Ray Raphael, Constitutional Myths: What We Get Wrong and How To Get It Right (2013), citing Tillman's "The Puzzle of Hamilton's Federalist No. 77" and 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/379/
CONSTITUTIONAL MYTHS
What We Get Wrong and How to Get It Right

Ray Raphael
Although some of Publius’s errors—misstating the quorum requirements for the Senate in The Federalist No. 59, miscounting the members of the first Congress in The Federalist No. 84, and falsely describing the runoff election of the vice president in The Federalist No. 68—might have been unintentional, stating that election of the president was “an immediate act of the people” and that “the people of each state” were authorized to choose presidential electors, when the Constitution did not say these things, was either extremely sloppy or purposive. The issue of presidential selection spoke to the heart of the relationship between the people and their rulers, not a matter to be taken lightly and one that Hamilton addressed on many occasions. This was no casual mistake.34

In Hamilton’s defense, one so-called error in The Federalist has been falsely categorized. The Constitution states clearly that presidential appointments for key offices must be accompanied by “the Advice and Consent” of the Senate, but it says nothing about Senate approval in case of a dismissal from office. Hamilton, writing as Publius in The Federalist No. 77, gave his rendering of the document’s intent: “The consent of that body [the Senate] would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.”

According to Clinton Rossiter and other commentators, Hamilton was
CONSTITUTIONAL MYTHS

mistaken "in assigning the Senate a share of the power of removal." Ros- sier forgives him for this, however; although Publius was "understand- ably wrong in his interpretation of some details in the Constitution," these details can be overlooked because he was "remarkably right about many more." From our vantage point today, Hamilton does appear to be off base, but because the Constitution provided no direction, his interpretation was neither correct nor incorrect in the technical sense. It only became "wrong" the following year when Congress, after an extensive debate that lasted sev- eral days, declared that the president could remove an official on his own authority.35

Why did Hamilton bother to raise the issue at all, since the Constitution did not? And why would this known proponent of unitary executive author- ity argue that the president needed to seek approval from the Senate before removing an official? These questions have long troubled some commen- tators, who have even given the problem its own name: "The Puzzle of Ham- ilton's Federalist No. 77."36

This puzzle is easy to solve. Only if we insist that Hamilton's views, ex- pressed on various occasions to different audiences, must remain logically consistent do we face a problem at all. As soon as we treat The Federalist No. 77 in its political context the apparent contradictions disappear.

Here is the backstory.

At the Federal Convention, the Committee of Detail's working draft of the Constitution granted the Senate, not the president, authority to appoint ambassadors, Supreme Court justices, and other key officials. On September 4, less than two weeks before adjournment, the Committee of Eleven transferred appointive powers to the president, with the Senate's assent. Eager to be done after meeting for more than three months, delegates agreed to the committee's proposal, but in their haste they did not think to indicate whether dismissal required Senate approval.

When Hamilton penned The Federalist No. 77 more than half a year later, he had had plenty of time to ponder the document, its weaknesses as well as its strengths. It would have been unlikely at that point for him not to no- tice that the question of removal was subject to competing interpretations: the president could dismiss officials on his own authority, as was eventually the case, or he would need approval from the Senate, as he argued in The
Federalist No. 77. To defend the first of these would be a political liability, feeding fears that the president was a thinly disguised monarch who could control lesser officials through intimidation. To alleviate suspicions, therefore, Hamilton proclaimed that the Senate would have to be involved in any dismissals. This safeguard against presidential abuse would make the Constitution appear more acceptable.37

The following year, when members of the first House of Representatives tried to create a Department of Foreign Affairs, they found themselves face-to-face with the Constitution’s silence. Should the secretary of that department be “removable from office by the President of the United States”? Some argued that if the president could not remove his inferior officers, they would in fact become more powerful than he was; others feared presidential overreach and insisted on Senate participation. During this debate, William Loughton Smith, to support the view that the Senate must be involved, quoted Publius’s words from The Federalist, which he called “a publication of no inconsiderable eminence, in the class of political writings on the constitution.” This created something of a problem for Hamilton, who was not present at the time but who heard that his words were being used to curb presidential authority, contrary to his actual beliefs. Immediately he tried to limit the damage. He sent word to his friends in Congress that since penning The Federalist No. 77, “upon more mature reflection he had changed his opinion & was now convinced that the President alone should have the power of removal at pleasure.” Had he really changed his opinion, or was he just adjusting his stance due to political contingencies? That does not matter. What counts is that he pushed for executive power during the Convention, then he retreated during the ratification debates to paint the Constitution in its least threatening light, and finally, when he was about to assume an office in Washington’s administration, he favored granting the president the exclusive authority of removal. The story makes perfect political sense, no puzzle about it.38
Judges, attorneys, political figures, and even bloggers will continue to cite _The Federalist_ as long as the practice produces any rhetorical leverage. On the Supreme Court, as justices struggle to establish legitimacy by alleging historical authenticity, if one justice cites Publius, others who disagree with his or her opinion feel compelled to countercite. According to a survey of recent Supreme Court cases, “The relative odds of citing a Federalist Paper in majority opinion are sixteen and twenty-fold higher if a dissenting or concurring opinion also cited the Federalist Papers.” Given that unilateral disarmament does not appear to be an option, all it takes is a single fan of Publius on the Court to continue the war for _The Federalist_.

