions, contentions, and disappointments; and may be

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discussion of the link between a political regime and its underlying economic structure, see WALTER DENNIS BURNHAM, "THE CONSTITUTION, CAPITALISM, AND THE NEED FOR RATIONALIZED REGULATION," in HOW CAPITALISTIC IS THE CONSTITUTION? 75-105 (Robert A. Goldwin and William A. Schambra, eds., 1982).

33. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

34. As Martin Diamond observed, The Federalist Papers assumed that men were not savages. Diamond supra note 28, at 631. They were eminently rational. *Id.* They simply had to be shown the proper method for controlling passions, hence tyranny. *Id.* The work, therefore, "spoke also to thoughtful men then and now, with a view to the permanence of its argument." Similarly, Maynard Smith argued that "[g]overnment is necessitated by the failure of passion to 'conform to the dictates of reason and justice without constraint.' In every 'free government,' the 'cool and deliberate sense' of the people will 'ultimately prevail' over both its rulers and its own passions and illusory interests." Maynard Smith, *Reason, Passion and Political Freedom in The Federalist*, 22 JOURNAL OF POLITICS 525, 528 (1960).

35. Thomas Hobbes, an English political philosopher, contended that life in a pre-government state of nature was "solitary, nasty, brutish, and short." THOMAS HOBBES, LEVIATHAN 107 (Herbert W. Schneider, ed., 1958). Consequently, man entered into civil society to protect himself from a fear of violent death at the hands of other men. *Id.* Hobbes's work was well-known to the Founding Fathers, although his influence on Publius was shaped and modified by John Locke's TWO TREATISES OF GOVERNMENT. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Thomas I. Cook, ed., Press 1947).

36. Smith, *supra* note 34, at 525.

37. THOMAS SCHWARTZ, PUBLIUS AND PUBLIC CHOICE: THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 31-38 (1989).

> classed among the most dark and degrading pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth; and by their lustre darken the gloom of the adverse prospect to which they are contrasted.[38]

Accordingly, the challenge for The Federalist Papers was not to reflect on the imperfections of man in a purely theoretical context, but to design a government that would transform "the infirmities and depravities of the human character" from vices into some semblance of (admittedly low-grade) virtues. By establishing "good government" through ratification of the U.S. Constitution, citizens could use, if not redeem, their base human nature to advance nobler purposes. Publius believed that, acting through a republican form of government, the whole of the national character could exceed the sum of its individual constituents. "Happy will it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough, to set so glorious an example to mankind . . . ," he wrote.[39]

If one preeminent stumbling block to this transformation existed, it was the problem of factions. Several commentators have rightly observed that the causes of factions are fairly broad and are not limited to economic self-interest.[40] Although the unequal distribution of property may be the "most common and durable source of factions," ideology is also a contributing factor.[41]

Whatever their origins, factions, these "mortal diseases under which popular governments have everywhere perished," had to be cured if popular government were to exist in perpetuity.[42] Of the two methods of "curing the mischiefs" of factions, Publius concluded that the first, removing the causes through totalitarian government controls, destroyed liberty and was "worse than the disease."[43] In lieu of destroying liberty, the causes of factions could be removed by giving all citizens the same opinions, passions and interests, but this method was similarly objectionable. If removing the causes of factions was not a viable option, the only recourse was to control its effects. Not surprisingly, it is here that one witnesses the intersection of the problem of factions, human nature, and the

38. THE FEDERALIST NO. 37, at 231 (James Madison) (Clinton Rossiter ed., 1961).

39. THE FEDERALIST NO. 36, at 224 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. *See e.g.*, GEORGE CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC (1989); Smith, *supra* note 34; Benjamin F. Wright, *The Federalist on the Nature of Political Man*, 59 ETHICS 12 (1949).

41. Publius wrote: "But the most common and durable source of factions, has been the verious and unequal distribution of property." THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). Earlier, however, he was careful to acknowledge that "[t]he latent causes of faction are thus sown in the nature of man . . . " *Id. See also*, Epstein, *supra* note 14, at 60, and White, *supra* note 14, at 57.

42. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

43. *Id.* at 78.

intended pivotal place of private property within the new regime.

Far from discouraging the formation of factions, Publius thought the appropriate solution was just the reverse: encourage the proliferation of innumerable factions so that it would be virtually impossible for a majoritarian faction to form (or, if formed, to long endure).[44] What would propel the steady creation of these numerous minority factions? "The diversity in the faculties of men, from which the rights of property originate . . . . " Not only do these rights of property originate in the very nature of man, but "[t]he protection of these [unequal] faculties [of acquiring property] is the first object of government."[45]

Publius hereby established what might be called the two great pillars of the new regime. First, by grounding property rights in the diverse faculties of men, he accepted that the regime would have an uneven distribution of things men value—material goods as well as honors—precisely because inequality is natural. Differing in such fundamental endowments as intelligence, motivation, endurance, and willingness to accept risk, men who start out equal invariably will end up otherwise. (At its core, this was the meaning of "equality of opportunity.") Second, by stipulating that the government has as its very first object the protection of these naturally unequal faculties (think for a moment of the government-protected rights of copyright and patent), Publius unequivocally created what one might call the first principle of the regime, namely that government is not only to safeguard but also enhance the production of material wealth.[46]

As regime foundations go, the first principle was admittedly base. But, as is often the case with such foundations, it contained a higher pur-

