

HAMILTON'S BUG

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Those of you who have experienced the joy of programming are familiar with the bane of programmers everywhere, the “bug”. There is, for the programmer, that fateful moment of truth when he or she seeks to compile his or her code, only to be met with the dreaded “syntax error”.

There are of course, other kinds of bugs besides the syntax variety, including logical, design, and evolutionary bugs (features which become bugs over the passage of time). The syntax bugs are the easiest to ferret out, the logical bugs less so, and the design and evolutionary bugs sometimes hidden from view entirely until the program is actually put into everyday practice by the user. In the case of design and evolutionary bugs, sometimes these bugs don't show up for years — or centuries.

Well, as most programmers know, the *algorithm* — the flow-chartable logic underlying any program regardless of the language it is instantiated in (whether C, C++, Visual Basic, Java, etc.) — is found in many domains besides programming. Recipes, geographical directions, policies, manuals, curriculums, organizational charts, rules of order, and many other areas have the concept of the *algorithm* underlying them. Most pertinently to this paper, we find algorithms in processes, including political processes.

Perhaps the most significant example of the algorithm in the political arena is that which provides the structure of government: the most common name for this algorithm is the term “constitution”. A constitution provides the flow-chart for government; it is the procedure which itself creates the process by which legislation is made and enforced.

Alas, constitutional procedures, like procedures in Visual Basic or C, reveal their bugs only after they are “compiled”. And unfortunately for the constitutional procedures, fixing the bugs is not (like it frequently is in Visual Basic or C) a trivial process. In fact, fixing constitutional bugs is an extraordinarily difficult process: the process of amending the constitution doesn't work like it does for the everyday programmer — you don't simply go in, cut out a line of code, and replace it with another that does the job. In fact, the process of constitutional amendment is not an independent act at all: you actually have to get AGREEMENT with millions of people that fixing the bug is a worthwhile task, and many of those people will argue against you! Some will argue against the existence of the bug at all, some, that the “bug” is a “feature”; others will argue against your proposed substitute. Still others won't even allow any debate on the issue of “bugginess”. The balanced budget and term-limits amendments are just some of many proposed constitutional bug “fixes” which have never, for one reason or another, yet made it to re-compilation. You might say that, like the cockroach, these are pretty hardy bugs. Only the strong survive!

Well, anyone can write a program with a bug: but what programmer(s) would send into the world a program with a KNOWN bug? What would their employer say had they intentionally (or negligently) ignored a bug, and sent it out into the world?

I have to say, this thought crossed my mind while reading THE FEDERALIST PAPERS, a superbly written collection of papers in the field of political science that may be considered the definitive “comments” on our constitutional algorithm, by the authors of the algorithm themselves. In particular, I was perusing FEDERALIST 84, written by one of the most eminent of our “Founding Fathers”, Alexander Hamilton, the man on the 10. In this paper, Hamilton was arguing against what some saw as a “bug fix”, the addition of a Bill of Rights to the Constitution. Hamilton told the people of 1787 why this “fix” was a bad idea:

I . . . affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

According to Hamilton, a bill of rights would be “dangerous” because, in creating a prohibition, it also created a clear implication that the Constitution granted powers other than those explicitly enumerated. And this would contradict the design of the 1787 Constitution creating a government of “enumerated” powers; that is, the government would have only those powers which were EXPLICITLY granted. Thomas Jefferson stated this view in 1791:

I consider the foundation of the Constitution as laid on this ground: that ‘all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people’ . . . To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition. [3 FOUNDER’S CONSTITUTION 246, Kurland/Lerner (Chicago: 1987)]

But, according to Hamilton, the addition of a Bill of Rights would implicitly endorse the concept of the “boundless field of power” by implication:

Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

. . . it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

The paradox of the Bill of Rights, according to Hamilton, was that by stating “no press restrictions”, it simultaneously created an “absurdity” — why ask for a bullet-proof vest when the government never had any bullets in the first place? To ask for a bullet-proof vest is to create the notion that the government has a right to own — and fire — bullets, and then your right is not to live in a world where governments aren’t shooting bullets to begin with, but rather a lesser right to protect yourself from the bullets fired by government. Any argument that “a little extra insurance couldn’t hurt” was lost on Hamilton.

Well, all well and good. But the story isn’t over yet, because we haven’t yet gotten to the bug. Let’s get to it!

Notwithstanding these “anti-insurance” comments, Hamilton had noted earlier in his essay that the Constitution **ALREADY** contained within it various prohibitions on government power such as that which would be contained in a Bill of Rights — but Hamilton didn’t simultaneously note the inconsistency. **In other words, the Constitution that Hamilton signed was, in his own words, “dangerous”**, because it *already* contained “various exceptions to powers not granted; and, on this very account, [afforded] a colorable pretext to claim more than were granted”! Hamilton listed some of these provisions in Section IX of Article I:

Section 9, of the same article [I], clause 2 — “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Clause 3 — “No bill of attainder or ex post facto law shall be passed.”

And then he listed some more:

Article 3, section 2, clause 3 — “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress

may by law have directed.” Section 3, of the same article — “Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

The presence of these “numerous handles which would be given to the doctrine of constructive powers”, “these various exceptions to powers not granted”, “would furnish, to men disposed to usurp, a plausible pretence for claiming that power”, according to Hamilton. So, **why, then, would Hamilton sign a document which contained the “dangerous” provisions found in Section IX of Article I?**

Strangely enough, however, only four years after stating these views in FEDERALIST 84 (that the Constitution did not have any powers by “construction”), Hamilton did a flip-flop. Magically, a Constitution of ENUMERATION became a Constitution of IMPLICATION, and suddenly the Constitution became a document of *no* powers by construction to one of *many*.

In the February 23, 1791 paper “Opinion on the Constitutionality of a Bill for Establishing a National Bank”, Hamilton focused on some constitutional language he managed to miss in his FEDERALIST essay, the “necessary and proper” clause in Article I, Section VIII:

[T]here are implied, as well as express powers, and . . . the former are as effectually delegated as the latter. The whole turn of the [necessary and proper] clause . . . indicates that it was the intent of the convention by that clause to give a liberal latitude to the exercise of the specified powers. . . . [A]n adherence to the letter of its powers would at once arrest the motions of the government. [3 FOUNDER'S CONSTITUTION 248-50, Kurland/Lerner (Chicago: 1987)]

Well, there's a switch for you. Turns out that the Congress had more powers than we thought after all, a “liberal latitude” to “exercise” not only “specified” powers, but “implied” powers which were as “effectually delegated as” the specified powers!

Well, if that's true, then why was Hamilton arguing against a Bill of Rights?