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Constitutions as Intergenerational Contracts: Flexible or fixed?

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The peer-reviewed journal *Intergenerational Justice Review* (IGJR) aims to improve our understanding of intergenerational justice and sustainable development through pure and applied ethical research. The *IGJR* (ISSN 2190-6335) seeks articles representing the state of the art in the philosophy, politics and law of intergenerational relations. It is an open-access journal that is published on a professional level with an extensive international readership. The editorial board comprises over 50 international experts from ten countries, representing eight disciplines.

Earlier versions of the research articles published in this issue were among the winning contributions to the 2015/2016 Intergenerational Justice Prize on the topic "Constitutions and Intergenerational Justice". The award was funded and supported by the Stiftung Apfelbaum (Apfelbaum Foundation).

By their very nature, constitutions are intergenerational documents. With rare exceptions, they are meant to endure for many generations. They establish the basic institutions of government, enshrine the fundamental values of a people, and place certain questions beyond the reach of simple majorities. Constitutions, especially written ones, are often intentionally made difficult to modify.

Inevitably, constitutions raise important questions of intergenerational justice. When one generation enshrines its values in a constitution, and makes it difficult to amend the constitution, does it deprive future generations of the sovereignty each generation should be able to exercise? It might well not make a difference if those future generations share the values of their ancestors, but what if they do not? What if future generations see some important provisions of the constitution as not merely inconvenient, but as morally wrong, or even as a threat to their well-being? Of course, if enough people share this view, the constitution can be changed – but what if the division falls short of the supermajority needed to amend the constitution?

This is the dilemma created by constitutions, particularly written constitutions which require supermajorities to alter their provisions. In our judgment there is no perfect solution to this dilemma. Rather, every solution represents a balancing of interests and risks.

On the one hand, constitutions are valuable precisely because they remove some questions from the hands of electoral majorities. The institutions of government and the basic rights of individuals and communities are among the matters commonly protected by constitutions against the impact of day-to-day politics. Future generations benefit to the extent that constitutions establish just and stable institutions which can adapt and change peacefully to changing needs and circumstances.

On the other hand, constitutions, like people, can age poorly. The values enshrined in a nation's constitution can be ethically wrong when adopted (for example, the protection of the slave trade written into the U.S. Constitution). Time can also demonstrate that some provisions of a constitution are unwise. Technological change may also alter the effects of some provisions. (Consider the difference between the right to bear a 1790 firearm, and the right to bear an automatic weapon in 2010.) And the values of a people can change, too. To some extent, all of these sources of discontent with a nation's constitution may be inevitable. The framers of a nation's constitution are not all-wise and all-seeing, and even if they were, the constitution that fits a nation in its youth may be quite different from that which fits it two centuries later. The question, then, is how future generations can adapt to their constitution, and how they can adapt their constitution to their needs.

This, in essence, is the problem we posed to the authors who submitted articles for this issue of the *Intergenerational Justice Review*. How do you balance the importance of placing some questions beyond the control of a simple majority in a written constitution, with the need to preserve for future generations the ability to adapt it to their changing needs? The answers our authors give in this issue of the *IGJR* vary. Two of them take as their starting point the disagreement between Thomas Jefferson and James Madison concerning the desirability of revising the U.S. Constitution every generation; and another addresses those concerns in the concluding section.

Iñigo González-Ricoy's opening article focuses on the legitimacy of constitutional provisions aimed at advancing future generations' interests. He argues that the dilemma of future generations being constrained by the choices of their ancestors can be reduced considerably, at least with respect to those constitutional provisions that seek to advance the needs and interests of future generations. Legitimacy concerns may be addressed further through the use of sunset clauses and regular constitutional conventions.

Our second article, by Shai Agmon, argues that Jefferson's proposal that a constitution be re-authorised every 19 years is unsatisfactory because it fails to fulfil its own normative aspirations. It produces two groups of people who will end up living under laws to which they did not give their consent: (a) citizens who reach the voting age after the re-enactment process; (b) citizens who did not assent to being obliged by the majority vote's results. In Agmon's view, the existence of significant numbers of citizens who have not consented to the laws undermines any consent-based rationale for adopting a Jeffersonian approach.

In our closing article, Michael Rose rejects the Jeffersonian argument that the self-determination of future generations is impeded by lasting constitutions. Rather, he argues that a demand for future generations' full self-determination is both self-contradictory, and impossible to achieve. Instead, we should employ an attitude of "reflective paternalism" towards future generations by introducing their interests into today's decision-making process, and by ensuring that the constitution itself provides for democratic self-determination.

No doubt, more research is needed on the best ways to incorporate protections for the rights and interests of future generations into constitutions. Future research should also examine how the lessons we have learned from trying to protect the environment can be applied to the circumstances of future generations. The goal is a very practical one: to discover what constitutional provisions can best protect the rights of future generations.

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Legitimate Intergenerational Constitutionalism

by Iñigo González-Ricoy

Abstract: This paper examines the legitimacy conditions of constitutionalism by examining one particular type of constitutional provision: provisions aimed at advancing future generations' interests. After covering the main forms that such provisions can adopt, it first considers three legitimacy gains of constitutionalising them. It then explores two legitimacy concerns that so doing raises. Given that constitutions are difficult to amend, constitutionalisation may threaten future generations' sovereignty. And it may also make the constitution's content impossible to adapt to changing circumstances and interests. Finally, the paper examines the ways in which such concerns may be addressed at the adoption, formulation, and amendment stages. In particular, it discusses if the use of sunset clauses and regular constitutional conventions may, and under what conditions, successfully address such concerns.