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44. Publius sought to control the abuses of democratic government through "scientific" means. In "Federalist NO. 9," he wrote: "The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients." THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For Publius, principles of federalism and the institutional structure of republican government would resolve political problems that had confounded thinkers since the days of the ancient Greeks. *Id.* A "republic," therefore, was a form of democratic government ("mixed" with non-democratic elements) that had been rehabilitated by science. Influential commentators such as Martin Diamond and Robert Dahl have acknowledged Publius' efforts to establish a scientific basis for government (albeit Dahl criticized "Madisonian democracy" for its failure to establish a genuine "political science," as opposed to a political "ideology"). Similarly, while admiring Publius' political theory as appropriate to the waning days of the eighteenth century, Benjamin Barber has criticized structural federalism, arguing that it has outlived its intended purpose. Benjamin R. Barber, "The Compromised Republic: Public Purposelessness in America," in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC, at 54 (Robert H. Horwitz, ed., 1986). For a general discussion of the positive and negative aspects of federalism, see especially, THOMAS J. ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS (1989); Martin Diamond, *The Ends of Federalism*, 3 PUBLIUS 129 (1973); MORTON GRODZINS, "THE FEDERAL SYSTEM," in CLASSIC READINGS IN AMERICAN POLITICS at 61-77 (Pietro S. Nivola and David H. Rosenbloom, eds., 1990); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Vol. 1 (1945).

45. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

46. *See* FORREST MCDONALD, "THE CONSTITUTION AND HAMILTONIAN CAPITALISM," in HOW CAPITALISTIC IS THE CONSTITUTION? at 49-74 (Robert A. Goldwin and William A. Schambra, eds., 1982); MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM (1982).

pose. "From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties," he observed.[47]

In other words, under the proper conditions, the diversity of our natures gives rise not only to unequal "degrees" of property, but also to different "kinds" of property. Because our opinions and passions are most influenced by our material possessions (again, a base view), multiplying both the kinds and degrees of property available will facilitate the formation of numerous minority factions. In reality, the great task of government in protecting these faculties fosters a means by which the governed "check" themselves, for it is in the interest of minority factions to see that none of their competitors becomes a majority faction, which then could impose its self-interested will on the rest. Such "self-government" does not necessarily require formal governmental regulation or institutional structures; in its optimum form, government only needs to "channel" the self-interested behavior that is driven by human nature itself.[48] This view of human nature was perhaps best expressed by Publius in a famous passage from "Federalist No. 51":

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.[49]

While individuals can be relied on to govern themselves, ambitious men, through their various enterprises, sometimes will encroach on individual liberties. For Publius, "auxiliary precautions" included not just a large land area where commercial opportunities to create private property are maximized, but also institutional controls supplied by a popular government, specifically a republican form of government.[50]

According to Publius, the principles underlying the new regime and embedded in the Constitution, broadly stated, were a belief in the beneficial aspects of pluralism and the creative possibilities found in diversity and conflict, the importance of protecting liberty and property interests,

47. THE FEDERALIST NO. 10, supra note 33, at 78 (James Madison)(Clinton Rossiter ed., 1961).

48. This principle reinforces another of Publius's critical points about controlling the governors rather than the governed: abuses can be curtailed by dividing power among and between departments. Both of these principles, so fundamental to the Constitution and The Federalist Papers, rely on a certain view of human nature.

49. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

50. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

the need to safeguard minority rights through "mitigated democracy" created and maintained by institutional controls, and the relative sovereignty of citizens who participate in consensual self-government. It was these principles, as articulated in The Federalist Papers, that served as the foundation of American political thought.

Statements of broad principles may be helpful in understanding foundations of American law, but they are exceedingly difficult to apply in specific cases. To illustrate this point, it is instructive to examine three instances in contemporary positivist law where identifying and attempting to apply constitutional principles discussed in The Federalist Papers might, in a best-case scenario, provide little practical guidance for legal interpretation and, in egregious cases, could contravene well-established positivist legal rules. A multitude of additional examples might be applicable to the discussion, but these three should suffice.

The first two examples involve controversial statutes that, according to critics, "make a federal case" out of issues historically handled by states, namely hazardous waste management and crime. The third example involves a constitutional doctrine announced by the U.S. Supreme Court at a time when the judiciary became considerably more activist during the New Deal. In all three examples, judges interpreting the statute or case did not cite The Federalist Papers as controlling authority but, had they done so, the question of whether the essays would support an expansive view of federalism would arise.

B. PROBLEMS IN USING CONSTITUTIONAL PRINCIPLES TO INTERPRET LEGAL RULES: THREE EXAMPLES

1. CERCLA

This first example demonstrates why The Federalist Papers provide little practical guidance in interpreting positivist legal rules. Consider the field of environmental law. Because environmental degradation and toxic chemical releases respect no political boundaries, and because this area of the law often has relied upon federal statutes and administrative regulations to share enforcement authority with states and, by extension, municipalities, few areas of the law raise as many explicit and implicit questions of federalism.

One of the most far-reaching and controversial environmental statutes of recent years has been the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or Superfund, as it is commonly known).[51] CERCLA was passed by Congress in 1980 to protect public health and the environment from exposure to hazardous substances. The act was amended six years later in the Superfund

51. Pub. L. 96-510, 94 Stat. 2767,(codified as amended at 42 U.S.C.A. §§ 9601- 9675 [1980]).

Amendments and Reauthorization Act (SARA).[52] For all of CERCLA's good intentions, many critics contend that the measure was forced on business and industry by a lame duck Congress after a limited debate, under a suspension of rules in the House, with no provision for amendments and virtually no legislative history. Even environmentalists who support CERCLA admit that its origins and scope are far-reaching and, therefore, its remedial provisions can be financially calamitous for some potentially responsible parties (PRPs). One prominent legal scholar has concluded that CERCLA is "[o]ne of the more dramatic forty-three pages of contemporary environmental law" and "the legal equivalent of a termite colony—undergoing constant structural change as a result of the aggregation of local endeavors" owing to the broad scope of the act, particularly the joint and several and strict liability provisions found in section 107.[53]

