

## A False Claim for a "Living Constitution"

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There are a significant number of people to buy into the argument that the U. S. Constitution should be a "living document". It is not just some crackpots who believe it; it is embraced by a fair number of educated people, some of them educated in constitutional law. Before I examine a supposed justification for the "living constitution", it is useful to spell out what is meant by that phrase. The underlying philosophy of the "living constitution" sect (for it is a civil religion) is that the U. S. Constitution was a great advancement in the 18th century, but is now obsolete. With the advent of technology and industry that supplanted the agricultural economy of the colonial period, it is necessary, they claim, for the government to expand its powers as it sees fit in order to do good, help the people, to pick economic winners and losers, and to regulate the activities of business and the people for the common good. These expansions of power are justified, they claim, because it is all done for the benefit of the people.

It is pretty obvious that the intent of the founding fathers was to create a limited government with limited specified powers, as stated in Article 1, Section 8 of the Constitution. The main idea was to protect individual liberty as much as possible, consistent with peace and stability. But the advocates for the "living constitution" sometimes attempt to find a justification for the arbitrary-power model of government in the writings of the founding fathers themselves. Mr. Garrett Epps does so in his essay of 1 Jun 2011 [1], titled "Constitutional Myth #2: The Purpose of the Constitution is to Limit Congress". It is true that the Constitution was intended to create a federal government that had viable powers, unlike the Congress under the Articles of Confederation. Congress under the Articles was simply too weak to function as a viable government, and it was obvious that some new form of government was required. That is quite different than saying the Constitution was designed to allow the federal government to anything it wanted. Mr. Epps claims in his article that Alexander Hamilton viewed federal powers as unlimited. To do so, he quotes a section from Hamilton's Federalist #34:

"There ought to be a capacity to provide for future contingencies as they may happen, and as these are illimitable, in their nature, it is impossible safely to limit that capacity."

Mr. Epps uses this passage in isolation in an attempt to show that Hamilton regarded the federal government as having arbitrary powers, including one to create more powers, and the power to use them all as it saw fit in the future. There are two fallacies here. The first is that Mr. Epps fails to point out that the Federalist #34 is part of a long sequence on taxation (numbers 30 through 36) in which Hamilton expends great effort to show that federal and state taxation are compatible, can be efficiently collected, and are devoted to different expenses. The federal expenses that Hamilton had in mind here are mentioned two paragraphs later in the same essay:

"What are the chief sources of expense in every government? What has occasioned that enormous accumulation of debts with which several of the European nations are oppressed? The answer plainly is, wars and rebellions; the support of those institutions which are necessary to guard the body politic against these two most mortal diseases of society. The expenses arising from those institutions which are relative to the mere domestic police of a State, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure), are insignificant in comparison with those which relate to the national defense."

Secondly, Mr. Epps declines to point out that Hamilton had, a few days earlier in the Federalist #33, discussed the fact that only specific powers were conferred to the federal government. In his discourse on taxation, Hamilton addresses objections to the "Supremacy Clause" (Article VI). The critics had claimed

that this and the power of taxation would be the "pernicious engines by which their local governments would be destroyed and their liberties extinguished". But Hamilton explains:

"If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy. But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but are invasions of the residual authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."

It is clear that Hamilton regarded the powers of the federal government to be limited; otherwise, how could he claim that laws contrary to the constitution are acts of usurpation? It is true that we the people have grown lazy and have failed to call acts of usurpation by their real name. The only fix for that is education. I would urge everyone to read the Federalist Papers, so as not to be misled by those like Mr. Epps who wish to impose arbitrary government upon you. It is clear that neither Hamilton nor the other founders implicitly advocated the notion of a "living constitution".

[1] <http://www.theatlantic.com/national/archive/2011/06/constitutional-myth-2-the-purpose-of-the-constitution-is-to-limit-congress/239374/>