Introduction[1]

From an intergenerational standpoint, constitutions raise serious procedural legitimacy concerns. For one thing, once adopted, constitutions are almost by definition rigid, as they typically impose amendment requirements, such as parliamentary supermajorities or approval by referendum, that are more cumbersome than ordinary law-making procedures. By making their content resilient to change, they may not be able to adjust to an evolving society, and may end up not reflecting future individuals' interests and circumstances. For another, given that future generations will have a hard time amending the constitution's content should they wish to do so, constitutions can end up imposing the will of the founding generation on subsequent generations, hence undermining future generations' sovereignty – i.e., their ability to live under rules of their own choosing. These two concerns are particularly worrisome when perpetuity clauses are included in the constitution, as these make (part of) the constitution's content impossible to amend. However, constitutions can also produce intergenerational legitimacy benefits. By entrenching democratic rules and fundamental rights against change, for example, they make it more likely for future generations to live under those rules and enjoy these rights. Further, when constitutions include provisions of environmental justice, fiscal fairness, or pension system sustainability – as many existing constitutions do – they can advance the interests of future generations in more specific ways.[2] For example, given that constitutions enjoy normative priority over ordinary statutes and are typically enforced by independent bodies, they can force elected officials – who often prioritise the short-term for electoral reasons – to better take into account future individuals' interests. They can also help public and private actors to overcome coordination problems in intergenerationally sensitive policy domains, such as climate change mitigation or investment in blue-sky research, in which such actors may be tempted to free ride on others' efforts. Finally, they can credibly signal the importance of intergenerational hazards to the general public, hence increasing citizens' willingness to take into account the interests of future individuals and to support far-sighted policies.

Given how fragile democratic institutions and fundamental rights often are, and how often future generations are dismissed in policy-making domains in which their interests are likely to be profoundly affected, constitutional means to protect such institutions and rights and to advance future individuals' interests may not only raise procedural legitimacy concerns. They may also importantly enhance the substantive legitimacy of policy-making in intergenerationally sensitive domains, i.e. it may make its outcomes intergenerationally fairer. In short, constitutions may bring both *substantive* benefits and procedural threats from the standpoint of their intergenerational legitimacy.[3] They are, as Axel Gosseries has put it, a double-edged sword.[4]

Constitutions can end up imposing the will of the founding generation on subsequent generations, hence undermining future generations' sovereignty – i.e., their ability to live under rules of their own choosing.

In this paper I shall focus on a particular case that nicely illustrates this tension – namely on provisions that are aimed at protecting future generations' interests and that, albeit included in a constitution and thus resilient to change, are not necessarily protected by a perpetuity clause. Two reasons motivate this choice. First, provisions aimed at protecting the interests of future individuals are considered, rather than constitutional provisions in general, because the tension between the legitimacy benefits and threats of constitutional rigidity is clearer in the former case. Since the goal of the paper is to address the legitimacy benefits and shortcomings of constitutionalism, these provisions provide a particularly informative case. Second, rigid yet amendable provisions, rather than provisions protected by perpetuity clauses, are considered because, while the two above-mentioned concerns are more pressing in the latter case, perpetuity clauses are seldom included in existing constitutions, the content of which is typically rigid – and often very rigid indeed – yet amendable. Further, to my knowledge no single constitutional provision that is aimed at advancing the interests of future generations *and* protected by a perpetuity clause can be found in existing constitutions.[5] Now, since the concerns and some of the benefits that will be examined in the paper also apply to more general provisions (as well as to intergenerational provisions), and to provisions protected by perpetuity clauses (as well as to rigid-yet-amendable provisions), the implications of what is examined throughout the paper will also be drawn for these cases.

The goal of this paper is to examine the legitimacy conditions of constitutionalism. This is pursued in two steps. It first explores the main substantive legitimacy gains that intergenerational provisions, as I shall refer to provisions aimed at protecting or advancing the interests of future individuals, may generate.[6] It then examines the main procedural legitimacy threats of constitutionalising these and more general provisions, and the ways in which such threats may be mitigated when constitutional provisions are properly adopted, formulated,

and amended. More specifically, the paper explores whether the use of sunset clauses and regular constitutional conventions to amend the content of constitutional provisions, intergenerational and otherwise, may successfully address the legitimacy concerns mentioned above. As we shall see, sunset clauses present insurmountable problems in this regard. Periodic constitutional conventions, on the other hand, may do so only under certain conditions of inclusiveness, deliberation, and collective authorisation. For, as we shall see, what is crucial from the standpoint of intergenerational legitimacy is that constitutional provisions be adopted and amended under above-ordinary normative conditions while preserving legal certainty and stability, something that sunset clauses are not particularly appropriate to deliver, and regular constitutional conventions can only deliver under very specific conditions.

What is crucial from the standpoint of intergenerational legitimacy is that constitutional provisions be adopted and amended under above-ordinary normative conditions [...].

The paper proceeds in four further sections. The next section briefly outlines the main forms that intergenerational constitutional provisions can adopt, illustrating these forms with a number of examples from existing provisions and court decisions. Then, the main substantive legitimacy gains that constitutionalising these provisions can produce are examined. The next section, in turn, looks into the main procedural legitimacy concerns raised by constitutionalising these as well as more general provisions, and the ways in which such concerns may be relieved at the adoption, formulation, and amendment stages. Finally, whether sunset clauses and regular constitutional conventions are appropriate to address such concerns, and under what conditions, is considered. The conclusion summarises the intergenerational legitimacy gains and losses examined above, and discusses whether an all-things-considered case for the intergenerational legitimacy of constitutionalising intergenerational and other types of provisions can be made.

Intergenerational constitutional provisions

Constitutions are intergenerational legal instruments almost by definition, given that they are typically hard to amend and thus likely to last across generations. Amongst the provisions they may include, however, intergenerational provisions are particularly noteworthy from an intergenerational perspective, as they explicitly target future individuals' interests. They can do so in a number of ways. Sometimes, they aim at protecting or advancing future individuals' interests by reference to their general interests, such as the "responsibility towards future generations" included in the Constitution of the Czech Republic and in the Swiss Federal Constitution. Some other times, they do so by reference to some particular interests of future individuals – such as their fiscal sustainability, as the "debt brake" recently adopted by several European countries and US states is often justified, or their environmental safety, as many existing constitutions nowadays do. Hence, for example, the Norwegian Constitution states that the environmental right to "an environment that is conducive to health" and to be "informed of the state of the natural environment", "be safeguarded for future generations as well". Similarly, the Constitution of Chile includes a fundamental right "to live in an environment free from contamination", which the Chilean Supreme Court has often interpreted as addressing not only current generations but also future ones.