CERCLA differs from previous environmental statutes in several ways. First, it regulates close to 40,000 identified hazardous substance sites retrospectively, that is, it addresses and remedies demonstrated problems from past releases of hazardous substances.[54] In addition, because CERCLA can apply at any stage of a substance's life, depending on when it is released (or threatened to be released) into the environment, the act potentially affects tens of thousands of additional sites around the country. By creating private rights of action for individuals to seek financial redress for costs associated with cleaning up contaminated hazardous materials sites (through equitable injunctions for enforcement and collection of penalties while still not allowing for damages to cover personal injury claims), CERCLA creates an incentive for all parties—claimants as well as PRPs—to focus on site remediation in lieu of compensating pri-

52. Pub. L. No. 99-499, 100 Stat. 1613 (1986), 42 U.S.C.A. § 9611 (1988). *See also*, OLGA L. MOYA & ANDREW L. FONO, FEDERAL ENVIRONMENTAL LAW: THE USER'S GUIDE at 155-158 (1997).

53. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW at 680, 683 (1994). CERCLA mitigates the severity of the joint and several and strict liability provisions of §107 by providing an alternate avenue for recovering from PRPs. *Id.* Under §113, which was added by SARA in 1986, common law negligence principles have been codified into the act to spread tort responsibility among PRPs according to degrees of fault. *Id.* This provision, coupled with an "innocent landowner" defense, has refined CERCLA to retain the Act's hardline approach to hazardous substance releases while also adding a measure of equity to an otherwise draconian statutory scheme. *Id.* For more detailed information, see Comment, *CERCLA Liability, Where It Is and Where It Should Not Be Going: The Possibility of Liability Release for Environmentally Beneficial Land Transfers*, 23 ENVTL LAW 295, 315 (1993); STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS at 343-347 (1997); Note, *Sifting Through the Ambiguity: A Critical Overview of the Comprehensive Environmental Response, Compensation and Liability Act as Amended by the Superfund Amendments and Reauthorization Act*, 17 T. MARSHALL L. REV. 191, 210 (1991); and Note, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA*, 23 U. RICH. L. REV. 403, 406 (1989).

54. CERCLA also differs from another important statute, the Resource Conservation and Recovery Act (RCRA), which regulates hazardous waste. Pub. L. No. 91-512, 84 Stat. 1227, 42 U.S.C.A. §§ 6901-6992(k) (1982). By referencing hazardous substances in lieu of hazardous waste, CERCLA can regulate a wider variety of chemical releases than is possible under RCRA. Ferrey, *supra* note 53, at 298-299. For a discussion of the evolution of hazardous materials statutes and regulations, see: Martin V. Melosi, *Hazardous Waste and Environmental Liability: An Historical Perspective*, 25 HOUS. L. REV. 741 (1988).

vate litigants for personal injury.[55] Finally, CERCLA does not allow PRPs to escape liability through traditional common law defenses such as indemnification clauses in commercial contracts, assertions that the corporate veil prevents the assignment of liability to corporate officers, the protection of federal bankruptcy laws, or the relatively narrow requirements of mens rea in criminal law. In short, CERCLA makes it extremely difficult for PRPs to impose the external costs of their business operations on other segments of society (i.e., taxpayers).[56] It also provides funding (through the Superfund) to cover costs passed onto third parties because a PRP cannot be identified or, once identified, is insolvent.[57]

CERCLA unquestionably affects property rights. The sale of a Superfund site that later poses a threat to human health or the environment allows the court to assign liability to both the former owner, who owned the site during the time the release occurred, as well as a new owner who purchased the site with actual or constructive knowledge that contaminants were present.[58] Moreover, former owners of a disposed hazardous substance remain liable even if the substance is subsequently removed by someone else, perhaps illegally, to a second site.[59] These features of the statute require property owners to be vigilant in selling, purchasing or otherwise transferring their property rights.[60]

In any case involving a CERCLA claim, a judge would receive little practical guidance in consulting The Federalist Papers. On one hand, because the statute allows private parties to recover cleanup costs and thereby mitigate the diminution in their property values owing to a hazardous materials release, Publius would find CERCLA to be an effective tool for protecting property. On the other hand, because the act changes common law rules concerning the sale, distribution or other conveyance of an affected site, it limits PRPs' property rights—even if a particular PRP did not directly contaminate the Superfund site.

Identifying a constitutional principle, such as the importance of protecting property rights as an extension of personal rights, does nothing to assist a court in deciding the outcome of a CERCLA case. The legal rule depends on the factual circumstances in the litigation. The judge could find rhetorical support in The Federalist Papers for virtually any decision

55 *See* Rodgers, *supra* note 53, at 783-787; Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181 (1986).

56. Joseph A. Sevack, *Passing the Big Bucks: Contractual Transfers of Liability Between Potentially Responsible Parties Under CERCLA*, 75 MINN. L. REV. 1571 (1991).

57 See e.g., Ferrey, *supra* note 53, at 301-302; Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal*, 87 NW. U.L. REV. 897 (1993).

58. Dedham Water Company v. Cumberland Farms Dairy Inc., 889 F.2d 1146 (1st Cir. 1989).

59. United States v. Cannons Engineering Corp., 720 F. Supp. 1027 (D. Mass. 1989).

60. See Geoffrey Douglas Patterson, *A Buyer's Catalogue of Prepurchase Precautions to Minimize CERCLA Liability in Commercial Real Estate Transactions*, 15 U. PUGET SOUND L. REV. 469 (1992).

he or she made. Unfortunately, finding support for any and all decisions is tantamount to finding no support at all.

