

# Constitutions as Intergenerational Contracts: Flexible or fixed?

by Jörg Tremmel

**A**bstract: Constitutions enshrine the fundamental values of a people and build a framework for a state's public policy. With regard to intergenerational justice, their endurance gives rise to two concerns: the (forgone) welfare concern and the sovereignty concern. In this paper, I outline a procedure for constitution-amending that is intergenerationally just. In its line of reasoning, the paper debates ideas such as perpetual constitutions, sunset constitutions, constitutional reform commissions and constitutional conventions both historically and analytically. It arrives at the conclusion that recurrent constitutional reform commissions in fixed time intervals strike the best balance between the necessary rigidity and the necessary flexibility of constitutions.

## Introduction<sup>1</sup>

From the perspective of the reproduction of political orders, constitutions are an interesting case. Arguably, they are the most important intergenerational contract in modern society. This raises the question of how binding this contract should be: flexible or fixed?

A “constitution” is usually<sup>2</sup> defined as a system of fundamental principles according to which a state is to be governed. Constitutions build a framework for a state's public policy. They enjoy normative priority over ordinary statutes and regulate the manner in which ordinary laws are made. Constitutions also enshrine the fundamental values of a people, often in their preambles or in their first part. They can (but need not) contain a catalogue of basic human rights and liberties. Constitutions are distinguished from ordinary legislation by their rigidity. Written constitutions usually require legislative supermajorities, concurrent majorities of different houses of the legislature, and/or popular referenda in order to be changed.<sup>3</sup> By their very nature, constitutions are intergenerational documents because they are intended to place certain questions beyond the reach of simple majorities. With few exceptions, they are meant to endure for many generations.

This paper proceeds as follows. The next section outlines the intergenerational challenge to “difficult to change” constitutions, starting with employing a thought experiment. After clarifying my key concepts, and paying tribute to the beginning of the debate, I put forth my proposal for a procedure of constitution-amending that is intergenerationally just. I test this proposal against two main concerns: the (forgone) welfare concern and the sovereignty concern. The conclusion summarises why recurrent constitutional reform commissions in fixed time intervals strike the best balance between the necessary rigidity and the necessary flexibility of constitutions, thereby fulfilling the requirements of intergenerational justice. Some questions regarding the possible design for these commissions are outlined for further research.

## A thought experiment<sup>4</sup>

*As a thought experiment, let us imagine that the founding fathers (no women are involved) of a newly-formed nation adopt a constitution. In this constitution, the very last provision stipulates*

*that no single clause of the constitution be changed or abolished for a time period of 300 years. After that time period, constitutional changes are possible by a supermajority of 75% of the members of parliament.*

This thought experiment is intended to illustrate the challenge that the idea of intergenerational justice poses to “very difficult to change” constitutions. In it, the framers of a constitution impose their will on subsequent generations. Those born in the next three centuries are expected to acquiesce to the norms of this constitution without their consent. But in a democracy, the legitimacy of governance is founded on the consent of the governed. All those who are subject to the rule of a constitution should be able to exert influence over the basic laws that regulate their lives.

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“Sovereignty” means the ability of a people, of each generation<sup>5</sup> of citizens, to live under rules of their own choosing. After all, whose is a constitution? If the answer is “the citizens of country X”, this means nothing else than it is the constitution of the citizens *currently alive*. This is the appropriate state of affairs since dead people can neither be benefited by possessing something, nor harmed by losing a property, including the capacity to rule after their death. But if a constitution is too difficult to change, the dead citizens of country X wield power over the living,<sup>6</sup> and the past rules over the present. It might well not make a difference if those succeeding generations share the values and views of their ancestors, but what if they happen not to? What if succeeding generations see some provisions of the constitution as a threat to their long-term well-being, or even as morally wrong? This problem is exacerbated when a stable majority of the citizenry would like to reform the constitution but falls short of the required supermajority of 66% or even 75%. Can we call it “the rule of the people” or “popular sovereignty” if stable majorities (let's say from 50% + 1 vote up to a three-fifths supermajority) of the present *demos* cannot change certain constitutional clauses for the simple reason that their forefathers put the bar for changing the constitution extremely high? “Generational sovereignty”<sup>7</sup> is closely linked to the concept of “legitimacy” for two reasons, namely that

- “the people” is considered the only legitimate source of governmental power in democracies;
- as a matter of fact, “the people” does not consist of the same people over time as generations come and go when time passes.<sup>8</sup>

## Terminology

In his otherwise well-formulated paper *The Problem of a Perpetual Constitution*, Victor Muñoz-Fraticelli writes: “A perpetual constitution has no ‘sunset clause’, no date of expiration; it *may* [my emphasis] contemplate for its amendment and even specify a procedure for its modification, but it does not consider its own

abolition. When adopted, it is intended to govern a society for as long as that society exists, and to be accepted by the present and future members of that society as a valid charter of political association.”<sup>9</sup> The problem with this definition is that the modal verb “may” renders it inadequate. Its extension encompasses both constitutions that cannot be changed for an indefinite future (even longer than in the hypothetical construct at the beginning) *and* constitutions that can be amended by (super)majority vote at any time. Muñoz-Fraticelli’s terminology forces him to speak of “a constitution sufficiently perpetual”<sup>10</sup> which is a contradiction in terms since “perpetuity” is not a gradual concept. It is more adequate, therefore, to distinguish terminologically:

a) Sunset constitution: A constitution that lapses automatically after a fixed time span, e.g. 19 years. (The analogue of this on the level of a single clause would be a “sunset clause”).

b) Perpetual constitution: A constitution that does not allow for amendment, repeal or replacement. (The analogue of this on the level of a single clause would be an “irrevocable clause”).

c) Endurance by default constitution: A constitution that endures by default in the sense that unless objection to it receives a certain level of political support, the constitution will endure. (The analogue of this on the level of a single clause would be an “endurance by default clause”).

Muñoz-Fraticelli does not distinguish between b and c. In his terminology, every constitution that is not a sunset constitution is by definition a perpetual constitution. But, as this paper will show, it is important to be able to distinguish terminologically a “perpetual constitution” from an “endurance by default constitution” that is “difficult to change”. In comparison to ordinary laws, all constitutions are difficult to change, but this does not make them “perpetual” in the usual sense of the word (“eternal”, “everlasting” or “perennial”). The constitution in the thought experiment could be called a temporarily unchangeable constitution. Despite its blatant rigidity, it is still less strict than a permanently unchangeable (a “perpetual”) constitution.

### The beginning of the debate about perpetual constitutions

At the end of the 18th century, the incipient constitutionalism in the United States of America and France spurred an intensive and high-level debate. Perpetual constitutions and sunset constitutions feature very prominently in the political theory literature due to the pro and con arguments of Jefferson’s famous proposal that a constitution should lapse automatically after 19 years in order to be intergenerationally legitimate. In a letter to James Madison from 6 September 1789,<sup>11</sup> Thomas Jefferson pondered the problem of intergenerational domination. From a discussion of public debt, he switched to laws and constitutions: “On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. (...) The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. (...) Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.”<sup>12</sup> Should laws remain valid until the succeeding generation repeals them? Jefferson answered negatively and counselled an explicit opt-in decision: “It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only. In the first

place, this objection admits the right, in proposing an equivalent. But the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves; their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents; and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.”<sup>13</sup>

In his reply, Madison dissented and pointed at the instability that would ensue. Madison’s reply is often unduly shortened in the contemporary discussion,<sup>14</sup> but it is worthy to be cited at some length. First, he acknowledged: “The idea which the latter evolves is a great one; and suggests many interesting reflections to Legislators; particularly when contracting and providing for public debts. (...) My first thoughts lead me to view the doctrine as not *in all respects* [Madison’s emphasis] compatible with the course of human affairs.” Madison’s objections were mainly of a practical nature.<sup>15</sup> “Would not a Government ceasing of necessity at the end of a given term, unless prolonged by some Constitutional Act, previous to its expiration, be too subject to the casualty and consequences of an interregnum? (...) Would not such a periodical revision engender pernicious factions that might not otherwise come into existence; and agitate the public mind more frequently and more violently than might be expedient? (...) I can find no relief from such embarrassments but in the received doctrine that a tacit assent may be given to established Governments & laws, and that this assent is to be inferred from the omission of an express revocation.”<sup>16</sup> In the locus classicus, Madison already points at the necessary distinction between constitutions that are beneficial and those that are harmful to future generations: “[My observations] are not meant however to impeach either the utility of the principle as applied to the cases you have particularly in view, or the general importance of it in the eye of the Philosophical Legislator. On the contrary it would give me singular pleasure to see it first announced to the world in a law of the U. States, and always kept in view as a salutary restraint on living generations from *unjust & unnecessary* [Madison’s emphasis] burdens on their successors.”<sup>17</sup>

As there is a need to strike a balance between the excesses of constant change and inflexibility, both extremes, sunset constitutions and perpetual constitutions, can be regarded as indefensible.