When intergenerational provisions are constitutionally enshrined, they show a number of features that are crucial for the proper advancement of future generations' interests. First, they are part of a legal document – the constitution – with normative priority over ordinary statutes (in the sense that, when an incompatibility between the former and the latter exists, the former prevails). Second, they can only be amended by means that are more cumbersome than ordinary law-making procedures, such as parliamentary supermajorities or referendum requirements. Third, and finally, they are typically enforceable by some independent body – a constitutional court or some other type of body, such as a fiscal council – with the ability to review, and in some cases turn down, statutes or administrative actions that may deviate from what the relevant provision mandates.

Let us briefly explore how these features can, when intergenerational provisions are included in the constitution, advance future individuals' interests. Consider the Chilean Constitution mentioned above. In 1988, in *Pedro Flores v. Corporación del Cobre, Codelco, División del Salvador,* the Supreme Court upheld the constitutional environmental right to "live in an environment free from contamination" in a lawsuit aimed at stopping the deposition of copper mill tailings onto the beaches of Chile in order to safeguard marine life. Similarly, in *Comunidad de Chañaral v. Codeco División el Saldor*, the Supreme Court upheld a farmer's constitutional right to life by prohibiting the drainage of Lake Chungará.[7]

Constitutions are intergenerational legal instruments almost by definition, given that they are typically hard to amend and thus likely to last across generations.

These two cases, however, were just a precedent to an extraordinary decision made in 1997, when the Supreme Court struck down the government's previous approval of the Rio Condor Project, a logging project in Tierra de Fuego, after finding that it threatened the constitutional right "to live in an environment free from contamination".[8] There are a number of reasons why the decision is relevant for the issue at hand. To begin with, the Court upheld the constitutional environmental right just mentioned against a decision made by the Chilean government to let a US-based corporation log 270,000 hectares of pristine forest – a project that was worth $350 million. In so doing, it put in practice some of the features mentioned above, namely the priority of the constitution's content, including the environmental rights included in it, and the ability of the Court to revise and eventually turn down the government's decisions when these are considered to threaten such content. In addition to this, the court interpreted the constitutional environmental right as protecting "not only present generations but also future ones", thus acknowledging future individuals' interests as protected by the constitution as well as intergenerational standing, i.e. the right of present individuals to sue on behalf of future generations.[9]

Of course, intergenerational provisions are not always equally adopted, formulated, and enforced or have the same constitutional status. For example, while intergenerational provisions are sometimes enshrined as fundamental rights, thus granting their holders a subjective, personal guarantee and heavily constraining governmental action as a result, they are often enshrined as statements

of public policy, and hence merely guide, rather than limit, governmental action. Also, while intergenerational provisions are often formulated in abstract terms, as general principles rather than precise rules, they sometimes adopt very specific formulations – e.g. when they set a specific debt ceiling or declare specific areas as national parks. When the latter is the case, judicial discretion is heavily reduced – yet so is the ability of the enforcing body to adjust their understanding of intergenerational provisions as scientific and moral change occurs over time and across generations. Finally, while intergenerational provisions are often drafted by ad hoc conventions constituted by members of civil society and adopted by means that are inclusive of all citizens, such as when ratification referendums are employed, at some other times they are drafted and adopted by merely parliamentary means. A case in point is the balanced budget amendment and debt brake added to article 135 of the Spanish Constitution in 2011, which was drafted in August, when most citizens were on holiday, and adopted by parliament with little discussion and no submission to ratification by referendum.

These and some further distinctions are crucial for the issue at hand. For, depending on how constitutional provisions, intergenerational and otherwise, are adopted, phrased, and amended, very different legitimacy concerns arise. Before turning to them, and to the legitimacy concerns they may generate, in the next section we briefly explore the potential benefits that constitutionalisation may bring about.

The benefits of intergenerational constitutionalism

The goal of this paper is to examine the intergenerational legitimacy of constitutionalisation as well as the means that may be used to mitigate the legitimacy concerns it may generate. Considering its potential benefits, if only briefly, is necessary for this task because, as Allen Buchanan has recently argued, institutional legitimacy crucially depends on how badly we would be affected in the absence of the relevant institution.[10] Hence, if the consequences of forgoing an institution are sufficiently hazardous, moral desiderata, such as sovereignty, may be sacrificed with less legitimacy loss than if such consequences are less grave.

In order to properly assess the legitimacy of constitutionalising certain rules or principles, we therefore need to consider the benefits that so doing may bring about – and how badly we would be affected if this did not happen – before we consider the legitimacy costs that it may generate. In the next two sections I shall argue that such costs are often merely apparent, and that constitutional provisions, both intergenerational and otherwise, need not generate grave legitimacy concerns if properly adopted, formulated, and amended. However, even *if* what I shall defend in those sections were wrong, it may nonetheless be the case that a scenario in which a constitution is in place is, *on balance*, more legitimate than an alternative scenario in which no constitution is in force, if the net costs of the latter scenario happen to outweigh the net costs of the former. It is dubious that constitutionalising provisions that only target present individuals' interests may provide *intergenerational* benefits that are sufficiently significant to outweigh such costs. The same does not apply to intergenerational provisions, however. For, as I shall argue, they are able to deliver such benefits.

> Intergenerational provisions are not always equally adopted, formulated, and enforced or have the same constitutional status.

