



To the Bag



De Minimis

To the Bag:

Apropos *True Minds* (7 GREEN BAG 2D 303 (2004)), and the Lerner gloss thereupon (7 GREEN BAG 2D 371 (2004)), herewith the residue of a long-ago Oxford legal education:

An unfortunate fellow named Rex
Had diminutive organs of sex
When charged with exposure
He replied, with composure,
“*De minimis non curat lex.*”

Cordially,
Robert A. Anthony
Arlington, Virginia



Hamilton's Honor

To the Bag:

Alexander Hamilton's June 18, 1787 speech before the Constitutional Convention was of momentous importance and insight, but his generation's Michael

Moore and James Carville twisted it into a moment of intrigue and scandal. I'm sorry to see that, courtesy of Timothy Sandefur's recent letter, it fares no better today. See *Citizen Hamilton?*, 7 GREEN BAG 2D 371 (2004). As Hamilton remains in no position to defend his own honor, I offer these observations:

Hamilton's political views, while a far departure from the direct democracy espoused by some of his contemporaries (both American and French), were hardly "highly antagonistic to the fundamental principles of the American regime." The institutions he espoused – the strong unitary Executive, the strong, contemplative Senate, the popularly-elected House, judicial independence – form the core of the American Republic. And other of his political views – including his firm abolitionism – fall much closer to "fundamental American principles," as embodied in the Constitution, than did those of many of his contemporaries.

Contrary to Sandefur's assertion, Hamilton's speech did not espouse a hereditary Senate. As Madison noted, Hamilton supported "[a] Senate to consist of persons elected to serve during good behaviour," subject to resignation or removal. He did not support a President chosen literally "for life," but rather, one elected to serve during "good behaviour" subject to resignation or removal. 1 *Records of the Federal Constitution of 1787* at 291–292 (M. Farrand, ed. 1966).

Hamilton did indeed pay great respect to the British Constitution and to the House of Lords – and for good reason! In 1787, no other government had so effectively protected the liberties of its citizenry. To have rejected outright Britain's institutions, to have taken no lessons from both their successes and their failures, would have demonstrated bold ignorance. And not to recognize the American Republic's own reflection of successful British institutions would show comparable ignorance.

According to Sandefur, Hamilton's speech "was so embarrassing to those present that *none* commented on it" (my emphasis). But as Ron Chernow's excellent new *Alexander Hamilton* recounts, this was not the case: Gouverneur Morris, the man responsible for much of the Constitution's text, remarked that Hamilton's effort was "the most able and impressive he had ever heard." Delegate William Samuel Johnson said that the speech was "*praised by everybody* [but] ... supported by none." Chernow at 233 (my emphasis).

Sandefur writes that Hamilton reacted to the delegates' "embarrassment" by "storm[ing] home shortly thereafter." This colorful narrative enjoys some poetic license. Following his June 18 address, Hamilton participated in the debates on June 19 (on the relationship between the Federal government and the States), on June 21 (on election of Senators by State Legislatures), on June 22 (on salaries of Senators), on June 26 (on the Senate), and on June 29 (on the States). Hamilton did leave the Convention for several weeks at this point, "to attend to personal business." Chernow at 235. While it is true that, in his absence, Hamilton was not optimistic toward the prospects of a successful Convention, his absence was not shown to have been motivated by the response of the delegates to his proposals. And it should be noted that, while Hamilton's absence was long, absence *per se* was not uncommon among the delegates. Delegates returned to their home states throughout the proceedings, and attendance was often spotty.

Finally, I find particularly unsatisfactory Sandefur's reliance on *Jefferson's* indictment of Hamilton's "machinations against the liberty of the country"; Jefferson hardly surpasses Hamilton in his commitment to national liberty. In our War of Independence, as Hamilton fought valiantly against British troops in the north, Thomas Jefferson fled Virginia's

capital as the enemy approached. Even after America secured the blessings of liberty, Jefferson sought to undermine the fledgling Republic's national liberty by tying America to France's bloody revolution; his explicit efforts surpass any diplomatic ties Hamilton allegedly sought to effect with Britain. (And on matters of *individual* liberty, Jefferson's slaveholding and Hamilton's abolitionism speak for themselves ... calling to mind Dr. Samuel Johnson's 1775 inquiry, *how is it that we hear the loudest yelps for liberty among the drivers of Negroes?*) Jefferson's angry critique of Hamilton in his message to Washington was less the effort of an American patriot fearful of Hamilton's fidelity to liberty than it was that of an angry, out-of-the-loop politician. He was jealous of Hamilton, upon whom the nation (in Jefferson's words, from the same letter) "heaped its honors upon his head," and was bitter toward Washington, who eagerly had performed much of the heaping while largely ignoring Secretary Jefferson.

