

How should one balance placing some questions beyond the control of a simple majority in a constitutional system with the need to preserve for future generations the ability to modify the constitution they inherit from their ancestors? This, in essence, is the problem we posed to the authors in this two-volume edition of the IGJR. In the first volume, the authors focused on the disagreement between Thomas Jefferson and James Madison concerning the desirability of rewriting the US Constitution every generation. The authors sided with Madison, arguing that constitutional endurance was important for advancing the interests of future generations.

The authors in this volume take constitutional endurance their starting point. The question they ask is how difficult it should be to alter constitutional provisions. They explore a wide range of options. At one end of the spectrum, the provisions of a constitution could be barely more difficult to alter than an ordinary statute. At the other end are eternity clauses, which seek to make specific provisions, or even the entire constitution, permanently unalterable. In between are many possible arrangements requiring different levels of super-majority support to change the provisions of a constitution.

Constitutions seek to protect institutional arrangements and certain rights and privileges against the possibility that future generations may prefer to abandon those provisions. But what is at stake is not only the protection of cherished values and institutions, and the ability of future generations to exercise sovereignty, but also the survival of the constitution. Constitutions that are especially difficult to change may be more likely to be abandoned as unworkable, or to be overthrown in a revolution.

Constitutions are valuable precisely because they remove some questions from the hands of electoral majorities. Yet, one needs to balance the importance of placing some questions beyond the control of a simple majority with the need to preserve democratic rule and the ability of future generations to adapt the constitution they have inherited to their changing needs. How does one strike that balance?

The authors in this volume of the IGJR are in agreement on two basic propositions. One is that it is important to place certain questions beyond the reach of simple majorities. They see restrictions on the choices of future generations as justified by the benefits that a constitution confers: greater stability in a political system, the protection of certain fundamental rights, the removal from the day-to-day political contention of certain vexing political questions. The authors also agree on a second proposition. They see eternity clauses as undesirable. It is one thing to bar changes temporarily until support for a constitution is established, quite another to seek to prevent changes in perpetuity. The former may be justified, the latter represents lack of faith in the integrity of the political institutions and traditions that a constitution is establishing, and in the judgement of future generations.

If there is agreement on the contours of the provisions of constitutions, there is much less agreement on what types of restraints on constitutional changes are desirable. Should some parts of

the constitution be more difficult to change than others? If so, which parts and which provisions? The question the authors of the papers in this volume ask is how to best to protect democracy and the interests of future generations in a constitutional system characterised by endurance.

Jörg Tremmel is on leave as editor of the IGJR, and did not participate in the editorial decisions for this issue. This enabled him to submit an article, himself. In this article, *Constitutions as Intergenerational Contracts: Flexible or fixed?*, Jörg Tremmel writes that, with regard to intergenerational justice, the endurance of constitutions gives rise to two concerns: the (forgone) welfare concern and the sovereignty concern. The difficulty of changing the provisions of a constitution may prevent future generations from changing provisions that are harmful to their welfare. He outlines a procedure for constitution-amending that he argues is intergenerationally just. Specifically, he makes the case that recurrent constitutional reform commissions, in fixed intervals, strike the best balance between the rigidity required of constitutions and the flexibility necessary to ensure justice to future generations.

In *Constitutional Handcuffs*, Richard Albert seeks to reinforce the theoretical foundations of constitutional entrenchment by defining degrees of constitutional permanence. Albert argues that absolute entrenchment undermines the participatory values essential to constitutionalism. He proposes an alternative to entrenchment, which he terms the entrenchment simulator. The entrenchment simulator retains the expressive value of the entrenchment of shared social and political values, while still allowing those rules to be amended, albeit with great difficulty.

In the final paper, *Constitutions as Chains?*, Konstantin Chatzathanasiou distinguishes between the challenge of establishing intergenerationally just constitutional provisions, and the challenge of creating a stable institution. He prioritises the stability. Chatzathanasiou discusses different ways of addressing the challenges of constitution-making, such as the amendability of a constitution, eternity clauses or recurring constitutional assemblies, concluding that a flexible approach towards existing constitutional provisions, that is open to future developments, is best.

In the end, whether constitutional entrenchment is good or bad may depend as much on what procedures and rights are entrenched, as on the mechanisms by which entrenchment is carried out. One question to consider as you read the articles in this volume is whether there is any reason to think that the procedures and rights protected by constitutional entrenchment will be necessarily well-chosen, or reflect the highest aspirations of a people. Perhaps one does not have to be overly cynical to worry that the framers of a constitution, like ordinary lawmakers, may seek to entrench protections for powerful interests and for rights favoured by an ideology.

Bruce Auerbach (Albright College)

Maria Lenk (FRFG)

Antony Mason (IF)

Markus Rutsche (University of St. Gallen)