In this section, I thus focus on intergenerational provisions and on their main potential benefits. I do so by drawing upon the wealth of constitutional political economy, political science, and legal philosophy literatures. I proceed by briefly describing three important intergenerational shortcomings of ordinary policy-making in the absence of constitutional constraints. I then examine how constitutionalising intergenerational provisions may contribute to overcoming such shortcomings, thus delivering the benefits mentioned above.[11]

First, properly taking into account the interests of future generations typically requires adopting policies, such as forestry preservation, investment in early education, or switching to low-carbon technologies, that impose short-term pain for long-term gain. When voters evaluate candidates on their aggregate performance, far-sighted policies like these are vulnerable to electoral cycles, for incumbents seeking re-election may be tempted to postpone their adoption. They may prioritise alternative policies with benefits arriving before the next election, thus passing the buck of not adopting such far-sighted policies to others in the future. Constitutionalisation of intergenerational provisions can help overcome this problem by taking the final authority on the provisions' content away from elected officials, or at least by raising the costs the latter face if they deviate in policy-making from their content. Further, since far-sighted policies typically need to be sustained over extended periods of time (think, for example, of investment in blue-sky research), constitutionalisation increases the likelihood that future officials will not deviate from policies adopted by previous officials, as much as they would like to do it for electoral or ideological reasons.

Second, many intergenerationally valuable goods are to a large extent common goods (e.g. environmental safety) or public goods (e.g. public security), meaning that in both cases it is not possible to prevent people who have not contributed to their provision from having access to them (i.e. they are non-excludable). This implies that their delivery is particularly prone to coordination failures, both amongst contemporaries and between non-overlapping generations. For instance, public bodies and private companies may decide not to reduce their carbon emissions if they know that others will reduce their own emissions, thus free-riding on the latter's effort. Alternatively, well-intended and cooperative institutional actors may hesitate to reduce their carbon emissions if they have no guarantee that others in the present or in the future will similarly do their share.

> Constitutional provisions, both intergenerational and otherwise, need not generate grave legitimacy concerns if properly adopted, formulated, and amended.

Constitutionalisation can contribute to mitigating such coordination failures by setting long-term goals to which private and public bodies may converge. Since, as part of the constitution's content, such goals enjoy normative priority over ordinary statutes and are legally enforceable by bodies that are typically independent from elected officials, constitutionalisation can both force potential free-riders to do their share and provide cooperative actors who distrust others with additional guarantees that the latter will do their share. Further, since such goals are hard to amend, future incumbents are less likely to deviate from them, thus contributing to mitigating coordination problems not only amongst contemporaries but also over time and across generations.

Third, and finally, given that future individuals do not yet exist, and that the circumstances in which they will live as well as the particular interests that they will have are uncertain to us, it is unsurprising that they often go unnoticed to present citizens. In addition to this, given that the sort of policies needed to advance their interests are likely to mature slowly over extended periods of time and to bring about long-term and uncertain outcomes, ordinary citizens are often hesitant to endorse this sort of policy, for which the payoff is uncertain.

Constitutions provide two responses to these clusters of problems. First, by granting intergenerational provisions the status of higher law, on a par with other basic rights and freedoms, a constitution signals the moral importance of future individuals' interests, the seriousness of long-term hazards, and the necessity of taking action to address them – and, given that so doing is likely to impose costs in the present, such signalling turns out to be credible.[12] Second, given that citizens are more familiar with the constitution's content than with ordinary statutes, constitutionalisation makes intergenerational provisions' content clearer and better known to the general public, hence reducing the degree of uncertainty that affects policy-making with long-term payoffs. For example, while the overall long-term effects of a debt brake is difficult to establish, it defines a clear and stable threshold that can be easily understood and monitored by the layman.

In short, intergenerational provisions may, when enshrined in a constitutional text and backed with credible enforcing mechanisms, enhance the substantive legitimacy of public policy-making in intergenerationally sensitive domains. They can do so in at least the three ways discussed in this section: by mitigating short-sightedness, by enabling coordination, and by shaping citizens' values and beliefs – which in turn provide reasons why this sort of provision may improve the substantive legitimacy of present policy-making. These reasons are not decisive, however. They are merely *pro tanto*. In order to arrive at an all-things-considered judgement about whether intergenerational provisions are on balance legitimate, they need to be examined along with alternative reasons regarding the intergenerational legitimacy concerns that such provisions may generate, which we turn to examine in the next section.

Legitimacy concerns – and how to address them

So far we have seen that there are good reasons why constitutionalisation, when enshrining intergenerational provisions, may contribute to mitigating some problems faced by public policy-making in properly taking into account future individuals' interests, thus improving the substantive legitimacy of such policy-making. And, in turn, these legitimacy gains may outweigh procedural legitimacy losses, if any, that constitutionalisation may generate, given how badly we need institutional mechanisms to extend the time horizon of policy-making in intergenerationally sensitive realms. Before such conclusion can be established, however, we need to carefully consider the potential procedural legitimacy losses that constitutionalisation may generate. In this section, I shall first examine these potential losses. Next, I shall contend that, when constitutional provisions are properly adopted, formulated, and amended, legitimacy losses can be importantly mitigated. Since, unlike in the case of intergenerational benefits, such losses often similarly – yet not identically – affect intergenerational and other types of provisions, what follows similarly – yet not identically – applies to the latter, as we shall see.

> When enshrined in a constitutional text and backed with credible enforcing mechanisms, [intergenerational provisions may] enhance the substantive legitimacy of public policy-making in intergenerationally sensitive domains.

Before proceeding, the following caveat is in order. Legitimacy concerns raised by constitutional provisions may be intra- and intergenerational. Hence, for example, the fact that unelected and unaccountable officials typically enact constitutional provisions raises serious democratic worries (the so-called "counter-majoritarian difficulty").[13] Yet this worry is purely *intra*-generational. It is not a worry that follows from the sort of relationship that different generations have with each other. Since the goal of this paper is to examine the *inter*-generational legitimacy of constitutionalism, we mostly leave aside these concerns. In this section we focus, thus, on the intergenerational legitimacy worries it generates.