What a shame that, in the bicentennial of Hamilton's death, there are still those eager to motor the anti-Hamilton attack machine! Were we of another era, Sandefur's scurrilous allegations would be sufficient cause for a Hamiltonian to challenge him to a duel. Lucky for him that, in this day and age, I find satisfaction in a snarky letter to the *Bag*.

Adam J. White
Arlington, Virginia



Timothy Sandefur responds:

Despite recent attempts to revive the reputation of the Federalist party, the fact remains that Hamilton the policymaker is only slightly less reprehensible than Hamilton the political philosopher. Yes, the young Hamilton said some marvelous things in defense of liberty, and served with great distinction in the Army. But like other veterans one might name,

he later came to hold views sharply in contrast with those he had fought to defend.

Consider his notion of “implied powers,” for example, embraced by Chief Justice Marshall in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Hamilton’s belief that the federal government could exercise power not granted by the Constitution whenever doing so was convenient to the exercise of a granted power has led remorselessly to an expansion of federal authority *far* beyond anything the framers dreamed. Madison warned at the time that if Hamilton’s theory were embraced, the Constitution would “no longer be a government possessing special powers taken from the general mass, but one possessing the general mass, with special powers reserved out of it.” Letter to Henry Lee, Jan. 21, 1792, quoted in Lance Banning, *THE SACRED FIRE OF LIBERTY* 346 (1998). Jefferson put it more colorfully: “Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at ‘This is the House that Jack built?’ Under such a process of filiation of necessities the sweeping clause makes clean work.” Letter to Edward Livingston, Apr. 30, 1800, 10 *WRITINGS OF THOMAS JEFFERSON* 165 (A. Bergh ed., 1907). And they were right. Even though the Constitution gives Congress only “those powers *herein granted*,” Art. I sec. 1 (emphasis added), *M’Culloch* and subsequent cases expanded that authority so that Congress now has no effective limit to its power. See further Randy E. Barnett, *The Original Meaning of The Necessary And Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003).

Hamilton’s hostility to limiting government power was part and parcel of his hostility to the notion of republican government to begin with. Henry Adams claimed that in a conversation about the right of the people to govern themselves, Hamilton shouted

“your people, sir, is a great beast!” *History of the United States of America During the Administrations of Thomas Jefferson* 61 (Library of America 1986). Whether he said it or not, this is an accurate characterization of Hamilton’s views. I was in error about the hereditary Senate, but Hamilton *did* advocate that “one branch of the Legislature hold their places for life or at least during good behavior. Let the Executive also be for life.” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 289 (M. Farrand ed. 1911). Adam White says that Gouverneur Morris praised this speech, but that is Morris, a high federalist, who also believed in a Senate chosen for life and other aristocratic notions. (And yes, Hamilton stuck around a few days after his speech, but when things didn’t go his way he left, only returning after New York’s other delegates had departed; whereupon Hamilton signed the Constitution contrary to his state’s express instructions.) His hostility to popular government also accounts for Hamilton’s unbecoming attachment to England – an infatuation so powerful that Hamilton, as Secretary of Treasury, exceeded his authority and began conducting secret, illegal negotiations with the English ambassador, behind Secretary of State Jefferson’s back. R.B. Bernstein, *THOMAS JEFFERSON* 88 (2003). White teases Jefferson for being “out of the loop,” but as Secretary of State, it was certainly Jefferson’s *exclusive* role to handle all negotiations with foreign representatives. No wonder Hamilton’s ally Adams thought him dangerously ambitious! (White goes on to chastise Jefferson for owning slaves. This tired indictment has been addressed too many times to be necessary here; Jefferson’s record of attacks on slavery – including the Declaration of Independence, the Northwest Ordinance, the banning of the international slave trade and other acts – have led historians like Lance Banning to state that “no one of his generation was a more effective, influential foe of slavery than Jefferson.” Lance Banning,

Three-Fifths Historian, CLAREMONT REVIEW OF BOOKS, Fall 2004.)

