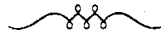


# The Permanent Constitution

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This essay is a summary of Professor Hamburger's article, "The Constitution's Accommodation of Social Change," which appeared in 88 Mich. L. Rev. 239 (1989).



Did the framers and ratifiers of the U. S. Constitution think that change in American society would require change in the Constitution? If they understood the possibility that their society might evolve, how did they expect constitutional law, whether the text or its interpretation, to accommodate such development? These days, Americans tend to think about the Constitution's response to change in terms of a "living constitution." In contrast, during the 1780s, many Americans, including many framers and ratifiers, made clear that they hoped for a permanent constitution.

The framers and ratifiers often discussed the implications of social developments for constitutional law. For example, when Anti-Federalists complained about the Constitution's failure to guarantee a jury trial in civil cases, Federalists responded that a change of circumstances might, in some instances, render the current form of such trial inappropriate and obsolete. As Hamilton explained, "the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails." He suspected "it was impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature." A

similar exchange took place in the Virginia ratification convention on the subject of the common law. When Patrick Henry complained that the Constitution “ought to have declared the common law in force,” Edmund Randolph responded that “the common law ought not to be immutably fixed” in the Constitution; on the contrary, “[i]t is established only by an act of the legislature, and can therefore be changed as circumstances may require it.”<sup>2</sup> James Iredell in North Carolina bluntly summarized the underlying point: “[T]here is a material difference between an article fixed in the Constitution, and a regulation by law,” which “can easily be occasionally altered so as best to suit the conveniences of the people.”<sup>3</sup>

Although the framers and ratifiers tended to assume that constitutions should, by their nature, be permanent, Federalists and Anti-Federalists differed on what they meant by this. Anti-Federalists often feared that social developments would undermine liberty and republican government, and they therefore objected that numerous rights and other legal barriers needed to be inflexibly established by the Constitution. Cato, for example, wanted limits on government “explicitly fixed” and explained: “It is alleged that the opinions and manners of the people of America are capable to resist and prevent an extension of prerogative or oppression, but you must recollect that opinion and manners are mutable, and may not always be a permanent obstruction against the encroachments of government.”<sup>4</sup> Like many other Anti-Federalists, he did not want the Constitution to accommodate social change, but rather thought it should establish liberty permanently regardless of such change.

Framers and Federalists also tended to assume that constitutions should contain what was permanent, but they perceived permanence in fewer provisions than did Anti-Federalists, for they thought any law that would have to change according to circumstances could not be permanent. The only surviving document on drafting from the 1787 Philadelphia Convention stated that, “[i]n the draught of a fundamental constitution, two things deserve attention,” the first being: “To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events.”<sup>5</sup> The Constitution, in other words, had to be adapted to the future already at the time of drafting by omitting what would become obsolete. Along similar lines, a well-placed observer during the summer of 1787 noted that “[t]he prevailing impression as well in, as out of, Convention, is, that a federal Government adapted to

the permanent circumstances of the Country, without respect to the habits of the day, should be formed.”<sup>6</sup> Framers and eventually Federalists tended to assume in this manner that the Constitution had to exclude all provisions that had the potential to become outmoded, and such men therefore tended to argue against many provisions that Anti-Federalists considered essential. For example, as already seen, Federalists rejected the idea that the Constitution should have included a guarantee of jury trial in civil cases, for “the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable.”<sup>7</sup> In short, much of what Anti-Federalists thought should be permanently established by the Constitution notwithstanding social change, Federalists decried as incapable of permanence and appropriate only for legislative discretion.

Even with their differences, most commentators—whether framers or ratifiers, Federalists or Anti-Federalists—held some beliefs in common. Although they often disagreed about what could be permanent, they tended to share an assumption that constitutional law should be permanent—that is, both inflexible and enduring. Of course, not all framers and ratifiers conformed exactly to the opinions outlined here. For example, a relatively small number of Federalists and Anti-Federalists held such views but also welcomed the possibility that the Constitution would have to be adapted, by amendments, to alterations in society. Typically, however, Federalists and Anti-Federalists seem to have assumed that, as much as possible, the Constitution should be drafted so that it would not evolve.

In retrospect, one may doubt whether any group of individuals could have the foresight and wisdom to craft a constitution that could be permanent in either the way desired by Anti-Federalists or the way sought by most framers and Federalists. As Madison acknowledged, “What change of circumstances[,] time[,] and a fuller population of our country may produce, requires a prophetic spirit to declare, which make no part of my pretensions.”<sup>8</sup> Yet even while making this profession of modesty, Madison and many of his colleagues among the framers and Federalists repeatedly attempted to anticipate at least the range of possible future developments, including “revolutions” in demographics, the economy, and social conditions.<sup>9</sup> They understood that they could not predict the future, but they did not therefore consider their task unmanageable, for rather than seek detailed constitutional regulation of what could not yet be known, they usually hoped merely to

omit constitutional provisions that would have to change.

Americans today often assume that they are too distant from their eighteenth-century predecessors to understand them. Many Americans then, however, did not hesitate to “look forward to remote futurity.” Although their task in looking forward was more difficult than ours in looking back, they did not flinch, for they understood that “[c]onstitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages.”<sup>10</sup> ♣

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#### ENDNOTES

- <sup>1</sup> The Federalist No. 83, at 573 (Alexander Hamilton).
- <sup>2</sup> Henry, Virginia Ratification Convention (June 14, 1788), 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447 (1941); Randolph, Virginia Ratification Convention (June 14, 1788), 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 469–70 (1941).
- <sup>3</sup> Iredell, North Carolina Ratification Convention (July 28, 1788), 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 144–45 (1941).
- <sup>4</sup> Clinton, Letters of Cato, Essays on the Constitution of the United States 266 (1982).
- <sup>5</sup> Max Farrand, The Records of the Federal Convention of 1787 137 (1966).
- <sup>6</sup> Letter from Edward Carrington to Thomas Jefferson (June 9, 1787), 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 38.
- <sup>7</sup> The Federalist No. 83 (Alexander Hamilton).
- <sup>8</sup> The Federalist No. 55 (James Madison).
- <sup>9</sup> The Federalist No. 41 (James Madison).
- <sup>10</sup> The Federalist No. 34 (Alexander Hamilton).

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