These worries are twofold.

First, given that constitutions are by definition rigid – i.e. they typically impose amendment requirements that are more cumbersome than ordinary law-making procedures, such as parliamentary supermajorities or approval by referendum – future generations will have a hard time amending the constitution's content and, as society evolves, such content may no longer reflect future individuals' interests and circumstances.[14] Constitutionalisation may thus make the entrenched provisions impossible to adjust with promptness and flexibility to changing circumstances. And, given how uncertain the founding generation's knowledge about the future is, constitutional provisions may end up being suboptimal, if not harmful, to future individuals' interests. Call this the *entrenchment concern*.

Second, regardless of whether future interests happen to shift or not, constitutionalisation threatens future generations' sovereignty, i.e. their ability to live under laws of their own choosing; for then, future generations – while bound by the constitutionalised provisions – will not have consented to their content and will not be able to easily amend it. Call this the *sovereignty concern*.

It is worth noting that, while the sovereignty concern is related to the entrenchment concern – as interests are likely to shift over time, and future individuals are likely to no longer see their interests reflected by the constitution's content, hence wishing to amend it – it is also distinct. For even if no interest shift occurred, and circumstances remained the same over time, future individuals would not have consented to the constitution and would not be able to easily amend its content all the same. As it is often argued, sovereignty is a modally demanding concept.[15] It refers to the ability to live under rules of one's own choosing, both under actual and non-actual circumstances and regardless of whether such ability is exercised or not. It is accordingly threatened whenever no consent by those who are bound by a given set of rules has occurred, or when they happen to be unable to amend or repeal such rules if they wish.

The following also pays noting. While these two concerns similarly affect intergenerational provisions and other sorts of provisions alike, they are especially worrisome in the former case. For, unlike provisions whose nature is not particularly intergenerational, intergenerational provisions may end up departing from the interests and circumstances, as well as threatening the sovereignty, of the very same individuals, i.e. future generations, whose interests they

purportedly aim to advance – and, paradoxically enough, doing it on their behalf.

> Given how uncertain the founding generation's knowledge about the future is, constitutional provisions may end up being suboptimal, if not harmful, to future individuals' interests.

No easy solutions are available for these problems. As noted above, we should bear in mind that, even if no means at all existed to mitigate them, given how badly needed reforms to better take into account future individuals' interests in policy-making are, we may want to forgo sovereignty and to take some risks in defining what the content of such interests will be in constitution-making. However, such means are available. There are a number of ways in which intergenerational provisions may be adopted, formulated, and amended in order to mitigate these problems – or so I shall argue in the remainder of the paper.

One such way is to limit, at the formulation stage, the content of constitutional provisions to those interests that are unlikely to shift over time and across generations – i.e. to basic or fundamental interests – so as to make the provisions' content more likely to reflect the interests of future individuals. Ekeli has advanced a proposal along these lines. He has argued that intergenerational provisions – or "posterity provisions", as he terms them – be restricted to protect those critical natural resources that are necessary for future individuals to meet their basic physiological needs.[16] Note, however, that this leaves the sovereignty concern intact. For it does not improve upon future individuals' ability to amend the provisions' content should they wish to do so. As much as future individuals may have their interests reflected in the constitution's content, and accordingly protected, their consent, as well as their ability to easily amend the constitution's content, remains absent all the same.

An alternative means consists – also at the formulation stage, even though it has important effects on enforcement – in constitutionalising the relevant provisions abstractly, as general principles rather than specific rules. It should be noted that abstraction in formulation may make the intra-generational democratic worry mentioned above more acute, as abstraction gives courts more discretion to interpret the relevant provisions and makes them more powerful as a result. It may also reduce the ability of intergenerational provisions to set specific goals that may clearly and predictably constrain public policy-making and that may enable coordination amongst private and public actors. However, abstraction no doubt brings intergenerational legitimacy benefits at the enforcement stage, for it makes it easier for courts to adjust their understanding to fit an evolving society, as circumstances and interests change over time. Abstractly defined provisions may thus minimise the dissonance between the interests of future individuals and the constitution's content.

However, it is unclear whether abstraction can fully address the sovereignty concern. For one thing, as much as courts may then have more discretion to adjust their understanding of the provisions' content to the evolving interests of future individuals, consent by those who are bound by such provisions remains absent. Abstractly formulated provisions are the upshot of a constitution-making process in which only the founding generation, and none of all the subsequent ones, have participated – no less than when constitutional provisions are formulated as precise rules. For another, even though abstraction may improve subsequent generations' ability to amend the interpretation of the provisions' content, it does so very indirectly, via legal interpretation by courts – whose members are typically unelected and unaccountable to citizens. Abstract, general principles provide, in short, no more consent and little more influence by future individuals than precise rules, and are thus unable to successfully address the sovereignty concern.

> Abstract, general principles provide, in short, no more consent and little more influence by future individuals than precise rules [...].

A third alternative focuses on the adoption stage. If the relevant provisions are adopted under conditions that are normatively more demanding than ordinary law-making – if, for example, they are adopted as a result of a deliberative and inclusive process in which well-informed citizens robustly engage and reach an ample consensus – constitutional rigidity may appear less like a constraint on present and future citizens, and more like a constraint on elected officials, who may be tempted, for electoral or other reasons, to deviate from the provisions' content if these are easily amendable or have no priority over ordinary statutes. Constitutional rigidity may then become a limit on elected officials' opportunism and short-sightedness, rather than on citizens' sovereignty, as Ackerman has famously argued.[17]

To properly understand this argument, let us consider it from the standpoint of commitment theory. Suppose an individual, A, commits at period P1 to take certain course of action at a later period, P2, and puts in place a mechanism to ensure that alternative courses of action at P2 be overridden. Sovereignty typically implies that A should be able to take whatever course of action she may wish to take at P2. Yet, her overriding commitment at P1 need not undermine her sovereignty at P2 if her prior decision at P1 is made under circumstances that are normatively superior to those of P2. As illustration, suppose that I pass my cell phone to a friend at P1, and ask him not to let me phone my ex-wife if I get drunk at P2. If I happen to get drunk at P2 and my friend refuses to give me the phone back, we tend not to say that his action diminishes my sovereignty. The reason for this is that my decision-making circumstances at P1 (I am sober) are normatively superior to those at P2 (I am drunk).