2. Civil RICO

A second example further illustrates why consulting The Federalist Papers will add little to positivist legal interpretation. Within criminal law, the Racketeer Influenced and Corrupt Organizations (RICO) Act raises many important questions about an area that traditionally has been left to the states. RICO allows jurisdiction for some criminal prosecutions and civil actions for damages to be removed to the federal courts, thereby significantly altering the relationship between states and the federal government. RICO originally was signed into law on October 15, 1970, as Title IX of the Organized Crime Control Act (OCCA).[61] The original target of the OCCA was organized crime, especially La Cosa Nostra, although by the 1990s more than 90 percent of all RICO cases were filed as private rights of action relying on the act's civil provisions.[62] Moreover, by late 1997, thirty-two states and territories had enacted their own "little RICO" statutes, most of which authorized private civil damage actions.[63] Those private actions sometimes included facts far removed from cases involving organized crime.[64]

As it is currently written and interpreted, the act's criminal provisions make it unlawful to engage in four types of conduct. Under section 1962(a), it is unlawful to use or invest income derived from a pattern of racketeering to acquire an interest in an enterprise.[65] Section 1962(b) makes it a crime for a person to acquire or maintain an interest in any enterprise through a pattern of racketeering activity. The most frequently litigated provision, section 1962(c), criminalizes participation in the affairs

61. Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C.A. §§ 1961-1968 (1970)).

62 JOHN E. FLOYD, AN INTRODUCTION TO CIVIL RICO, CIVIL RICO (State Bar of Georgia 1992), at 01-001.

63. JOHN A. CHANDLER, AMELIA TOY RUDOLPH, AND WILLIAM K. WHITNER, AN INTRODUCTION TO FEDERAL RICO, RICO SEMINAR at 01-001 (State Bar of Georgia 1997). *See also*: *Gregory P. Joseph, Federal Practice RICO "Conduct,"* NAT'L L. J., July 26, 1999, at B11.

64. Floyd, *supra* note 62, at 01-001.

65. The term "racketeering" has a dubious history within the American lexicon. MURRAY I. GURFEIN, "THE RACKET DEFINED," in ORGANIZED CRIME IN AMERICA: A BOOK OF READINGS at 181 (Gus Tyler, ed., 1962). By one account, it was first applied to "Big Tim" Murphy, an infamous gangster of the 1920s. *Id.* Another anecdote suggests that an investigator looking into corruption charges against two Chicago teamsters in 1885 mused that "this is not a noise but a racket." *Id.* A third theory holds that Vaudeville supplied the term as synonymous with a lazy way of entertaining a generally undiscriminating audience. *Id.*

The most likely origin of the term, however, refers to the loud noises emanating from a boisterous party. During the 1890s, social clubs in New York City hosted large parties, or "rackets." *Id.* In some cases, political leaders would coerce their followers into buying tickets to the gala events. *Id.* Local gangsters eventually joined in, forming "associations" to sell tickets to those New York City parties. *Id.* Thus, the profits derived from selling party tickets became known as an "easy racket." *Id.* Whatever the origins of the term, by the 1950s, organized criminal syndicates often participated in "racketeering" enterprises designed to infilitrate legitimate businesses and thereby shield profits from law enforcement officials. *Id.*

of an enterprise through a pattern of racketeering activity. Finally, conspiring to violate any of the forgoing provisions is a crime pursuant to section 1962(d).

RICO is especially attractive to plaintiffs in civil cases because the civil provisions allow for trembled damages and the recovery of attorney fees. In addition, recovery of damages under civil RICO requires the plaintiff to shoulder a lesser burden of proof than is required to obtain a criminal RICO conviction. Because they can rely on a relaxed evidentiary standard to recover money damages, private litigants have a strong incentive to pursue what might otherwise be considered a dubious cause of action.[66]

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66. Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 814 (1990). Since its enactment, civil RICO has not suffered from a shortage of critics. According to one commentator, "RICO has clearly developed into something other than what its enactors anticipated." Floyd, *supra* note 62, at 01-001. D.C. Circuit Court of Appeals Judge David Sentelle once called RICO "the monster that ate jurisprudence." David Sentelle, *Wounding the RICO Beast*, WASH. TIMES, November 27, 1989, at F2. Vanderbilt University law professor Robert K. Rasmussen has suggested that "RICO's bark . . . is accompanied by a bite worthy of a pit bull." Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990). Commentators Paul A. Batista and Mark S. Rhodes have referred to civil RICO as "the legislative equivalent of the 'stealth bomber.'" Paul Batista & Mark S. Rhodes, CIVIL RICO PRACTICE MANUAL: 1995 CUMULATIVE SUPPLEMENT NO. 2 at 1 (1995). *See also*, Paul Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DELAWARE J. OF CORP. LAW 181 (1983). In Miranda v. Ponce Federal Bank, the First Circuit Court of Appeals referenced the act as "an unusually potent weapon—the litigation equivalent of the thermonuclear device." 948 F.2d 41, 44 (1st Cir. 1991). G. Robert Blakey of the Notre Dame Law School, a legal scholar who helped draft RICO and subsequently served as its most tireless defender, has repeatedly recommended that "[e]fforts to circumscribe RICO in the courts should . . . be turned aside." G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 348-349 (1982). See also, G. Robert Blakey and Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?,"* 43 VAND. L. REV. 851 (1990). Yet, at the same time, he has recognized that the courts' continued enlargement of RICO far beyond organized crime, especially in abortion cases, "will unconstitutionally chill social protest." G. Robert Blakey, *Enlarged RICO Threatens Right of Free Speech*, NAT'L L. J., May 4, 1998, at A22.

