

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

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Extract from Michael I. Meyerson's Liberty's
Blueprint citing Tillman's The Federalist Papers as
Reliable Historical Source Material for
Constitutional Interpretation

Seth Barrett Tillman



Available at: https://works.bepress.com/seth_barrett_tillman/74/

But once we conclude that *The Federalist* can be useful for constitutional interpretation, we still must determine precisely how it should be used. It would be both dangerous and foolish to treat *The Federalist* as "holy writ," and mechanically accept every word as definitive. Some statements made by Publius are simply incorrect. In *Federalist* 69, Hamilton wrote, "In the national government, if the Senate should be divided, no appointment could be made: in the government of New-York, if the Council should be divided the Governor can turn the scale and confirm his own nomination." It is not accurate that no appointment can be made with a divided Senate. Since Article I, Section 3 of the Constitution expressly provides that the vice president shall vote if the Senate "be equally divided," the appointment will be effective when the Senate is divided, so long as the vice president supports the president.

In addition to technical errors, modern readers might well be unsettled by *The Federalist's* defense of two troubling aspects of the original Constitution. First, the justification for the lack of a bill of rights was not convincing to many of its initial readers and appears to have even less validity now. Second, we must confront Madison's uncomfortable defense of the constitutional provision which declared that slaves were to be regarded as three-fifths of a person for purposes of representation and taxation. While he did not express support for

- 158 "holy writ": See Seth Barrett Tillman, "The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation," *W. Va. L. Rev.* 105 (2003): 601, 617.
- 158 the appointment will be effective: While it was not until the Twelfth Amendment that it was ensured that the president and vice president would be of the same party, the structure of the original Constitution still permitted a unity of interest between the two, and thus did not mandate that no appointment could be approved in a split Senate. For other technical errors in *The Federalist*, see Tillman, 603-615.
- 158 slaves were to be regarded as three-fifths: U.S. Constitution, art. 1, sec. 2.
- 158 While he did not express support: Madison did permit himself to condemn in emphatic language the "barbarism" of the international slave trade, which under article I, section 9 of the Constitution, could be prohibited in 1808. *Federalist* 42 (Madison)

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LIBERTY'S BLUEPRINT

HOW MADISON AND HAMILTON
WROTE THE FEDERALIST PAPERS,
DEFINED THE CONSTITUTION,
AND MADE DEMOCRACY SAFE
FOR THE WORLD

MICHAEL I. MEYERSON



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