Similarly, constitutional rigidity need not undermine the sovereignty of subsequent generations, some commitment theorists contend, provided that the constitution is adopted under circumstances that are normatively superior to those of ordinary politics. If, unlike the latter, constitutional provisions are adopted under circumstances in which all citizens engage in politics, deliberate with each other at length, reflect carefully about the consequences of their choices, and reach ample consensus, then the fact that, once adopted, such provisions' content is difficult to amend need not thwart future generations' sovereignty – for it prevents elected officials, whose gaze often extends no further than the next election, from easily deviating from such provisions, while letting future citizens amend their content if conditions that are as normatively demanding as the conditions of the adoption obtain. Such conditions may include, *inter alia*, the following:[18]

1. The constitution-making procedure may be triggered by popular initiative. For example, the signature of a sufficiently large number of registered voters may force the parliament to call for a constitutional convention.

2. The constitution 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).
3. 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 on-going technical and legal advice.
4. If, alternatively, elections are employed to appoint the members of the convention, a proportional system rather than a majority system is used, to improve representativeness.
5. The document drafted by the convention is submitted to popular ratification by referendum and a minimum turnout is required.
6. A deliberation day – a national holiday in which each deliberator is paid to engage in meetings in which experts provide the hard facts – is celebrated before the constitution is ratified by referendum.

Commitment theories of constitutionalism have three main virtues for the issue at hand. First, they nicely spell out the conditions that need to obtain, e.g. (1)–(6), for such provisions to be procedurally legitimate. Given that, once granted constitutional status, the relevant provisions have normative priority over ordinary statutes, as well as a pervasive impact on present and future citizens' basic interests, and can only be amended by very cumbersome means, they need to be adopted as a result of a process that is exceptionally inclusive, deliberative, reflective, and acceptable to an ample majority of the population. Second, commitment theories nicely explain why, when such conditions obtain, constitutional provisions are much more legitimate than ordinary statutes – and why critics of such provisions' content who were nonetheless able to participate in their adoption have little grounds for complaint. If they wish to amend their content, commitment theorists may retort, they should be able to successfully go through an amendment process whose conditions are as normatively demanding as those of the adoption process. Third, they show why, if one accepts that the above conditions are necessary for the constitution's content to be legitimate, perpetuity clauses (i.e. clauses that cannot be amended by any means) have little hope of ever being procedurally legitimate, however serious the interests they purport to protect may look to its framers.[19]

> Constitutional rigidity need not undermine the sovereignty of subsequent generations, some commitment theorists contend, provided that the constitution is adopted under circumstances that are normatively superior to those of ordinary politics.

In short, commitment theories provide powerful tools to understand the legitimacy conditions of constitutionalism. However, they fail to provide an entirely satisfactory response to the sovereignty concern. If inclusion, deliberation, reflection, and ample consensus are sine qua non conditions of a constitution's legitimacy, then future citizens may still be able to issue a sensible complaint. For, as much as these four conditions could have been met in the adoption process, a legion of future citizens were not included in such process, and never had the chance to deliberate or reflect upon – let alone consent to – the constitution's content.
It should come as no surprise, then, that a fourth option – namely the use of sunset clauses and of regular constitutional conventions – has traditionally informed the debate on the intergenerational legitimacy of constitutional provisions. In the next section, we turn to examine this option as well as its potential benefits and shortcomings.

Regular conventions and sunset clauses

The idea that every generation should hold a convention to revise and perhaps entirely replace the constitution's content goes back to constitutional debates in the 18th century. It emerged as a response to the sovereignty concern triggered by perpetual laws as well as by constitutions inherited from previous generations. The people, Jefferson argued, "are masters of their own persons, and consequently may govern them as they please."[20] This was the reason why Jefferson believed that every generation should establish its own constitution and why keeping a constitution in force beyond the lifespan of its founding generation would render it illegitimate. "Each generation", Jefferson reckoned, "is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness."[21]

It is worth noting that, notwithstanding the fact that the quote above refers to periodic constitutional convention in terms of a *right*, Jefferson went way beyond defending a mere *opportunity* to amend or repeal the constitution – as something that each generation could freely decide to exercise or not. He rather argued for *mandatory* periodic constitutional conventions as a way of respecting each generation's sovereignty.[22] After studying a set of actuarial tables, Jefferson estimated that this should happen every 19 years. And, partly inspired by Jefferson, some 14 American states accordingly require the people to be regularly consulted by the legislature about whether to call a constitutional convention. Similarly, the former Fijian Constitution of 1990 mandated review every ten years, and Papua New Guinea's Constitution establishes that a General Constitutional Commission should review the workings of the document after three years.[23]
Regular constitutional conventions are typically aimed at revising and, if appropriate, replacing the entire constitutional text. When particular provisions are targeted, sunset clauses – which Jefferson also supported as a means to ensure that no dead generation could extend its will beyond its own lifespan – may be alternatively employed. Sunset constitutional clauses, which date back to Roman law, are clauses that establish that certain provision or set of provisions shall cease to have effect beyond a particular date, unless further action is taken to extend their duration. As illustration, suppose that an environmental provision setting a limit on national greenhouse gas emissions is given constitutional status. Further suppose that the framers are unsure whether such a limit will be appropriate in the future, as technical change may perhaps allow safe capture and storage of carbon emissions beyond the threshold set by the provision – or that they believe that the next generation should not have its hands tied to decide which level of emissions they want to establish for themselves. A sunset provision establishing that the provision should expire after, say, 30 years if no further action is taken may then make the relevant environmental provision flexible enough to adapt to changing circumstances. It may also make it respectful of the next generation's sovereignty to set the environmental rules by which they wish to be bound.
Are these two means appropriate – and under what conditions – to successfully

address the entrenchment and sovereignty concerns? More broadly, are they appropriate to enhance the intergenerational legitimacy of constitutional intergenerational provisions? I address these questions by firstly discussing three intergenerational shortcomings of these means. I then examine the specific conditions under which these means may bring, if any, intergenerational legitimacy gains.