Whereas Publius has reigned supreme as the nation’s authoritative commenter on the Constitution, historians and legal scholars in recent years have paid more attention to the political purpose of his essays. The “overriding imperative” of authors on both sides of the ratification debates was “to determine whether the Constitution would be adopted, not to formulate definitive interpretations of its individual clauses,” wrote Jack Rakove in 1996. Naturally, these scholars began to ask: by what authority can _The Federalist_,
THE FEDERALIST PAPERS

an avowedly biased tract, lay claim to the privileged status it has enjoyed for two centuries? 48

Several justifications have been posited.

Some say its iconic status is reason enough. It is so celebrated, so revered, that we find it “simply unthinkable” that courts could ignore it. But this reasoning is clearly circular: The Federalist is authoritative because we have claimed it to be so. 49

Some say it provides insights into the “legislative history” of the Constitution because its two leading authors figured prominently at the Convention. But Madison and Hamilton were only two of fifty-five framers, and they both defended views in The Federalist that differed markedly from those they had expressed at the Federal Convention. (For Madison’s contradictory positions, see chapter 5.) Further, if we really wish to know about the Convention, Madison’s extensive transcriptions of the debates constitute a far better source.
NOTES TO PAGES 117–118

reason: to make the proposed new government appear less threatening so people would accept it (837–38).

34. In The Federalist No. 59, Hamilton reported that a quorum in the Senate would “consist of sixteen members,” although at the time he wrote eleven states had ratified the Constitution, yielding twenty-two senators, and according to Article I, Section 5, Clause 1, quorum was to be a simple majority, in this case twelve. If all thirteen states were counted, the majority of twenty-six senators would be fourteen. In The Federalist No. 84, Hamilton wrote, “The two branches of the legislature are, in the first instance, to consist of only sixty-five persons, which is the same number of which Congress, under the existing Confederation, may be composed.” This was actually the number of representatives only, listed in a state-by-state enumeration in Article I, Section 2, Clause 3, and did not include senators; once all thirteen states had ratified, the total number in both houses of Congress would total ninety-one. In Federalist No. 68, Hamilton explained the runoff for executive officers in case the electors did not produce a majority: “The Vice-President is to be chosen in the same manner with the President; with this difference, that the Senate is to do, in respect to the former, what is to be done by the House of Representatives, in respect to the latter.” This was not the case. According to Article I, Section 2, Clause 3, the House, not the Senate, chose the vice president as well as the president if electors produced no majority winner, and only if the House produced two or more runners-up with equal votes would the Senate break that tie. The first two of these mistakes, whether intentionally or not, furthered arguments Hamilton was making at those moments. A larger quorum in the Senate produced greater security from intrigue, and a smaller number of representatives and senators would reduce the expenses of the federal government. See Seth Barrett Tillman, “The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation,” West Virginia Law Review 105 (March 2003): 603–13. Regarding Hamilton’s prevarication: Selection of the president had been a major focus of debate on several different occasions over the course of the Federal Convention. Although Hamilton had missed some of those sessions, he was present when delegates overwhelmingly rejected Wilson’s idea for popular selection on June 2, and he had returned in time to participate in the floor discussion of the elector scheme presented by the Committee of Eleven in early September. He had been one of five delegates appointed on September 8 to the Committee of Style, charged with fine-tuning the wording of the entire Constitution in the final days, and in that capacity he must have read and considered the clause in the Committee of Eleven’s report and adopted by the Convention: “Each State shall appoint in such manner as its Legislature may direct, a number of electors . . . .” Hamilton’s Committee of Style made one small change in this provision, substituting a more legalistic “the Legislature thereof” for “its Legislature.”


36. See Seth Barrett Tillman, “The Puzzle of Hamilton’s Federalist No. 77,” Harvard Journal of Law and Public Policy 33:1 (2010): 149–67. Tillman tries to untangle the puzzle by making a purely legalistic distinction between the words “displace” (Hamilton’s term) and “removal” (the term used in the congressional debates). This subtle distinction supposedly makes Hamilton’s
views logically consistent, but that is not even necessary. There is no political or historical reason why Hamilton’s words to one audience in one context should not contradict his words to another audience in a different context.