The US Constitution that came into force in 1789/1791 did not become a sunset constitution; it became a constitution that is notoriously difficult to change. Today we live in a world without sunset constitutions. In contrast to the situation in 1789, to defend the idea of a “constitution without a set expiration date” nowadays does not seem very challenging. It is a bit like beating a straw man.

As there is a need to strike a balance between the excesses of constant change and inflexibility, both extremes, sunset constitutions and perpetual constitutions, can be regarded as indefensible.<sup>18</sup> Roznai concludes from a study of unamendable content in 734 historic and current constitutions: “Treating the *entire* [my em-

phasis] constitution as unamendable derives either from ascribing it to a superhuman source, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection.”<sup>19</sup> The constitutions we find in all countries of the world are endurance by default constitutions, so this is the material to be dealt with, at least from the perspective of *applied* political philosophy. Figure 2 shows what types of endurance by default constitutions can be distinguished.

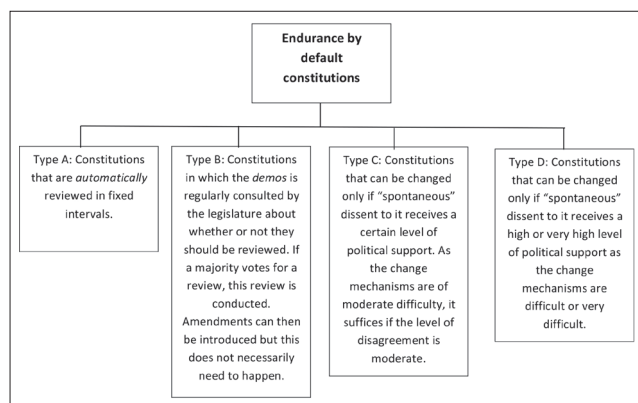


Figure 1: Different forms of endurance by default constitutions

### Irrevocable provisions protected by eternity clauses

Isn't there a type E-constitution? As mentioned, there is no such thing as a perpetual constitution anywhere in the world. However, there are irrevocable provisions *within* endurance by default constitutions. I will call those provisions that are sheltered from alteration or repeal "irrevocable provisions". I will call those provisions that *guarantee* that some provisions are irrevocable "eternity clauses".<sup>20</sup>

Eternity clauses present the intergenerational challenge in its extreme. They are the little brother of perpetual constitutions. In the 735 past and present constitutions that Roznai examined, 28% include or included eternity clauses.<sup>21</sup> If one believed that first and foremost basic rights and liberties (as far as they are part of constitutions) are candidates for irrevocable clauses, one is mistaken. In the constitutions that are or were in effect after World War II, less than 30% of the clauses referred to basic rights.<sup>22</sup> Around the globe, the form and system of government are more often the content of irrevocable clauses than anything else. While more than 100 constitutions protect the republican form of a government, some protect a monarchy.<sup>23</sup> The second notable group is protecting the state's political or governmental structure, such as federal or unitary, for instance, or presidential or parliamentary.<sup>24</sup>

To get a better understanding for eternity clauses and irrevocable content, here are a few examples from the US, Turkey, Germany and France. There are two provisions in the US Constitution that are irrevocable by the methods specified in Article 5. The first is that no amendment to the constitution may abolish the African slave trade prior to the year 1808,<sup>25</sup> and the second is that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." The Turkish Constitution has a high number of irrevocable clauses: Article 1 declares the form of the state as a republic. Article 2 establishes the following: "The Republic of Turkey is a democratic, laic and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the na-

tionalism of Atatürk, and based on the fundamental tenets set forth in the Preamble." Article 3 declares: "The Turkish state, with its territory and nation, is an indivisible entity." It then decides upon the official language, the national flag, the national anthem and the national capital. Article 4, the eternity clause, declares the immovability of the founding principles of the Republic defined in the first three Articles and bans any proposals for their modification. In the German "Basic Law", the eternity clause in Article 79 (3) shields the contents of article 1 and article 20 from being changed, as well as the division of the Federation into *Länder* and their participation in the legislative process.<sup>26</sup> Article 20 enshrines some constitutional principles;<sup>27</sup> article 1 protects human dignity.<sup>28</sup> In France, altering the "republican form of government" (article 89) is out of reach for the politicians.

Most of the world's eternity clauses are not irrevocable provisions.<sup>29</sup> In theory, this would allow a two-step process by which, firstly, the eternity clause could be abolished, and then, secondly, the previously entrenched content can be altered by normal constitutional change procedure. But some eternity clauses are declared irrevocable themselves<sup>30</sup> – in this case of "second-order unamendability", no legal recourse can be taken by successor generations to change the content that was entrenched by their predecessors.

"Institutions are sticky, and constitutions are the stickiest of them."<sup>31</sup> If this is true, eternity clauses are the stickiest of the stickiest of all institutions. Nevertheless, in the literature, the significance of this stickiness is sometimes played down. It is sometimes light-heartedly asserted that succeeding generations are always free to abandon the constitutional order they inherited – by means of a revolution. From this, the conclusion is drawn that there is no intergenerational injustice in including irrevocable (or almost irrevocable) content in constitutions. But this is the most cynical argument of all, since it devalues human lives. Historically, revolutions were often followed by periods of unrest and civil war, and they usually brought about a plethora of casualties and a massive loss of well-being for a large share of the population. There should be easier ways for succeeding generations to get rid of an outdated constitutional legacy.

Constitutional amendment procedures should be designed with the aim of making the voices of succeeding generations heard from time to time by opening a window of opportunity.

### The proposal: recurrent constitutional reform commissions

More often than not, the reason outdated provisions are not changed is not that the people still support them, but that reformers lack windows of opportunity to mobilise the silent (super)majority.<sup>32</sup> In type A and B constitutions, a time for reflection about the constitution is incorporated in the text of the constitution. In fixed intervals, a review has to be conducted either automatically (type A), or the *demos* has to be asked if such a review should be taking place (type B). I will argue in the remainder of this article that constitutions that are *automatically* reviewed in fixed intervals (type A constitutions) rank first from the point of view of intergenerational justice. Type B constitutions come second as they also create a review situation (of a second order), even though such a review of the constitution is not mandatory. In type C and D constitutions, inertia plays into the hands

of the existing system despite the fact that time goes on and the world changes constantly. Constitutional amendment procedures should be designed with the aim of making the voices of succeeding generations heard from time to time by opening a window of opportunity.

A constitution should prescribe a time for its own revision. But, of course, the revision of constitutional provisions remains possible in the midst of such an interval (i.e. “spontaneously”) by the established amendment procedure as well.<sup>33</sup>

Assuming the demographic data are available, one can calculate the point in time at which the post-framers’ generation has become as numerous as the framers’ generation (“generational change point”) for each country and each base year. Based on the variables “number of eligible citizens in a base year  $x$  (framers’ generation)”, “citizens reaching the voting age in the years  $x+1$ ,  $x+2$ , ...,  $x+n$ ”, “deaths of framers’ generation members in the years  $x+1$ ,  $x+2$ , ...,  $x+n$ ”, one arrives at different time periods until the next generational change point for each country, depending on its population structure. An entire article could be devoted to such a model.<sup>34</sup> To cut a long story short, I take 25 years as a good length of time between two constitutional reform commissions.