Jefferson argued for mandatory periodic constitutional conventions as a way of respecting each generation's sovereignty.

First, regarding the particular case of intergenerational provisions, and bearing in mind the potential legitimacy gains discussed above, we should note that sunset clauses and periodic mandatory conventions may seriously undermine the possibility of intergenerational coordination on the content of such provisions – which crucially depends on the provisions' content being stable over time and across generations. Properly taking future generations' interests into account often requires making decisions (e.g. investing in blue-sky research, or developing low-carbon technology) whose outcomes are located in the long run and that need to be consistently enacted over extended periods of time. As we have discussed above, the constitutionalisation of intergenerational conventions may enable coordination across generations by making such provisions' content stable and resilient to change.

Sunset clauses and periodic mandatory conventions may jeopardise such stability across time, undermining the possibility of intergenerational coordination as a result. Further, uncertainty about the long-term resilience of the provisions' content may have an important effect on citizens' willingness to endorse far-sighted policies, i.e. policies with benefits expected in the long run – for, as Jacobs and Matthews have shown, such willingness is decisively shaped by citizens' beliefs about whether future incumbents will abandon (e.g. for electoral or partisan reasons) previously adopted far-sighted policies.[24] If citizens believe this is likely to happen, they are less likely to endorse policies whose payoff is uncertain – something that is more likely to happen if the constitutional framework within which such policies are adopted and sustained is unstable.

Second, and turning to one of the main aims of sunset clauses and periodic mandatory conventions – namely to uphold each generation's sovereignty – it should be noted that *mandatory* expiration and amendment dates might also constrain future generations' sovereignty. Indeed, it might do so perhaps more than the absence thereof. Why should citizens be forced to abandon a well functioning constitution? Why should they be forced to engage in a costly process aimed at deciding whether they want to revise or repeal a constitution they wish not to change? If we are truly committed to future generations' ability to live under rules of their own choosing, setting mandatory expiration or amendment dates may thwart their sovereignty to greater extent than merely including the opportunity of amending, or entirely repealing, the document in the constitution – for the former may impose a course of action that future generations may not want to take, or not at the specific date set by the expiration or amendment clause, while the latter may leave the opportunity of doing so open to them. This is even more so if the conditions under which the constitution may be amended are, albeit cumbersome, particularly inclusive, deliberative, and democratic, such as the ones spelled out in the previous section.

Why should citizens be forced to abandon a well functioning constitution? Why should they be forced to engage in a costly process aimed at deciding whether they want to revise or repeal a constitution they wish not to change?

Third, and related to the previous point, setting *mandatory* expiration and amendment dates may induce amendment or repealing processes that score lower than spontaneous amendment or repealing processes in terms of citizens' inclusion, participation, deliberation, and consensus-reaching. As Ackerman contends, constitutional adoption and amendment processes only achieve legitimacy as a result of slow-motion processes, in which the relevant issue firstly enters the constitutional agenda – pushed by activists and pressure groups – beyond daily competition amongst partisan factions, as it is considered of sufficient depth, breadth, and decisiveness.[25] It then gives way to an increasingly specific proposal, which is followed by the calling for a constitutional convention and a process of intense popular deliberation and engagement, only to finally result, if successful, in formal codification. To be sure, nothing prevents artificially established expiration and amendment dates from being inclusive, participatory, and deliberative in this sense, as well as from generating ample consensus. Yet this is less likely to happen compared to those cases in which constitutional amendment is allowed by the constitution and it occurs, if at all, spontaneously, when citizens are sufficiently mobilised, ample deliberation takes place, and consensus is reached.

In short, the use of sunset clauses and mandatory periodic conventions are fraught with difficulties from the standpoint of their intergenerational legitimacy. In the case of intergenerational provisions, sunset clauses' difficulties are probably insurmountable – for, unlike provisions whose content is not particularly intergenerational, intergenerational provisions' substantive legitimacy crucially depends, as discussed above, on their stability over time and across generations, as well as on their ability to generate legal certainty amongst citizens and private and public institutions alike.

Different conclusions may be reached with regard to periodic conventions, provided no expiration of the constitution's content occurs in the absence of normatively cumbersome amendment procedures and a successful ratification by referendum – for then the outcome does not very much differ from ordinary constitutional amendment requirements, while future generations' sovereignty is nonetheless greatly improved. Let me explain. If mandatory periodic constitutional conventions impose procedures that are normatively demanding, then legal uncertainty is greatly reduced, as the constitution's content will turn out to be amended only if cumbersome requirements of inclusion, deliberation, reflection, and consensus – such as conditions (1)–(6) outlined in the previous section – are reached. If, by contrast, they are not, then the constitution's content remains the same. Yet, unlike in the case of voluntary amendment procedures, future individuals cannot object that the will of the founding generation has been imposed on them, for they have the opportunity of amending the constitution's content, and – unlike in the case of purely voluntary amendment procedures, which if cumbersome enough often become a dead letter and are seldom exercised – this opportunity is realised in the form of a constitutional convention that is compulsorily held at least once in their lifetime.