My comments regarding Hamilton are meant only partly as fun historical banter. The recent revival of interest in the Federalists, led in large part by conservative historians, ought to be greeted with serious skepticism. The Federalist Party came to a deserved end because of its hostility to the idea that people could govern their own lives, without being kept in place by a patriarchal government which regulated their morals and industry. As Jefferson put it, Federalists believed “that men in numerous associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will ... to constrain the brute force of the people ... to fascinate the eyes of the people, and excite in them an humble adoration and submission, as to an order of superior beings.” Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 3 *THE REPUBLIC OF LETTERS 1862, 1862* (J. Smith ed. 1995). Modern conservatives believe precisely the same thing, and this, I think, accounts for their recent attempts to polish up the Federalists’ record. Hamilton was undeniably a great man, whose importance in the Constitutional design cannot be ignored. But his reputation and that of his party deserve the scars they bear, and we ought not to forget them. Heaven forbid that I detract from his deserved fame as a Revolutionary soldier and author of so many great *Federalist* papers. But Hamilton’s greatest service to his country was probably when he helped engineer Jefferson’s victory as President.



Adam White replies:

Timothy Sandefur’s response is as interesting for what it does *not* say as for what it does.

As to the former, I note that Sandefur no longer

argues that Hamilton supported “hereditary” government, or that his famous June 1789 speech “was so embarrassing to those present that none commented on it.” (Of course, as noted above, Delegate Johnson would differ with Sandefur over the amount of praise offered by the delegates.)

As to the latter, I note that Sandefur now has changed his argument. In his first letter he argued that Hamilton was “antagonistic to the *fundamental principles of the American regime*” (emphasis added). In his reply he argues that Hamilton was hostile to “limited,” “republican” and “popular” government. I won’t challenge the argument that Hamilton supported government action arguably falling outside of plain text of the Constitution. (Then again, Sandefur’s Jefferson hardly rates better, given his Louisiana Purchase and undeclared Barbary Wars.) But Sandefur *surely* does not mean to equate “popular government,” “republican government,” and “fundamental principles of the American regime,” because anyone who has engaged in even the most cursory reading of the Constitution knows that institutional brakes on unfettered majoritarianism are as core to the Republic as is popular rule. To say that Hamilton was not a populist is not to say that he was anti-Republic, much less *anti-fundamental-American-principles*.

Moreover, Sandefur’s reading of Farrand is incomplete. Hamilton’s proposal of a Senate or Executive elected “for life” actually referred to election “for life” subject to *removal*, and Hamilton’s standard for removal was *lower* than that for modern impeachment: “mal – and corrupt conduct.” Hamilton’s executive was far from a king, especially given that his Senate wielded more power than does the modern Senate; see Farrand at 292.

Sandefur’s protests notwithstanding, I also note that while Hamilton’s “secret diplomacy” with Major George Beckwith may have usurped the province of Secretary of State Jefferson, it was done with

the approval and oversight of President Washington. Chernow at 294. Given President's assent, the negotiations were far from "illegal." Apparently President Washington disagreed with Sandefur on how "exclusive" Jefferson's role was.

Finally, as Sandefur relied on historical revisionism to color his first letter's account of Hamilton's speech, so does he rely on historical fiction to color his reply. The infamous "great beast" exclamation was first recounted in *Memoir of Theophilus Parsons*, published in 1859, nearly seventy years after Hamilton allegedly uttered those words. (The book was published by Parsons's son more than four decades after Parsons died.) Parsons's sourcing is "suspect," to say the least: he himself noted that "I have this anecdote from a friend, to whom it was related by one who was a guest at the table." Chernow at 398–99. Sandefur suggests that "*whether he said it or not*, this is an accurate characterization of Hamilton's views." While "fake but accurate" may serve the purposes of Sandefur (and of, in the recent case of the bogus Bush memos, Dan Rather), I suggest that Alexander Hamilton – and history – deserves better. 