A constitutional reform commission at fixed time intervals strikes the right balance between the two legitimate goals of flexibility and rigidity. A constitutional reform commission at fixed time intervals strikes the right balance between the two legitimate goals of flexibility and rigidity. To be very clear: a constitutional reform commission is not a constitutional convention. The mandate of the latter would be to draft a new constitution of a piece, a monolithic and integral new document. By contrast, the mandate of a reform commission is to make proposals for the adoption/change/abolition of single clauses of endurance by default constitutions. There is no danger that a generation could end up without any constitution at all when a reform commission is at work. My proposal substantiates Condorcet’s ideas, not Jefferson’s. While Jefferson counselled that constitutions should be adopted anew by each generation, Condorcet argued that each generation should have a window of opportunity for a revision.<sup>35</sup>

It is very likely that the implication of such a window of opportunity is not that the constitution be rewritten from scratch, quite the contrary. Zachary Elkins, Tom Ginsburg and James Melton have analysed each and every constitution written since 1789.<sup>36</sup> One of their key findings is that flexibility (defined as the constitution’s ability to adjust to changing circumstances captured in the empirical analysis by the ease of formal and informal amendment, either informally via constitutional construction by the courts or via formal amendment procedures by the legislature) is positively correlated with the endurance of a constitution.<sup>37</sup> Likewise, the inclusiveness of a constitution (defined as the degree to which the constitution includes relevant social and political actors taking into account that time will change which societal groups will have a stake in the endurance of the constitution) is positively correlated with its stability over time. The life expectancy of the least inclusive constitution is a full 55 years less than the most inclusive constitution (14 years vs. 69 years).

The finding that flexibility increases endurance makes sense intuitively. Here is a second, slightly changed version of the initial thought experiment to illustrate this point:

*In another state, the framers of a newly-formed constitution (women are involved now) install a review provision which stipu-*

*lates that, instead of leaving all constitutional clauses unchanged for 300 years, each generation can have a reform commission and revise the constitution.*

Which constitution is more threatened to be repealed entirely after 300 years: the one with the 300 year-old content due to the entrenched embargo by the framers’ generation, or the one that has been updated by each generation (who wanted to do this) in the last 300 years? In the first scenario, the citizens have been hindered to exercise the *pouvoir constituant* for a long time, whereas in the second scenario no generation was shut out of their project of constitutionalism. Even if not all installed review commissions actually did lead to amendments, all generations have had their say. In this second version of the thought experiment, 300 years after the initial formulation of the constitution a revolution will be unnecessary, given that an evolutionary process (in the form of amendments) has taken place.

In what follows, I will try to defend my proposal in the light of two concerns: the (forgone) welfare concern and the sovereignty concern.

### **The (forgone) welfare concern**

*The proclaimed benefits of constitutions for future generations – and the danger of parochialism*

Since Madison, the benefits of constitutions for succeeding generations have often been highlighted. There are indeed good arguments to aver a positive impact of constitutions on the quality of life of succeeding generations, compared to a world without constitutions. But constitutions are so commonplace in our real world nowadays that the danger of a people of being “constitutionless” for a relevant time period is virtually non-existent. No doubt: constitutions are great inventions in the history of humankind. But this in itself does not defend “difficult to change” or even perpetual constitutions. Are they defensible at all? Here are some arguments that have been brought forward on their behalf:

*1) Constitutions as defenders of human rights and liberties: When constitutions entrench democratic rules and fundamental rights against their abolition, they make it more likely for succeeding generations to live under those rules and to enjoy these rights and liberties. Constitutions are thus devices to ensure intergenerational justice.<sup>38</sup>*

It is certainly true that fundamental rights and liberties are a boon for present and future individuals. Fundamental rights are not only enshrined in international documents such as the *United Nations Declaration of Human Rights* or the *European Convention for the Protection of Human Rights and Fundamental Freedoms* but, selectively, also in national constitutions.<sup>39</sup> One of these fundamental rights in a number of national constitutions is the right to freely exercise one’s religion. Religious freedom implies that there is no state religion, since a religion imposed by a government would discriminate against both citizens of a different faith and citizens who are agnostics or atheists. Now, according to the devotees of very rigid constitutions the fact that religious freedom is enshrined in constitutions seems to support the conjecture that national constitutions are defenders of human rights. But the debate is usually led with a parochial bias: the constitutions of some Western states feature very prominently in it, but then the derived conclusion (namely, that only cumbersome procedures of constitution-amending are intergenerationally just) are more or

less generalised to *all* constitutions of the world. Based on some single-case studies of Western constitutions, general conclusions about the merits of rigid constitutions are drawn. It should not go unnoticed that only 4% of national states today lack a constitution.<sup>40</sup> But of all states, only 11.4% (home to 4.5% of the world population) can be classified as “full democracies”.<sup>41</sup> Taking a global view, one cannot ignore the fact that almost all authoritarian states are constitutionalised states. It is thus quite surprising that only recently some political and legal theorists have discovered the rest of the world.

It is high time for the mainstream to debate the intergenerational challenge to constitutionalism in the context of authoritarian constitutions, too.

It is high time for the mainstream to debate the intergenerational challenge to constitutionalism in the context of authoritarian constitutions, too. Until now, only a few studies argue that constitutions in authoritarian regimes matter, and that they even have a causal effect in regime endurance.<sup>42</sup> Several constitutions in Islamic countries enshrine the primacy of Islam.<sup>43</sup> By fusing religion into the branches of government, these constitutional clauses defy the principle of religious freedom and are thus in contrast to one basic human right. Yet these examples are constantly ignored when legal scholars assert that constitutions are defenders of human rights and liberties.

The case of Iran deserves a closer look. Starting in 2009, Iran was repeatedly the site of vigorous youth revolts. Millions of young people took to the streets when waging the so-called Green Revolution against the rigged election of Ahmadinejad and soon against the whole illiberal theocratic political system that is protected by the present constitution. They sought basic liberties. When “their” constitution was enacted 38 years ago (in 1979), the majority of the people living in this country today were not even born. The subsequent youth revolutions were repressed with sheer brutality, and failed to change the political system. The irrevocableness of some key provisions<sup>44</sup> makes it very difficult for the succeeding generations in Iran to adapt their constitution to their values as the framers have sought to leave an immovable imprint. Now the youth has the choice between the devil and the deep blue sea. A revolution would give them the opportunity to replace the Iranian constitution, but during a revolution many (more) Iranians would be imprisoned, tortured and killed.

As in Iran, constitutions in many countries of the world protect the political order without protecting human rights and liberties. The claim that future generations are the beneficiaries, not the victims, of constitutions enacted by their predecessors is wrong when looking at constitutions in authoritarian regimes. There is a paradox here: those states that would need the valve of mandatory constitutional reform commissions the most are also those least inclined to put it in their constitutions.

Harm and forgone welfare are two distinct concepts. While some provisions of the Iranian constitution are harmful, other constitutions, even in Western Europe and North America, can be held responsible for forgone welfare. Who would aver that all constitutional clauses in established Western democracies foster the welfare of the citizens living under the jurisdiction of these constitutions? Take the US constitution. The Second Amendment<sup>45</sup> to the United States Constitution protects the right of the people

to keep and bear arms and was adopted on 15 December 1791, as part of the first ten amendments contained in the Bill of Rights. People who are forced to live under the Second Amendment forgo welfare. Comparative studies have shown that the percentage of people killed in gun incidents is much higher in the USA than in similar countries where citizens do not have a constitutional right to bear arms, such as Canada. If the Second Amendment were abolished, the welfare of all succeeding generations of US citizens would be higher.