Other commentators have examined the statute and derided critics' fears concerning the overbreadth of civil RICO as overwrought. Proclaiming RICO's constitutionality "precarious," one commentator nonetheless has concluded that "RICO civil remedies are remedial and regulatory in nature and therefore are constitutional . . . . " Comment, *The Precarious Constitutionality of RICO Civil Remedies*, 2 N. ILL. U. L. REV. 413, 447 (1982). Rejecting the criticism that RICO undermines principles of federalism by "making a federal case" out of claims that ordinarily could be handled effectively through state criminal and tort law, another observer has written that "[t]he RICO statute does not expressly divest the courts of jurisdiction over RICO claims, and the legislative history contains no evidence that Congress 'even thought of the issue.'" Michael P. Kenny, *RICO and Federalism: A Case for Concurrent Jurisdiction*, 31 B.C. L. REV. 239, 263 (1990). Kim A. Gandy, executive vice president of the National Organization of Women, has defended the use of civil RICO in abortion cases, observing that, "[t]here are indeed legitimate concerns about the RICO law, but they don't apply to this case against the network of thugs (the self-described 'pro-life mafia') that has used fear, force and violence to stop abortion 'by any means necessary.'" Kim A. Gandy, *Critics of NOW's Use of RICO Belittle Violence*, NAT'L L. J., May 18, 1998, at A24. *See also*, Jill Schachner Chanen, *A Trial Twelve Years in the Making; After Victory Against Anti-Abortion Groups, NOW Lawyer Recalls the Long Battle*, A.B.A. J., June 1998, at 38-40.

While not definitively settling the debate regarding the application of civil RICO, the U.S. Supreme Court repeatedly has emphasized that civil RICO provisions are constitutional as a matter of positivist law. *See*, National Organization for Women, Inc. v. Scheidler, 510 U.S. 249

The lower federal courts have been hostile to civil RICO cases based on the difficulty of applying the vaguely-worded statute to increasingly creative fact patterns. Because the U.S. Supreme Court has refused to limit civil RICO to organized crime cases, however, the statute has become a potent, high-profile litigation tool.[67] Given its broad scope, the statute also has been used in novel ways. For example, the RICO statute was the basis of a claim brought by the children of Sonny von Bulow against their stepfather, Claus, even though he had been acquitted of criminal charges that he tried to murder his comatose wife. The plaintiffs asserted civil racketeering charges to recover money he received from the estate, and the court sustained the suit despite von Bulow's motion to dismiss.[68] In 1991, the owners of several adult dance clubs challenged the denial of their business licenses by relying on civil RICO.[69] Perhaps the most creative use of civil RICO occurred in a case where a divorce lawyer's former client alleged that the lawyer "defrauded her into having sexual relations with him in lieu of payment for his services."[70] Although the woman eventually lost her case, she was able to rely on civil RICO to gain entry into the federal courts.[71]

Civil RICO is such a complex, fact determinative statute that it is difficult to ascertain how it squares with constitutional principles articulated

(1994); H.J., Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Company, 473 U.S. 479 (1985); Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576 (1981).

67. *See e.g.*, H.J., Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989); *Turkette*, 452 U.S. at 576 (1981). The number of civil RICO cases has risen dramatically since the inception of the act. From 1970 until 1985, approximately 300 civil RICO cases were filed each year. By 1988, the number of cases had increased to almost 1,000 a year. The number has leveled off at roughly 1,000 per year in the 1990s. *See* Michael Goldsmith, *RICO and "Pattern": The Search for "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971, 998 (1988); Michael Goldsmith and Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735 (1990). Yet, despite the large increase in the number of cases in the 1980s, approximately 60-65 percent of civil RICO cases filed in federal courts are eliminated before trial each year, leading some pro-civil RICO commentators to dismiss the claims of opponents who argue that the statute imposes an onerous burden on the federal court system. Stated another way, the average number of civil RICO cases each year translates into approximately ten per district or fewer than two per federal district judge per year. Chandler, *supra* note 63, at 01-067 - 01-068.

68. Von Bulow v. Von Bulow, 634 F. Supp. 1284 (S.D.N.Y. 1986).

69. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3d. Cir. 1991).

70. Doe v. Roe, 958 F.2d 763, 765 (7th Cir. 1992).

71. *Id.* With the emergence of RICO as a tool for resolving civil cases that do not involve organized crime, the statute has been used in ideological disputes, much to the chagrin of civil libertarians. This usage has been especially controversial in anti-abortion protest cases. *See* Northeast Women's Center, Inc. v. McMonagle, 624 F. Supp. 736 (E.D. Pa. 1985) (McMonagle I), *vacated and remanded*, 813 F.2d 53 (3d. Cir. 1987), *on remand*, 665 F. Supp. 1147 (E.D. Pa. 1987) (McMonagle II), 670 F. Supp. 1300 (E.D. Pa. 1987) (McMonagle III), 689 F. Supp. 465 (E.D. Pa. 1988) (McMonagle IV), *modified*, 868 F.2d 1342 (3d. cir. 1988), *cert. denied*, 110 S. Ct. 261 (1989); Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d. Cir. 1990); *Scheidler*, 510 U.S. at 249. *See also*, BARBARA HINKSON CRAIG AND DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS (1993); Note, *Northeast Women's Center, Inc. v. McMonagle: A Message to Political Activists*, 23 AKRON L. REV. 251 (1989); Daniel Popeo, *Civil RICO: New Weapon of Choice?*, 1 FLORIDA BUSINESS INSIGHT 28 (1997); David E. Rovella, *Abortion Foes Face RICO Suit; NOW's Novel Lawsuit Could Bankrupt Protest Groups*, NAT'L. L. J., March 23, 1998, at A6.