37. R. B. Bernstein identifies seven arguments for how to resolve the Constitution’s troublesome silence on dismissals. “The Constitution As an Exploding Cigar and Other ‘Historian’s Heresies’ About a Constitutional Orthodoxy,” *New York Law School Law Review* 55 (2010–11): 1042–43. It took Hamilton little time to discover a different error in the Constitution, not just an omission but a genuine “defect.” On January 25, 1789, ten days before electors were to cast their votes for the first president and vice president under the new Constitution, he wrote to James Wilson: “Every body is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President.” Since electors were to cast two votes but were not directed to distinguish between president and vice president, those preferring the second candidate on a ticket to the top candidate could “throw away a few votes” for the presidential candidate, thereby allowing his running partner to become president. The system could be gamed, and Hamilton himself attempted to do so in the elections of 1789, 1796, and 1800. See Raphael, *Mr. President*, 199–206, and Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven, CT: Yale University Press, 2001), chap. 5.

38. *Annals of Congress*, 1:474; William Loughton Smith to Edward Rutledge, June 21, 1789, in *South Carolina Historical Magazine* 69 (1968), 6, 8, cited in Tillman, “Puzzle of Hamilton’s *Federalist* No. 77,” 162. Tillman dismisses Hamilton’s disavowal because it does not live up to legal standards of proof, but historical standards are quite different. Smith’s letter to Rutledge, written at the time, is extant. Benson’s report of the communication with Hamilton is plausible, while any conjecture that this conversation was manufactured is implausible. While Hamilton’s exact words are admittedly open to question, the basic message, that he repudiated his words in *The Federalist No. 77*, is not only plausible but also consistent with all other evidence. The only inconsistency lies with Hamilton’s stated views in diverse contexts; legally this might create a problem, but historically it does not.


INDEX

Bush v. Gore decision, 165–66, 294n28
Citizens United decision, 164–65, 292n27
and The Federalist Papers, 94, 107
Nixon v. Shrink Missouri Governor’s PAC, 94
and originalism, 153, 162–66, 164–66, 292n27, 294n28
three-fifths compromise, 37, 45–46, 49, 257n25–26, 258n31
Tillingsha, Charles, 117
Tillman, Seb Barrett, 277n36, 278n38
Treaty-making powers, 88, 156–57, 268n19, 291n16
Tribe, Laurence, 169–70
Tucker, Thomas Tudor, 27, 67, 146, 147, 270n35

United States v. International Business
Machines Corp. (1996), 163
United States v. South Eastern Underwriters
Association (1944), 273n9

U.S. Supreme Court
authority as final arbiter on issues of
constitutionality, 157–58
and federal tax law, 28–29, 31–33, 254n27, 255n29
late nineteenth-/early twentieth-century
interpretative approaches, 161–62
late twentieth-century jurisprudence,
162–73
opinions citing The Federalist, 93–94, 103, 123–24, 127–28, 129, 260n30, 273n9, 277n44
originalism/appeals to original intent, 153, 160–73
Scalia and original meaning, 153, 162, 166–73, 280n2, 289n35, 295–97n43
Thomson and originalism, 153, 162–66, 292–93n27, 294n28
See also originalism


veto, federal
Hamilton’s arguments, 115
Madison’s arguments, 80, 81–86, 89–92, 267n12, 267n14–15, 268n22
Pinckney-Madison motion to strengthen, 82–83, 85
presidential veto and “proper proportion”
of each branch that could override, 86–88, 268n17

Virginia
colonial charter, 134
“declaration of rights” and principle of no
taxation without representation, 26
House of Burgesses, 3–4
institution of slavery, 249n3
proposed amendments, 141
ratification convention, 24–26, 141, 262n13
Virginia Declaration of Rights, 26, 285n9
Virginia Independent Chronicle, 111
Virginia Resolutions (1798), 94–95, 269n31
Virginia Statute for Religious Freedom
(1788), 142, 161

Wait, Morrison, 161, 292n18
“wall of separation” between church and
state, 161, 292n18
War of 1812, 30
Warren, James, 10, 13, 140, 252n18
Washington, George
and the Bill of Rights, 133, 142, 143–44
and the Continental Army, 5
Farewell Address, 34
and federal powers of taxation, 17, 28, 34, 253n11
and The Federalist, 110–11
and Jay’s Treaty, 157, 291n16
“Legacy” letter to the states (1783), 9, 187–96
national bank bill, 63–65
New England tour (1789), xi, 250n4

315