The example of this amendment is suggestive in even more respects. If the hunch is correct that the provisions of the Second Amendment ought not to have been protected in the Bill of Rights, then we must ask what the fact of its protection says in general about the decisions of framers of the US Constitution. Two possibilities stand out as the most obvious. The first is that it speaks to the fallibility of the authors of constitutions. The second is that the meaning and impact of the Second Amendment changed over time with population growth and with changing technology (a muzzle-loaded musket is not the same as an AK-47 assault rifle, after all).<sup>46</sup> Either explanation is the basis of a powerful argument for a regular review of constitutions at fixed time intervals.<sup>47</sup>

To sum up: it is not overstated to say that the majority of present people worldwide forgo welfare due to *certain* constitutional clauses in their respective constitutions.<sup>48</sup>

If the hunch is correct that the provisions of the Second Amendment ought not to have been protected in the Bill of Rights, then we must ask what the fact of its protection says in general about the decisions of framers of the US Constitution.

2) *It is a good thing that constitutions shield certain matters from capricious everyday politics. Contentious issues must be silenced at some point in order to secure peaceful co-operation and fellowship among all citizens.*<sup>49</sup>

Usually, democratic societies don't avoid debate and deliberation. To use constitutions as “gag devices” is a risky strategy since “whatever is silenced might explode in the future”.<sup>50</sup> In such cases, Ruznai counsels rather “a temporal unamendability, which allows the removal of the contentious issue from the public agenda for a while without long-term restraints.”<sup>51</sup> The fear of agitating public passions too strongly could indeed be justified if constitutional reform commissions were established at very short intervals (every five years or so). But the “risk” of stirring up political interest and engagement once within the course of a generational cycle – every 25 years or so – seems bearable. Moreover, as long as the debated question is not “this constitution, or an alternative” but just single provisions of the constitution in place, the conflict will be manageable.

Veneration for constitution-making events should not obscure the fact that each constitution is man-made. Drawing on the common division between polity, policy and politics, constitutions are usually regarded as part of *polity*. This view neglects that constitutions (and all other institutions) are “clotted” *politics*. Before they came into existence, politicking happened. Although politicking is never very harmonious, it is necessary from time to time.

3) *No long-term private investment of time and capital will occur if there is no reasonable certainty of reaping its reward. Constitutions may reduce uncertainty – assuring for instance, the performance of contracts*

and securing the rights to property – or increase it. A system in which the constitution and the laws are self-expiring increases uncertainty about the future and undercuts most long-term private investments.<sup>52</sup>

The endurance of a constitution must not be equated with the endurance of ordinary laws. Even though laws have a more modest claim than constitutions, their longevity (at least in some areas) is often greater. France, for instance, has seen no less than 15 constitutions come and go, yet the French Code Civil of 1805 has endured unaltered “[w]hether the French government has been imperial, republican, or fascist.”<sup>53</sup> The same is true, by analogy, of the *Bürgerliches Gesetzbuch* in Germany, which came into effect on 1 January 1900.<sup>54</sup>

4) *The citizens of yesterday know best what is right, better than the citizens of today themselves.*

The core argument of paternalistic thinking – that the framers of a constitution are in a position to identify and represent the general interest – does not hold. Scepticism is justified on a number of grounds. Firstly, it is extremely unlikely that the interests and preferences of a group of adults<sup>55</sup> can be better identified by a third-party than by the affected group itself. The paternalistic conception that men understand women’s needs better than women themselves was successfully rejected by women during their long battle for the right to vote. By the same token, we reject the idea that the interests of Afro-Americans could have been adequately represented by their white masters during the era of the Declaration of Independence, which was neither demanded by – nor beneficial for – the represented. That citizens themselves best understand their own interests is a generally accepted principle in contemporary political theory for sound reasons.

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It is nothing less than hubris for a generation to pretend to be able to determine which institutions will be the most appropriate ones over several decades, even centuries. Let’s change the thought experiment in the introduction and replace 300 years by 3,000 years. It is difficult to even conceive that a constitution written 3,000 years ago would function at all, let alone do so perfectly. The conditions in which people live now, the size of the population, the types of problems we face and the values we consider important, are all, in fact, very different to those of civilisations that existed 3,000 years ago. Now, this being said, 300 years are likewise a considerable time span in a world that changes at a rapid pace. A framers’ generation should be modest enough to acknowledge that their decreed rules of government might display some deficiencies in the future. If one generation entrenches irrevocably *rules and systems of government*,<sup>56</sup> they mistrust their successors. But why should a father mistrust his adult son? Why a mother her adult daughter? A framers’ generation should *offer* a constitutional content to its successors, not try to force it upon its children and grandchildren.

5) *There is more rationality – that is, more checks and balances against short-term passions – in older constitutions.*

Since Madison, the defenders of very rigid constitutions have been arguing that their content must be protected against changes by successor generations that are motivated by irrationality and pre-

sentism. The resounding assertion that later generations will pander to their “passions” and short-term interests can be countered by pointing at an interesting development in constitution-amending worldwide. The growing acceptance of our responsibility for posterity has resulted in the fact that constitutions, especially the ones which were adopted in the last few decades, refer verbatim to long-term thinking and speak of the obligations of today’s citizenry towards future generations.<sup>57</sup> These newly inserted clauses may be termed “posterity protection provisions” (PPPs).<sup>58</sup> Thematically, most of these clauses fall into one of the following three categories: general PPPs, ecological PPPs and financial PPPs.<sup>59</sup> An example for the ecological PPPs is Art. 24 of South Africa’s Constitution of 1994.<sup>60</sup> Examples for financial PPPs are the “debt brakes” recently adopted by several European countries. The Constitution of Poland, for instance, limits the level of national public debt to three-fifths of GDP.<sup>61</sup>

Some of the PPPs are enshrined as fundamental rights; some others are enshrined as statements of public policy, often in preambles, and hence function rather as a guide than a restriction for public policy-making. Individual basic right PPPs aimed at environmental protection can be found, inter alia, in the constitutions of Argentina, Brazil, Finland, Hungary, Latvia, Portugal and South Africa. Often they do not explicitly mention future generations, but give every inhabitant of the country the right to a healthy and well-balanced environment. This follows the rationale that protecting the environment for today’s generations is also good for future generations. Public policy PPPs are based on the assumption that there is a potential conflict of interests between present and future generations with regard to many environmental issues, for instance nuclear waste and global warming. Today’s generations can benefit by burdening future generations. These provisions usually mention future generations explicitly and underline our responsibility to them. Article 20a in the German *Grundgesetz* is based on this approach (likewise, provisions in the constitutions of the Czech Republic, France, Greece, the Netherlands, Lithuania, Spain, Sweden, and Switzerland).

Yet another distinction is their abstractness v. concreteness: while intergenerational provisions are often formulated in abstract terms, they sometimes adopt very specific formulations – e.g. when they set a *specific* debt ceiling or declare *specific* areas as national parks.<sup>62</sup> The literature on PPPs, especially those that constitutionalise “green rights”, is abundant. The important point for our context is that most of these clauses have been adopted just recently. Cho and Pedersen mention a time span of 25 to 30 years,<sup>63</sup> which is roughly equivalent to the time span in which the vulnerability of the environment came to the fore in public and scientific debate. This contradicts the hypothesis that there is more rationality and more foresight in older constitutions. It refutes the claim of the proponents of perpetual or “difficult to change” constitutions that the succeeding generations could give more room for passion than for wisdom in “their” rounds of constitutionalism.

While there is no consensus as to whether or not mankind has progressed morally since ancient times, some theorists do see some kind of moral progress at work.<sup>64</sup> One would expect this to materialise in constitutional evolution, unless stunted by onerous constitution-amending mechanisms. The insertion of PPPs in constitutions, however, can be regarded as a sign of moral progress, since these provisions are guided by an impartial concern for the common good in the long term.