in The Federalist Papers. On one hand, the statute strengthens the powers of the federal government in addressing criminal conduct that threatens the stability of the nation's financial institutions. Publius certainly argued in favor of providing the federal government with the requisite power to ensure the smooth, orderly flow of goods and services, especially in interstate commerce, and the stability of the nation's economy. In "Federalist No. 11," he observed that "an unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets."[72] The damage to the U.S. economy if the federal government were divested of its authority to provide for a stable financial infrastructure was too horrible for Publius to contemplate. "The entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates," he wrote.[73]

Yet The Federalist Papers also can be read as supporting state sovereignty in the face of an ever-expanding federal government. Publius may have been an ardent advocate for a strong central government, but he did not champion a unitary political system. "There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light," he wrote in "Federalist No. 17." Later he added, "I mean the ordinary administration of criminal and civil justice."[74] Separating power into a system of concurrent governments, thereby limiting sovereignty, "is of great importance in a republic, not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[75] Further separating political power into a system of distinct departments adds a "double security" to "the rights of the people" because "[t]he different governments will control each other, at the same time that each will be controlled by itself."[76] In "Federalist No. 14," he observed:

> The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the

72. THE FEDERALIST NO. 11, at 89 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

73. THE FEDERALIST NO. 13, at 97 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In "Federalist No. 39," Publius was careful to distinguish between "federal" and "national" powers, although the distinction generally is lost on modern audiences. He wrote that if the power covered by the Constitution were "wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union." *Id.* If it were "wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all." THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in the original). Because the Constitution was "neither wholly national nor wholly federal" according to Publius, it covered questions involving both individuals and states. *Id.*, (emphasis in the original).

74. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

75. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

76. *Id.*

> convention to abolish the governments of the particular States, its adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished the general government would be compelled by the principle of self-preservation to reinstate them in their proper jurisdiction.[77]

Given his distrust of government authority, Publius might conclude that civil RICO threatens the carefully constructed system of federalism and separation of powers he articulated so persuasively in "Federalist No. 10" and "Federalist No. 51," respectively. Civil RICO makes a "federal case" of some criminal and civil cases that historically have been the province of state jurisdiction.[78] As a result, it may threaten civil liberties because it empowers the federal government to become more actively involved in resolving criminal cases and attendant civil damage claims.[79]

Moreover, civil RICO's emphasis on trembled damages, and the incentive this creates for plaintiffs to pursue such claims zealously, may undermine property rights, even in non-meritorious cases. A defendant facing a civil RICO lawsuit cannot convey property free of encumbrances or distribute funds freely because he does not know if those resources will be needed to satisfy a judgment against him. In addition, intangible "property" such as the defendant's reputation and standing in the business community are placed at risk because a civil judgment may result in labeling the defendant a "racketeer." All of these risks to a defendant's financial assets may violate Publius's assertion that "[m]oney is, with property, considered as the vital principle of the body politic; as that which sustains life and motion . . . ."[80]

Finally, and perhaps most importantly, Publius might reasonably conclude that civil RICO's treatment of factions is anathema. The Federalist Papers envisions a regime where all factions compete with each other on a more or less equal footing. Yet the potential civil liability imposed by the statute—trebled damages, even when a defendant has not been convicted of racketeering under RICO's criminal provisions—may restrict some factions from competing. This distinction is owed to the statute's "chilling" effect on free speech and dissident political activity.[81]

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77. THE FEDERALIST NO. 14, at 102 (James Madison)(Clinton Rossiter ed., 1961).

78. Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 779 (1990).

79. *See* Califa, *supra* note 66 at 815-816.

80. THE FEDERALIST NO. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81. Justice Thurgood Marshall expressed the concern with civil RICO's "chilling" effect eloquently in his dissent in *Sedima, S.P.R.L.*: "Many a prudent defendant, facing ruinous exposure will decide to settle a case with no merit . . . . [C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." 473 U.S. 479, at 506. As one commentator observed, "[t]he mere onset of litigation can provide a serious affront to first amendment privileges. Indeed, plaintiffs intolerant of a group's opinions may file suit, realizing that their allegations will be very difficult to prove, with the sole intention of inhibiting the activities that they consider to be an imposition. Our system cannot tolerate such a casual use of the courts to achieve political ends through litigation, especially when those ends are not grounded in legitimate allegations." Califa, *supra* note 66, at 835.

Controlling factions before they engage in political dissent arguably is tantamount to what Publius called "removing the causes of faction," that is, "destroying the liberty which is essential to its existence."[82] Because the "latent causes of faction are . . . sown in the nature of man," destroying the liberty of factions truly is a remedy "worse than the disease."[83]

Again, the possible interpretations of The Federalist Papers raise more questions than they answer. In the face of conflicting language, which objective should reign supreme—the need for increased federal authority to fight a racketeering problem that cuts across state, national and sometimes international boundaries (thereby threatening the nation's financial institutions) or the need to curb the encroachment of the federal government on state sovereignty, hence individual liberty? Ronald Dworkin may be correct that it is important to compare the relative weight of principles when two or more collide, but in situations where principles are not articulated clearly, the calculation becomes problematic. By what measure is one principle held in higher regard than its brethren?[84] Unfortunately, any time and energy spent sorting out the problem of conflicting principles articulated in The Federalist Papers does nothing to resolve the legal dispute that triggered the inquiry in the first place.

