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Extract from Dan T. Coenen's The Story of The Federalist: How Hamilton and Madison Reconceived America citing Tillman's The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation

Seth Barrett Tillman

THE STORY OF *THE FEDERALIST*

HOW HAMILTON AND MADISON RECONCEIVED AMERICA

By

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How could sensible citizens resist ratification, Madison asked, when "most of the capital objections urged against the new system, lie with tenfold weight against the existing Confederation"?[139]

This is not to say that all of Publius's arguments themselves reflected perfect common sense.[140] Hamilton, for example, erred in

139. *Id.*

140. In particular, the papers did contain a number of simple errors. *See, e.g.*, Roy P. Fairfield, *Introduction* to THE FEDERALIST PAPERS, at xxvii (Roy P. Fairfield ed., 1981) (noting Publius's "misquoting of the Declaration, Constitution, Montesquieu, and other sources"); Seth Barrett Tillman, The Federalist Papers as *Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 603–14 (2003) (noting errors in treatment of the size of the legislature, quorum needed in Senate, manner of selecting the Vice President, and the selection of the President).

ıtomatically to be appointed if
)f the nomination."[106]
ılso look for opportunities to
:t.[107] For instance, columnist
No. 10 to oppose proposed
that the political parties that
serve to "moderate factions"
[108] He also found support in
n to impeach President Clinton
sition. Will reasoned that "Re-
political ethic—its categorical
ıld take comfort from the fact
ssness has a pedigree that runs
the perils that make republics
The Federalist was "frequently
t the notion that the framers
ajority rule concept."[110] These
rule—adopted by the Repub-
ırt of the so-called "Contract
fifths vote to pass any increase

surfaced with particular fre-
cial appointments.[112] The Sen-
gs on the confirmation of John
:ed States, for example, gener-
erences to the essays. Publius
and sometimes by then-Judge
)erly limited role, in trumpet-
dicial precedent, in highlight-
:onstitutional system, and in
icial and legislative powers.[113]
s high-visibility setting leaves
)undational text in our politi-

Madison would have thought
leralist among contemporary
he essays, after all, were never

Relying on modern historical research, some scholars have urged that the limited and localized distribution of *The Federalist* renders it poor evidence of dominant thinking at the state ratification conventions,[126] particularly given the diverse range of participants involved in those proceedings.[127] Other skeptics have argued that: (1) Publius may have been unjustifiably elevated among "dozens, if not hundreds, of writers who defended the Constitution,"[128] (2) the papers should not be treated as "holy writ" because they contain a number of factual errors,[129] and even (3) *The Federalist* should count

for little because its main purpose was to "fill up space in the New York 'federal' newspapers and thereby to make less obvious the exclusion therefrom of opposing views."[130] A recurring line of argument questions the relevance of centuries-old essays in a world that has "changed far beyond anything that the authors of *The Federalist* could have known."[131] As Yale Law Professor William Eskridge has asked, "why should the views of Madison, who would have found the modern regulatory state inconceivable, offer guidance as to issues of modern administration . . . ?"[132]

> to believe the reaction would have been uniform across states, for their interests were very different. Some states had large war debts, and some did not; some states relied on import duties (the impost), and some could not; some states farmed tobacco, whereas others made beeswax and potash. Whatever one thinks a New Yorker might have thought of *The Federalist*, there is no reason to think that a Georgian or a resident of Massachusetts would have had a similar reaction.

McGowan, *supra* note 116, at 831.

129. Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 617 (2003).

130. CROSSKEY, *supra* note 120, at 8–9. A separate question is whether, even assuming the legitimacy of invoking *The Federalist*, it has been used in actual practice in a properly principled and neutral fashion. For some suggestions that the Court has not, see McGowan, *supra* note 116, at 874–881 (arguing that, in *Alden v. Maine*, 527 U.S. 707, 726 (1999), the Court selectively invoked Hamilton's work to make the strong nationalist seem to support a broad conception of state sovereignty); Tillman, *supra* note 129, at 618 (objecting to self-serving "textual cherry picking" in the use of *The Federalist* by the Supreme Court); Wilson, *supra* note 73, at 81–83 (noting that the Court sometimes ignores or gives little weight to *The Federalist* despite its relevance); *see also* J. Christopher Jennings, Note, *Madison's New Audience: The Supreme Court and* The Tenth Federalist *Visited*, 82 B.U. L. REV. 817, 869–73 (2002) (criticizing the Court's use of No. 10 in a variety of opinions).