## The sovereignty concern

### Definitions of sovereignty

A definition of sovereignty has already been used in the introduction but will now be carved out more thoroughly. Axel Gosseries presents three concepts of generational sovereignty of which the first one, termed “jurisdictional generational sovereignty”, reads as follows: “A generation is jurisdictionally sovereign during its period of existence to the extent that it is free from enforceable extra-generational jurisdictional claims made by other generations willing to impose their own rules.”<sup>65</sup> With regard to constitutionalism, a shorter, yet sufficiently broad definition would be: “A generation within a state can be called sovereign if it has the ability to live under constitutional provisions of their own choosing.”<sup>66</sup> The sovereignty concern and the (forgone) quality concern are interconnected. Imagine the following cases:

1) A people lives under the jurisdiction of a “very difficult to change” constitution<sup>67</sup> that was established long ago. All of the constitution’s provisions in fact foster their welfare/guarantee their liberties but the citizens are under the false impression that they do not. The citizens thus want to change/repeal/add one or several provisions. But the rigidity of the constitution does not allow for them to do so.

2) A people lives under the jurisdiction of a “very difficult to change” constitution that was established long ago. The citizens are under the impression that all of their constitution’s provisions foster their welfare and guarantee their liberties, which in fact they do. The citizens don’t want to change/repeal/add any single provision. The rigidity of this constitution would not have allowed for them to do so anyway.

3) A people lives under the jurisdiction of a “very difficult to change” constitution that was established long ago. One or more of the constitution’s provisions do in fact impair their potential welfare/infringe on their liberties, and the citizens recognise this fact. The citizens thus want to change/repeal/add one or several provisions. But the rigidity of the constitution does not allow for them to do so.

4) A people lives under the jurisdiction of a “very difficult to change” constitution that was established long ago. One or more of the constitution’s provisions in fact impair their potential welfare/infringe on their liberties but the citizens don’t recognise this fact. The citizens don’t want to change/repeal/add any single provision. The rigidity of this constitution would not have allowed for them to do so anyway.

The sovereignty concern applies to all four cases, but to a different extent. The least problematic is case 2. Is generational sovereignty impaired here at all? Take the individual counterpart to this question: Is your freedom restrained if you are not free to do what you don’t want to do – and should not be doing anyway? One may conclude that there is at most a theoretical, if any, sovereignty concern here.

In case 3, there are good reasons to reform constitutional provisions since they clearly impair welfare, but the people are incapable of doing so because a previous generation decided otherwise over their head. This is the situation which Jefferson, Paine and Condorcet had in mind when they demanded flexible constitutions.

To evaluate case 1, it makes sense to draw on the distinction between autonomy and freedom as is familiar on the level of an individual. The Greek etymology of the word “autonomy” means

These four cases can be depicted in the following matrix:

	Citizens want reform	Citizens don’t want reform
Constitution fosters welfare	1) “disimprovement” situation; possible trade-off	2) reasonableness of present citizenry; no trade-off
Constitution impairs welfare	3) reasonableness of present citizenry; no trade-off	4) unsuspecting immaturity situation; trade-off

Figure 2: Trade-offs between quality and sovereignty

“one’s own law”. On the level of a *demos*, autonomy refers to self-governance, i.e. a country’s ability to determine its own affairs and to make decisions according to reasonable principles. “Freedom”, on the other hand, includes the capacity to override these reasoned decisions, by following one’s passions. It seems to me that “sovereignty” is, semantically speaking, more closely connected to “autonomy” than to freedom.<sup>68</sup> Thus, in case 1 it is primarily a people’s freedom that is restrained by the constitution, not their sovereignty/autonomy. This state of affairs, if true, would justify paternalistic arguments.<sup>69</sup> It is necessary to distinguish the inter- from the intragenerational context here. In an intragenerational context, a generation can commit itself in a “sober” state to certain rules. The aim is to prevent itself from actions in a “drunken” state that it will regret when “sober” again. The story of Ulysses and the Sirens is seen as the archetype of such practice. He has his companions tie him to the ship’s mast in order to be able to listen to the Sirens without falling for their call. Now, as long as each generation decides *intragenerationally* that it wants to be tied to the ship’s mast, there is no *intergenerational* sovereignty concern. But the autonomy of an earlier generation must not turn into heteronomy of the latter. Unlike in Ulysses’s case, the constitutional hand-cuffs called “eternity clauses” are not self-imposed.<sup>70</sup> Finally case 4: if the citizenship as a whole (as the premises have it) is happy with suboptimal constitutional clauses, then their freedom is not infringed upon. Nevertheless, they forgo life quality as they don’t realise the full potential of their lives and thereby one could argue that their sovereignty has not fully materialised. Paternalism could be justified. But to impose on a people paternalistically a new, and better, constitution against their will is quite hard to do – unless the country collapses after a war. The post-World War II constitutions of Germany and Japan might be cases in point.

### Tacit consent

Given the severity of the sovereignty concern, one could, *prima facie*, conclude that this blatant intergenerational injustice should be corrected as soon as possible. But the defenders of perpetual constitutions have a rejoinder that must now be explored in more detail: tacit consent.<sup>71</sup> John Locke was one of the classical proponents of the idea that individuals articulate decisions as free agents entering into consensual relationships with other free agents, and that this becomes the basis for political governance. But the notion of tacit consent can also be retrieved from Locke’s writings.<sup>72</sup> According to Locke, both citizens and temporary residents have to obey the law but temporary residents, just like passers-by, don’t have a voice in passing future legislation.<sup>73</sup> Michael Otsuka spec-

ifies the Lockean argument for tacit consent by adding that tacit consent can be presumed only when an individual has a realistic opportunity to exit the political society in which he is currently residing.<sup>74</sup>

Tacit consent seems to provide a splendid justification for leaving constitutions unchanged for very long periods of time. However, tacit consent as an argument might not reach all that far.

There are always some dissenters in a pluralistic society who want to change this or that constitutional provision. In practice, there is no such thing as tacit consent by *all* the people ruled by a constitution or, more precisely: all constitutional clauses. One must thus think of tacit consent as a *gradual* concept. Leaving aside those who flee the country, those who express open dissent with some constitutional provisions should be subtracted from the group of tacit consenters. It is thereby important to understand that the failure of *success* of the open dissenters is not a criterion of the legitimacy of certain constitutional provisions. Let's imagine a constitution to be changeable by direct rule of the people, that is: referenda without parliamentary intervention, by a supermajority of 75%. Assume arguing that a lot of citizens are unhappy with one clause in the constitution, the right to bear arms in public. Let's assume the dissent varied in the past fifty years, ranging from 51% to 74%. The dissenters were unsuccessful in abolishing this clause; but it would be false to say that the clause enjoyed "the tacit consent of the people".

There are always some dissenters in a pluralistic society who want to change this or that constitutional provision.

The provisions that specify amendment procedures are arguably the most important part of constitutions. These rules are the rule-changing rules whereas other provisions "only" establish the rules of the political game, which, in turn, determine public policy decisions and outcomes.<sup>75</sup> It has been shown that the degree of rigidity of a constitution negatively correlates with the number of times a constitution is changed/amended.<sup>76</sup> For instance, article 5 of the US Constitution provides two methods for constitution-amending.<sup>77</sup> The first method authorises Congress to propose constitutional amendments "whenever two-thirds of both houses shall deem it necessary". The second method requires Congress, "on the application of the legislatures of two-thirds of the several states" (currently 34), to "call a convention for proposing amendments". In the 20th century, concerted efforts were undertaken by proponents of particular issues to secure the number of applications necessary to summon an Article V Convention – yet to no avail. One of the legal scholars who demand a new Constitutional Convention (second to the Philadelphia Convention 1787) is Sanford Levinson. In his book *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* he argues that many of the US Constitution's provisions promote either unjust or ineffective government.<sup>78</sup> Among the provisions he criticises most is the current process for electing the US president commonly known as the Electoral College. The 2016 presidential election again pointed at the problems of this institution. It allowed Donald Trump to become president without the support of the plurality of the voters, as Hillary Clinton had received 48.2% of the vote, Donald Trump 46.1% and others 5.7%. Clinton received 2,864,974 votes more than Trump, which is a substantial margin. The Electoral College

currently employed in the USA is seen by many as an outdated institution that should be reformed (or abolished). It would be a stark mistake to conclude from its endurance that there is tacit consent for this institution. But not only the Electoral College is under the critical spotlight: 11,699 measures have been proposed to amend the Constitution since 1789 (counted up to 3 January 2017).<sup>79</sup> Individual members of the House and Senate typically propose around 190 amendments during each two-year term of Congress. Thirty-three amendments have been proposed by the United States Congress and sent to the states for ratification since the Constitution was put into operation on 4 March 1789. Twenty-seven of these, having been ratified by the requisite number of states, became part of the Constitution.<sup>80</sup> Of the six proposals adopted by Congress and sent to the states that have not been ratified by the required number of states, four are still technically open and pending, one is closed and has failed by its own terms, and one is closed and has failed by the terms of the resolution proposing it. In comparison, the Norwegian Constitution, the second oldest in the world, has been changed 200 times since it came into existence in 1814.