3. United States v. Carolene Products Company and the Preferred Freedoms Doctrine[85]

Finally, in a third example, consider an instance in which the constitutional principles enunciated by Publius concerning the importance of protecting private property rights leads to a conclusion contrary to a positivist legal rule articulated by the U.S. Supreme Court.

In 1938, the high court decided a case, *United States v. Carolene Products Company*,[86] concerning whether a congressional statute prohibiting shipments of "filled milk" (i.e., skimmed milk compounded with fat or oil) in interstate commerce violated either the commerce clause or the due process clause of the Fifth and Fourteenth Amendments. A lower federal court had struck down the statute as unconstitutional, but the Supreme Court was reluctant to invalidate federal legislation in the wake of President Franklin D. Roosevelt's famous (or infamous, depending on one's point of view) 1937 court-packing plan.[87] In reversing the lower court's

82. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

83. *Id.* at 78-79.

84. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1981). Moreover, perhaps commentators have treated Publius's essays with too much deference. As Diamond suggested, perhaps the principles he articulated "were relevant only to those old problems." Diamond, *supra* note 14, at 52.

85. This analysis was suggested by Wilson, *supra* note 9, at 127.

86. 304 U.S. 144 (1938).

87. Prior to 1937, when President Franklin D. Roosevelt unveiled his plan to add a new justice for every member of the U.S. Supreme Court over 70 years of age (up to a total of six new justices) through the Court Reform Bill of 1937, the president's New Deal programs frequently

ruling, Justice Harlan F. Stone, writing for a unanimous court, held that Congress could legitimately use its legislative authority to conclude that filled milk potentially injured public health. In fact, according to Justice Stone in his famous footnote four analysis, legislative enactments are presumed to be valid unless they restrict certain fundamental freedoms, "such as those of the first ten amendments."[88]

Moreover, Justice Stone argued that some freedoms are so integral to maintaining a free, democratic society that the burden of proof rests on any party who seeks to abrogate those rights; consequently, the presumptive validity of "ordinary legislation" disappears when Bill of Rights freedoms are involved. The "preferred freedoms" doctrine thereby established a double standard for judicial review.[89] The courts would strictly construe any case challenging a fundamental democratic right, but loosely construe other cases.[90]

Owing to Publius's emphasis on the importance of property rights in many of his essays, The Federalist Papers probably would disapprove of Justice Stone's positivist legal rule holding that certain "fundamental" rights are more important than other rights. If Publius is correct that the "verious and unequal distribution of property" is the "most common and durable source of factions" because unequal property distributions create distinct interests, and "[t]he regulation of these various and interfering interests forms the principal task of modern legislation," then the preferred freedoms doctrine may contravene Publius's understanding of constitutional principles owing to its insistence that not all rights are equal. By elevating Bill of Rights freedoms over other protections explicitly or implicitly found in the Constitution, the court altered the Founders views on the appropriate role of governmental authority. "Government is instituted no less for protection of the property than of the persons of individuals," Publius contended in "Federalist No. 54." "The rights of property are committed into the same hands with the personal rights. Some

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had been struck down by a politically conservative, restraintist judiciary. ROBERT SCIGLIANO, "THE PRESIDENCY AND THE JUDICIARY," in THE PRESIDENCY AND THE POLITICAL SYSTEM (Michael Nelson, ed., 1990), at 471.

Even though the court-packing plan failed and the president suffered a decisive defeat, the post-1937 court was more amenable to Roosevelt's legislative initiatives (albeit personnel changes on the court also contributed to the changed attitude). *Id.*

88. Quoted in WILLIAM COHEN AND DAVID J. DANELSKI, CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS at 20 (1994).

89. The importance of "an obscure footnote in a relatively insignificant case" cannot be overstated, according to two commentators. "Stone's statement marked a major change in course for an institution that had, for its entire history, been tilted toward settling private economic disputes and wrestling with questions of government power," political scientists Lee Epstein and Thomas G. Walker have observed. "From this point forward the civil liberties docket began to grow, and the Court rapidly began to evolve into an institution with a primary focus on civil liberties issues." LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE at 242-243 (1998). For further application of the preferred freedoms doctrine, *see* Thomas v. Collins, 323 U.S. 516 (1945).

90. MARTIN SHAPIRO AND ROCCO J. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 6th ed. at 335 (1983).

attention ought, therefore, to be paid to property in the choice of those hands."[91]

Publius also would have been dismayed by the *Carolene Products* case because it recast the judiciary as an intrusive "big brother" in citizens' lives. The mere suggestion that the court could reshape Bill of Rights guarantees to supersede other guarantees would have been the realization of the Founders most fervent fears. In "Federalist No. 84," for example, Publius warned that a bill of rights "are not only unnecessary," but in some cases "would even be dangerous" because, among other reasons, the fact that some rights were enumerated and others were not might lead people to infer that unlisted rights enjoy a lesser status than those rights contained in the bill.[92] If Publius had read footnote four of *Carolene Products*, no doubt he would have modified his comment, expressed in "Federalist No. 78," that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution because it will be least in a capacity to annoy or injure them."[93]

Once again, The Federalist Papers provides little assistance and may, in fact, undermine positivist legal rules established by the Supreme Court. One essay often contradicts another essay, depending on how they are interpreted—especially if the fictional "Publius" identity is discarded and the differences between the two principal authors, Hamilton and Madison, are considered. Therefore, even the most ardent supporter of Publius's work is forced to admit that the compilation, while it remains a masterful enunciation of constitutional principles, fails as a tool of positivist legal construction.