It is misleading to say that constitutions around the world enjoy (or have ever enjoyed in the past) tacit consent by all voters. But to aver that constitutions generally do not enjoy the support of the citizenship would also be inaccurate. What is correct is that there is constant call for reform which sometimes becomes louder, sometimes less loud, but never ceases. And even if the government tries to silence it, as is often the case in authoritarian regimes, it is still there. The desire of a part of a nation's citizenry to modify their constitution as they learn about unintended, unexpected and unwanted consequences is ubiquitous in a globalised and interconnected world.

#### *Different levels of consent/dissent in different age groups*

The intergenerational challenge to the legitimacy of a constitution is alleviated if the level of consent is higher within the young generation than it is within the older one (with the young being the first generation in a sequence of succeeding generations). Consequently, the intergenerational challenge is aggravated if there is a significantly higher level of dissent among the younger part of the *demos* compared to the older part. The "Brexit" is a telling example of a situation in which young voters were outnumbered and dominated by the old. Some 75% of voters aged between 18 and 24 voted against Brexit, and thereby chose to speak out in favour of the United Kingdom remaining in the EU.<sup>81</sup> On average, those who voted Leave had 16 years left to live at the time of the decision (2016), while those who opted for Remain had a life expectancy of another 69 years.

The older voters made a decision the consequences of which will not affect them for very long. Even if the legality of the vote is out of question, this has the flavour of intergenerational domination.

#### **Conclusion and outlook**

I hope that this essay has convincingly made the following points: that flexibility and inclusiveness keep an old constitution young; that eternity clauses protecting the state's governmental structure are incompatible with the principle of intergenerational justice; that constitutions which do not provide windows of opportunity for amendments for succeeding generations stand in contradiction to popular sovereignty, and are thus not legitimate; and



that recurrent reform commissions strike a good balance between the necessary rigidity and flexibility of constitutions. If all this is granted, the route for further research lies ahead. Given the great variety of legal and political traditions in constitutionalised states around the world, democracies and non-democracies, it seems appropriate to conceive differently of such a reform commission for each country. There cannot be a “one-size-fits-all” approach.<sup>82</sup> It would be presumptuous to propose the same design for recurrent constitutional reform commissions for countries as different as, say, Iran and Germany. Further research should look at the national level and try to answer the following questions for each country: *In which time spans should the constitutional reform commission be convened?*<sup>83</sup> As mentioned, there can be a mathematical calculation for this, using the demographic structure of a country. But if this is deemed too complicated, a people could just agree on an accommodating number, for instance 25 years.<sup>84</sup> *How long should the commission be in session, once it has been convened?* Arguably, it should not sit for more than two or three years. *By which mode should the members of the commission be selected or elected?* *How many members should the commission have altogether?*<sup>85</sup> Here, due to very different national traditions, the opinions might vary the most. Path dependencies might limit the range of feasible solutions. One option might be an intensive deliberation process, bringing members of civil society to the forefront of the process.<sup>86</sup> In fact, there were some intriguing examples for that approach in Iceland and in British Columbia.<sup>87</sup> But expert commissions could also have their merits. After German Reunification, the Joint Constitutional Commission that was composed solely by members of parliament completed the amendment process successfully.<sup>88</sup> *Provided the commission makes a proposal for a more or less extensive revision of the constitution, how should it be ratified? Should the usual amendment procedure suffice?*<sup>89</sup> Providing answers to these kinds of questions<sup>90</sup> is very much a national project – it could even be “the constitutional project” of the current generation of citizens in each country in which the institution of a constitutional reform commission has yet to be established. It is, after all, “their” constitution.

## Notes

1 I am grateful to two anonymous reviewers for valuable comments.

2 Both “constitution” and “constitutionalism” are contested concepts. For an extended discussion, see e.g. Lutz 2006: 1-25. Grey opens his essay with: “Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.” (Grey 1979: 189-209).

3 This raises interesting questions with regard to states which do not have written constitutions, such as the United Kingdom or Israel. In these countries, constitutional provisions can, in principle, be changed by ordinary acts of the legislature.

4 A short note on the method of thought experiments: Thought experiments play a crucial role in all philosophical subdisciplines, including political philosophy/political theory. While extremely counterfactual thought experiments can indeed be a thought-provoking method in philosophy, one must be aware that one can seldom derive recommendations for real-world politicians and law-makers from premises that are too outlandish. We usually want decision-makers to make “all-things-considered-decisions” – and rightly so. Thus, thought experiments have a place in po-

litical theory but they should have the right level of “counterfactuality” in order to be illuminating for the question at hand. The point of thought experiments is to render only the relevant features of the moral dilemma under discussion salient, so that the precise real-world issue at hand can easily be comprehended and our intuitions on the real-world matter isolated. If political theorists design thought experiments that are counterfactual in a misleading way, these thought experiments fail to do what they are supposed to do. Good thought experiments apply just about the right level of counterfactuality, and they are extremely cognisant of details.

5 Two different meanings of the word “generation” can be distinguished: generations as age groups and generations as ensembles of all people living together at a given point in time. The former can be termed temporal and the latter intertemporal generations (see Tremmel 2009: ch. 2). Thus two kinds of intergenerational justice must be distinguished as well: “justice between young, middle-aged and old people alive today (temporal intergenerational justice)” and “justice between the present generation (all people alive today) and future generations (intertemporal intergenerational justice)”. Constitutions that are perpetual or very difficult to change present a problem for both kinds of intergenerational justice. However, unless stated otherwise, in this paper the temporal meaning of generation applies. The primary problem is thus justice between young, middle-aged and old people in constitution-amending; the secondary problem is to do justice to present and future people in constitution-amending.

6 More precisely, those who were of voting age at the time the constitution was adopted bind those who were not of voting age then because they were too young, or not even born, at that point in time. Both groups – those too young to vote and those not yet born – can be combined in the term “succeeding generations” (or “successor generations”).

7 Otsuka describes the problem of intergenerational sovereignty like this: “[H]ow can one defend the claim that laws enacted by a deceased generation of citizens of country x have any authority over the present generation of citizens of country x?” (Otsuka 2003: 136).

8 A contemporary account that is oblivious of this empirical fact and sees a demos – in the tradition of Jean-Jacques Rousseau or Carl Schmitt – as a homogenous entity is Muñoz-Fraticelli’s (2009). He theorises in the ontological part of his article: “As sovereignty is more than the mere exercise of force, it must be the case that there exists a norm that recognizes legitimate authority in the sovereign. Sovereignty presupposes such a norm; otherwise it is merely the exercise of power without justification. Now, popular sovereignty is the sovereignty of ‘the people’; it is not the imposition of the will of the majority of individuals in a certain territory, but the exercise of sovereignty by the people as a whole, as a collective entity. Therefore, for popular government to be intelligible there must exist a norm that grants legitimate authority to this collective agent. While it is true that the norm must have an origin, the sovereign people itself cannot be the source of it; before the norm there is no ‘people’, but only an individual or group of individuals exercising arbitrary power. In conferring legitimacy to ‘the people’, the legitimating norm and the democratic sovereign come into being at once.” (pp. 401/402).

9 Muñoz-Fraticelli 2009, 377.

10 Muñoz-Fraticelli 2009, 390, fn. 26.

11 Jefferson begins his letter with the words: “The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water.” (Jefferson 1789). However, the problem of self-determination was already discussed in John Locke’s *Second Treatise of Government*, albeit from a different angle. Locke wrote: “[W]hatever engagements or promises any one made for himself, he is under the obligation of them, but cannot bind the children or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son than it can of anybody else.” (Locke 1690: 156).

12 Jefferson 1789.

13 Jefferson 1789.

14 It was not really a “retort” but in fact a reply that counsels a more flexible position. See for the same exegesis Auerbach/Reinhart 2012: 19. One might also point to the factual behaviour of Jefferson and Madison: their historic actions diverged considerably from their rhetoric (see Elkins/Ginsburg/Melton 2009: 12-35).

15 In one theoretical remark, Madison raises the “lost generation” objection (see e.g. Shai 2016). In short, this is the complaint that those adolescents lucky enough to become enfranchised immediately before the end of Jefferson’s 19-years-long electoral cycle have almost 19 more years of political participation than those who come of age immediately after the next electoral cycle has begun. The “lost generation” objection must be put in perspective: What is preferable: to have one lost generation, or to have many lost generations? Secondly, the similar problem, albeit on a smaller scale, arises by a system of elections every four or five years, as it is commonplace. And thirdly, the “disenfranchised youth objection” (as it should be called more precisely) is somewhat overstated because babies, little children and younger adolescents have no interest in political participation anyway. For those minors who do wish to participate, a remedy would be a flexible voting age as proposed by Tremmel and Wilhelm (2015).

16 Madison 1790.

17 Madison 1790. In the intense debate at the end of the 18th century, Thomas Paine sided with Jefferson and coined the following well-known phrase: “The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies.” (Paine 1998: 91) The right of a people to reform their constitution was a key element in the Girondin constitutional project. Article 28 of the draft of the French Constitution of 1793 stated: “A people always has the right to review, reform, and amend its constitution. One generation may not subject future generations to its laws.” But this constitution was invalidated during the so-called “Reign of Terror” in the French Revolution. In the Thermidorian Reaction, it was discarded in favour of a more conservative document, the Constitution of 1795.

18 From the correct statement that we should not “[conceive] of democracy as an exclusively presentist enterprise” (Rubinfeld 2001: 12), one cannot derive that prescriptions from unamendable constitutions should outweigh the will of the present citizenry.

19 Roznai 2015: 3.

20 Although Roznai (2015: 4) acknowledges that provisions that prohibit amending certain subjects are most commonly referred to in the literature as “eternal” provisions, he prefers the term “unamendable” provisions for them. I do not follow him here because of the difference between a change and an amendment of a constitution. An “amendment” in the Anglo-Saxon tradition is subsidi-

ary to the original text. Amendments can nullify provisions in the original text, but they do not change the text; they merely add to it. In the US constitution, even amendments such as the 18th (prohibition), which are repealed (by the 21st), remain in the text. In contrast, in those parts of the world where constitutions are “changed” and not “amended”, the original text is reworked to incorporate the intended change of its content. Even if I myself sometimes use, for convenience, “amendment” as the umbrella term for both amendments of a constitution and changes of a constitution, I see merit in using an unambiguous term such as “eternity provision” here.

21 Roznai 2015: 8. These numbers include those multiple constitutions of the same state.

22 Often, such human rights entrenchments in national constitutions are attempts to break from a past characterised by human right violations, as in the cases of Bosnia-Herzegovina or the Republic of Congo.

23 Especially in some of the Arab countries; see for instance Bahrain Const. (1973), art. 120(c); Jordan Const. (1952), art. 126(2); Libya Const. (1951), art. 197; Qatar Const. (2004), art. 145; Kuwait Const. (1962), part V, art. 175; Morocco Consts. (1970, 1972, 1992), arts. 100, 106, 100, respectively. Roznai (2015: 15) draws the conclusion: “Unamendable provisions can not only limit governmental power, but also empower it. When unamendable provisions protect the rights of a monarch, the principle of inherited rules, and succession to the throne, they serve as a mechanism to preserve the existing power of the rulers rather than limit it.”

24 Roznai 2015: 11.

25 Roznai (2015: 21): “The unamendability of this provision was the result of a compromise because South Carolina and Georgia would not consent to an immediate prohibition of slave trafficking. Insisting on ending slavery at the constitutional convention might have resulted in the collapse of the entire constitutional enterprise.”

26 Article 79 (3)

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

27 Article 20

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

28 Article 1

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

29 This is, for example, the situation with regard to the Bulgarian Const. (1991), art. 57; the German Basic Law (1949), art. 79; the Romanian Const. (1991), art. 14.

30 See, for example, Armenia Const. (1995), art. 114; Bosnia and

Herzegovina Const. (1995), art. X2; Honduras Const. (1982), art. 374; Niger Const. (2010), Art. 177; Rwanda Const. (2003), art. 193.

31 Elkins/Ginsburg/Melton 2009: 3.

32 See the section below on the notion of “tacit consent”.

33 The way a constitutional provision can be “challenged” in normal times (outside the window of opportunity of a reform commission) varies from state to state. In many countries, a certain number of MPs can trigger the procedure of constitution-amending. In some countries such as Switzerland, it can be triggered by popular initiative. If a sufficient number of registered voters push for a change, the parliament must debate the proposition.

34 If migration is factored in, the variable “naturalised immigrants (above the voting age) in the years  $x+1$ ,  $x+2$ , ...,  $x+n$ ” adds to the part of the population who are citizens of a country without having had the chance to consent to the constitution. But one can argue that by applying for naturalisation, these people have consented to the constitution of their new home country. I am very grateful both to Jürgen Dorbritz (Scientific Director of the Federal Institute for Population Research of Germany) and to Markus Rutsche (University of St. Gallen) for thoughtful discussions about this question.

35 Condorcet proposed a national assembly, convened by the legislative body, to deliberate possible modifications of the constitution (Condorcet 1793). He did not plead for sunset constitutions.

36 Their dataset from the Comparative Constitutions Project (CCP) covered the constitutional history of every independent state from 1789 to 2005, altogether 935 constitutions for more than 200 different states – the complete universe of cases, not just a sample.

37 Elkins/Ginsburg/Melton 2009: 76.

38 Muñoz-Fraticelli (2009: 402): “Overwhelmingly, future generations are the beneficiaries, not the victims, of a constitution enacted by their predecessors.”

39 Historically, the first guarantors of human rights were states (guaranteeing rights for their respective citizens), but international treaties today play an equal, if not more important role in protecting human rights.

40 Rasch/Congleton 2006: 340.

41 According to the *Democracy Index* 11.4% of all countries are “full democracies” and another 34.1% are “flawed democracies”, see Economist Intelligence Unit 2016. Of course, “democracy” is a highly contested concept. For a different definition of the term, and thus a different count, see Bertelsmann Stiftung 2016.

42 Ginsburg/Simpser 2014. See also Svobik 2012.

43 Iran, Algeria and Afghanistan use irrevocable provisions to prevent Islam from ever being disestablished.

44 Article 177 (Revision of the Constitution) states: “The contents of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the wilayat al-*mr* the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver Ja’fari] are unalterable.”