IV. CONCLUSION

If The Federalist Papers cannot be relied on for assistance in interpreting and applying legal rules, the question of its continued value to the regime (apart from its recognized place in the history of the nation) again becomes salient. One commentator has written, "[t]hroughout this book, I consistently contend that The Federalist Papers provides perhaps the clearest evidence that public administration was of great concern to several of the Founders', most notably James Madison and Alexander Ham-

91. THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961). In another context—during the constitutional convention—James Madison was even more direct in his insistence that protecting property rights was an instrumental purpose of the new regime. "Property as well as personal rights is an essential object of the laws, which encourage industry by securing the enjoyment of its fruits: that industry from which property results, and that enjoyment which consists not merely in its immediate use, but its posthumous destination to objects of choice and of kindred affection." Quoted in PASCHAL LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY: WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE at 239 (1930). In other words, property rights are an extension of personal rights, hence as deserving of constitutional protection as individual rights. *Id.*

92. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

93. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ilton."[94] The argument that Publius's essays illuminate the Founders' thinking on issues still relevant to the modern era is supported by persuasive historical evidence, but is the work valuable in other ways as well?

While cautioning against overemphasizing the importance of The Federalist Papers, Albert Furtwangler has suggested that the greatest value of the work is its civil tone.[95] According to Philip Abbott, the essays succeed as the ur-text of the polity owing to the author's remarkable storytelling abilities.[96] James G. Wilson has suggested that the essays illuminate American values even as a new millennium approaches. This is not the same thing as suggesting that The Federalist Papers should be used as controlling precedent according to stare decisis rules of positivist legal interpretation, but it is a recognition that an influential historical work can provide useful insight into values underlying the regime.[97]

With each passing decade, the Founders grow farther from us in time and circumstances. As they recede deeper into the pages of history, their works no longer directly pertain to the particular questions of the day. Federalism in Publius's time meant something vastly different than it means today. He knew nothing of modern telecommunications, interstate transportation, and environmental degradation, so his insights into the practical realities of administering an eighteenth century version of federalism fail to guide our actions at the beginning of the twenty-first century. The positivists were correct in arguing that legal principles provide only limited utility in applying specific rules in the context of cases and controversies, as this article has attempted to demonstrate.

If Publius's work ultimately fails to provide guidance in resolving day-to-day legal disputes, however, this failure should not be viewed as condemning the work to obsolescence. Quite the contrary. By providing modern man with a glimpse of what Edward Corwin called the "higher law" background of American constitutional law and ignoring all but the

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94. WILLIAM D. RICHARDSON, DEMOCRACY, BUREAUCRACY, AND CHARACTER: FOUNDING THOUGHT at 35 (1997). *See also*, LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1961).

95. Furtwangler, *supra* note 31, at 148.

96. Abbott wrote:

> We listen, not because of the inherent reasonableness of Publius's arguments nor because we are overwhelmed by his philosophy or science, though reasonableness and philosophy and science do make their mark. We listen because he establishes himself as one who knows when newness is rashness and when prudent innovation, when it is exceptional and when tragic, when the new is vigorous, young and fresh and when raw, untested and unsophisticated.

Abbott, supra note 15, at 543.

97. Wilson explained that the value of Publius's work for positivist legal interpretation was its authoritative perspective on the history of the Founding. "Evaluating The Federalist's origins and its arguments forces us to reconsider our own basic values. The Federalist's authors astutely commented on issues obviously relevant to constitutional interpretation; to ignore their arguments would be provincial. Additionally, we can understand how our own views are formed by intellectually and historically studying their origins, and can appreciate why and how changes in ideas have taken placed how we are bound by history. We must be careful not to dismiss the past." Wilson, *supra* note 9, at 128.

most illustrative disputes of the day, Publius ensured his own timeliness.[98] As he observed in "Federalist No. 37," the most effective means of interpreting a legal rule is to consider it in light of its particular circumstances—a feat he would have to leave to his successors. "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation," he wrote, "are considered as more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[99] Perhaps this statement was Publius's wisest pronouncement on the question of positivist legal interpretation, and perhaps there the matter should rest.

Postmodernists no doubt would object to the use of The Federalist Papers as a sacred text for legal interpretation. Supplanting traditional legal materials such as statutes and cases with a book of essays, no matter how historically contemporaneous the essays may be, does not escape the reliance on metanarratives for rational discourse. It merely exchanges one form of stodgy traditionalism with another. At the same time, if postmodernism is taken at face value, replacing traditional legal materials with any other text, including The Federalist Papers, should be a fruitful method of resolving legal cases and controversies. If anything, the exercises here demonstrate the problems inherent in postmodern approaches to rational discourse. Authoritative legal decisions require authoritative legal sources that address specific issues in their factual context. A legal analysis that does not rely on authorities is doomed to failure.

This highlights the most difficult feature of postmodernism, namely that it destroys the structure of traditional rational discourse, yet it offers no workable alternatives. If "perspective" is the paramount consideration, how can human beings develop heuristics for resolving controversy? Are they not rendered mute by their inability to reach common ground through shared reasoning? Postmodernists would answer "yes." That is precisely the point. Rational discourse is moribund, if not dead, in the postmodern world.

No matter how one considers postmodernism, the analysis fails. By using philosophical discourse to argue for an end to philosophical discourse, postmodernists risk looking foolish and inconsistent. What is the only recourse but to reject an anti-philosophy philosophy that revels in its own contradictions and seems to slouch toward nihilism? Postmodernism may be an engaging academic concept and may provide philosophical food for thought, but it fails to provide guidance on legal interpretation. If a seminal text such as The Federalist Papers cannot be counted on to guide legal analysis, the use of other texts apart from cases and codes seems suspect as well.

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98. EDWARD S. CORWIN, "THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW," in AMERICAN GOVERNMENT: READINGS AND CASES at 37 (Peter Woll, ed., 1969).

99. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).