45 “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

46 I owe this point to Bruce Auerbach.

47 The Second Amendment is a case in point against the hope that

the doctrine of a “living constitution” as proclaimed by scholars like David Strauss (2010) will soon materialise in the USA. The US Supreme Court has not taken into account changing values and circumstances when interpreting key constitutional phrases. In *District of Columbia v. Heller* (2008), the Supreme Court handed down a landmark decision holding that the Second Amendment protects an individual right to possess and carry firearms. In *McDonald v. Chicago* (2010), the Court clarified its earlier decisions that limited the amendment’s impact to a restriction on the federal government. In *Caetano v. Massachusetts* (2016), the Supreme Court reiterated its earlier rulings that the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding, and that its protection is not limited to only those weapons useful in warfare.

48 In 1789, the enacting of the US Constitution was a great leap within the history of political thought, and maybe for the well-being of mankind as a whole. But nowadays the inability of this constitution to be developed further is a problem, perhaps again for mankind as a whole, since the USA is needed as a global leader on mankind’s hopeful path to a world without of weapons of mass destruction and in balance with global environmental boundaries.

49 Madison elaborated on this point in the *Federalist Papers*, No. 49. We should “recollect,” he says, “that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord.”

50 Roznai 2015: 22.

51 Roznai 2015: 22. See also Holmes 1993: 19.

52 Muñoz-Fraticelli 2009: 388.

53 Elkins/Ginsburg/Melton 2009: 76.

54 I owe this point to Markus Rutsche.

55 Paternalism with regard to children is a different issue that is not discussed here.

56 This relates to decisions such as “federalist v. unitary” or “presidential v. parliamentary”. Rules of government must be distinguished from basic rights and liberties here. The question whether or not basic human rights should be understood as moral truths, and therefore be entrenched in national constitutions, would justify an article of its own.

57 For details, see Tremmel 2006: 192–197; Brandl/Bungert 1992; May/Daly 2014; Cho/Pederson 2013; Ekeli 2007; González-Ricoy 2016b; MacKenzie 2016; Hayward 2005.

58 Clauses that are designed only for the purpose of protecting future generations and their respective interests are termed “intergenerational constitutional provisions” by González-Ricoy (2016a) and “posterity provisions” by Ekeli (2007). But I think these two terms are ambiguous, since basically all clauses of a constitution reach into the future and are thus in a certain way “intergenerational” or “related to posterity. Therefore, I deem “posterity protection provisions” a clearer term for this very special kind of clauses.

59 Tremmel 2009: 57; Tremmel 2006: 190.

60 “Everyone has the right a) to an environment that is not harmful to their health or well-being;

and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislature and other measures that prevent pollution and ecological degradation promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

61 Constitution of Poland (1997), art. 216 IV.

62 González-Ricoy 2016a: 42.

63 Cho/Pedersen 2013: 435. Some dates for the insertion of such provisions: Estonia 1992 (preamble); Czech Republic 1992 (preamble and art. 7); Poland 1997 (preamble and art. 74); Switzerland (preamble and art. 73) 1999/2002; Ukraine 1996 (preamble); Argentina 1994 (art. 41); Brazil 1988 (art. 225); Finland 1999 (art. 20); Germany 1994 (art. 20a); France 2004 (Charter for the environment); Hungary 1989 (art. 15); Netherlands 1987 (art. 21); Latvia 1998 (art. 115); Lithuania 1992 (art. 54); Portugal 1976 (art. 66); Slovakia 1992 (art. 44); Slovenia 1991 (art. 72); South Africa 1994 (art. 24); Spain 1978 (art. 45); Sweden 1976 (art. 1); Uruguay 2004 (art. 47); Bolivia 2002 (art. 7); Norway 1992 (L 110 b) etc. There are PPPs that were inserted in constitutions directly after World War II, such as article 11 of the Japanese Constitution of 1946, but one hardly finds any PPPs in older constitutions.

64 For instance, see Singer 2011; Pinker 2011. Jefferson himself expressed his belief in the progress of the human mind in a letter to Samuel Kercheval from 12 July 1816: “I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand *with the progress of the human mind* [my emphasis]. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.” (Jefferson 1816)

65 Gosseries 2016: 101.

66 Both definitions, Gosseries’ longer and my shorter one, are congruent in asserting that “generational sovereignty” has different connotations and implications than “state sovereignty” (a concept that is not discussed any further here).

67 To put some flesh to this hypothetical, one might imagine that this constitution contains several irrevocable clauses.

68 Note that definitions of “autonomy” and “freedom” are manifold. See e.g. Schneewind 1988; Raz 1988.

69 Apart from the model, the assumption that the framers of a constitution know better what is good for a generation living far in their future than that very generation itself is so unrealistic that paternalism, so conceived, has to be rejected.

70 Elster (2000) uses Ulysses’s case to lay out a fully articulated constraint theory. See also Chatziathanasiou 2017, this issue.

71 For a comprehensive account of different kinds of consent, see Simmons 1979: 75-100.

72 “There is a common distinction of an express and a tacit consent, which will concern our present case. Nobody doubts but an express consent of any man, entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds—i.e., how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or

whether it be barely travelling freely on the highway; and, in effect, it reaches as far as very being of any one within the territories of that government.” (Locke 1690: 157 and §§ 117-122 generally).

73 Cf. Muñoz-Fraticelli 2009, fn. 14.

74 Otsuka 2003: 95-105.

75 Rasch/Congleton 2006.

76 See Lutz 1994. Lutz’s findings are cogently discussed by Rasch/Congleton (2006).

77 Art. 5 of the US Const. reads: “The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

78 Levinson (2006: 6): “I believe that it is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twentyfirst-century norms, that vindicates the Constitution under which we are governed today.” And on p. 12: “My task is to persuade you that the Constitution we currently live under is grievously flawed, even in some ways a clear and present danger to achieving the laudable and inspiring goals to which this country professes to be committed, including republican self-government.” On his legal account of the Second Amendment, see also Levinson 1989.

79 [https://www.senate.gov/pagelayout/reference/three\\_column\\_table/measures\\_proposed\\_to\\_amend\\_constitution.htm](https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm).

80 The first ten amendments were adopted and ratified simultaneously and are known collectively as the Bill of Rights. Counting the Bill of Rights as one change, the US Constitution has experienced only 18 changes in 230 years. Guess how long it took to ratify the 27th Amendment of the US Constitution? 202 years, 7 months, 10 days.

81 <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why>.

82 By analogy, this is also true for a related reform proposal for constitution-makers: the representation of future generations by a future branch of government (see Tremmel 2015).

83 So far, there are only very few examples for constitutions that are automatically reviewed clause by clause in fixed intervals (type A constitutions), see Elkins/Ginsburg/Melton 2009: 13-14. With regard to type B constitutions: 14 American states within the USA require the people to be regularly consulted by the legislature about whether to call a constitutional reform commission. Article XIX of the New York Constitution, for example, provides that the state electorate be given the opportunity every 20 years to vote on the following question: “Shall there be a convention to revise the constitution and amend the same?”

84 In the historic blueprint for regular reform commissions, the Girardin Constitutional Project, Condorcet and his co-authors were not unambiguous about the time span either, mentioning both twenty and ten years as options, see Condorcet 1793, 244.

85 The composition of the commissions is rather an intragenerational than an intergenerational topic.

86 González-Ricoy (2016a) lists some criteria for civil society reform commissions, among them: a) The amendment is drafted by a convention called for that purpose and constituted by members of civil society (rather than by members of parliament, who may have electoral or partisan motivations); b) To ensure diversity and inclusiveness, members of the convention are appointed by lot. To improve descriptive representativeness, some seats are reserved for members of minorities. Members of the convention receive ongoing technical and legal advice.

87 Landemore 2015; Warren/Pearse 2008.

88 This was a commission that was brought about by special historic circumstances, as the German Basic Law does not yet speak of constitutional commissions.

89 Formal amendment rules for “spontaneous” amendments (independent from the proposed reform commission) vary significantly. Supermajorities in parliament, referenda and intervening elections (confirmation by a double vote) are the most common ones. For classification schemes, see Rasch/Congleton 2006: 328-330; Elster 2000: 101; Lane 1996: 144.

90 For related questions with regard to constitution-making assemblies, see Elster 2012: 16.

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