Conclusion

Two main conclusions can be drawn. First, while constitutionalism often raises intergenerational procedural legitimacy concerns, these concerns may be importantly mitigated if constitutional provisions, intergenerational or otherwise, are properly adopted, formulated, and amended. If they are phrased abstractly, as general principles rather than precise rules, and if they are adopted and amended under normatively cumbersome conditions of inclusion, deliberation and ratification – whether by voluntary amendment procedures or in periodic constitutional conventions – then they may be able to adapt to future generations' evolving interests and circumstances with promptness and to uphold future individuals' ability to live under constitutional rules of their own choosing.

The use of sunset clauses and mandatory periodic conventions are fraught with difficulties from the standpoint of their intergenerational legitimacy [...]. Different conclusions may be reached with regard to periodic conventions [...].

Second, the sceptic may want to call into question the first conclusion. She may want to protest that, no matter how constitutional provisions are adopted, formulated and amended, sovereignty concerns endure. Let us assume this is the case. While these concerns are probably insurmountable with regard to provisions whose content is not particularly intergenerational, they are not when it comes to intergenerational provisions – for, whatever their intergenerational legitimacy shortcomings, these are likely to be outweighed by their legitimacy gains, given how badly we need public policy-making to be more sensitive to future individuals' interest in policy domains, such as climate change mitigation and adaptation, in which such interests are likely to be seriously harmed. As we have seen, the constitutionalisation of intergenerational provisions may importantly contribute to mitigate short-sightedness, enable coordination, and shape citizens' values and beliefs about intergenerational matters.

Notes

1 For comments on a previous version of the paper, I am grateful to three anonymous reviewers.

2 For discussions of this sort of provision, see Brandl/Bungert 1992; May/Daly 2009; Hayward 2005; Tremmel 2006; Ekeli 2007; Cho/Pedersen 2012; González-Ricoy forthcoming.

3 On the idea of intergenerational legitimacy, see Gosseries forthcoming; González-Ricoy/Gosseries forthcoming: 16-20.

4 Gosseries 2008.

5 I am grateful to an anonymous reviewer for raising this point.

6 The label is stipulative. These provisions have also been termed as "posterity provisions" (Ekeli 2007) and as "clauses for intergenerational justice" (Tremmel 2006).

7 See May/Daly 2009: 239.

8 *Trillium Case*, Decision No. 2.732-96, Supreme Court (March 19, 1997, Chile). See May/Daly 2009 for a more detailed account of the decision.

9 For a court decision in which intergenerational standing is even more clearly acknowledged, see *Minors Oposa v. Factoran*, G.R. No. 10183, 224 S.C.R.A. 792, July 30, 1993 (Philippines).

10 Buchanan 2016.

11 The first and third benefits are examined in greater detail in González-Ricoy forthcoming. See also Hayward 2005; Tremmel 2006.

12 On the expressive effects of the law see, *inter alia*, McAdams 2000; Dharmapala/McAdams 2003.

13 About this concern, see, *inter alia*, Dworkin 1995; Waldron 1999; Eisgruber 2001. See also González-Ricoy 2013 for an attempt to relate this to the intergenerational angle.

14 The degree of rigidity negatively correlates with the number of times that a constitution is amended, as Lutz 2004 has shown.

15 Southwood 2015.

16 Ekeli 2007.

17 Ackerman 1991.

18 On these and further conditions, see Elster 1995, 1998; Ackerman/Fishkin 2002; Schwartzberg 2013; Landemore 2015.

19 We should bear in mind that, as pointed out above, one might nonetheless want to forgo procedural legitimacy if the stakes are sufficiently high (think, for example, of human rights in the German Basic Law, which along with other fundamental principles are protected by a perpetuity clause).

20 Jefferson 1999: 596.

21 Jefferson 1999: 216.

22 Holmes 1997: 2005.

23 Elkins et al. 2009: 13-14.

24 Jacobs/Matthews 2012.

25 Ackerman 1991.

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Could Present Laws Legitimately Bind Future Generations? A Normative Analysis of the Jeffersonian Model

by Shai Agmon

Abstract: Thomas Jefferson's famous proposal, whereby a state's constitution should be re-enacted every 19 years by a majority vote, purports to solve the intergenerational problem caused by perpetual constitutions: namely that laws which were enacted by people who are already dead bind living citizens without their consent. I argue that the model fails to fulfil its own normative consent-based aspirations. This is because it produces two groups of people who will end up living under laws to which they did not give their consent: (a) citizens who reach the voting age after the re-enactment process; (b) citizens who did not assent to being obliged by the majority vote's results. I reject possible responses to my argument by showing that they result in making the model either impractical or redundant. The remainder of the paper discusses whether implementing the model would enhance the consent-based legitimacy of the modern state.

Introduction[1]

It is commonly believed that the legitimacy of political authority is founded on the consent of the governed to be bound by it. However, for those who take this stance, the transition between generations presents an intergenerational challenge: why should laws which were enacted by people who are now dead bind those presently alive? What about their consent?[2] Thomas Jefferson most famously raised this question in his

letter to James Madison from September 1789. His answer was that "'the dead have neither powers nor rights" over the living, and thus "no society can make a perpetual constitution."[3] Thomas Paine, who sided with Jefferson on this issue at the time, similarly claimed that "every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it."[4]

For laws to have legitimate authority over future generations, Jefferson suggested the following institutional design: all laws would be re-enacted every 19 years by a majority vote of the living, and laws not re-enacted would lapse.[5] Such a mechanism is supposed to obtain the consent of every new generation to the state's laws, and thereby provide a solution to the intergenerational challenge; only the living will govern the living[7].

Although intuitively compelling, in this paper, by engaging with the contemporary discussion regarding modern states that followed Jefferson's proposal, I argue that Jefferson's institutional design in particular, and thus the idea of reaffirming the constitution at fixed intervals by every new generation in general, fails to fulfil its own normative aspiration of ensuring the legitimacy of the state based on the consent of its living citizens.[7] That is because it *necessarily* results in two groups of people (on a significant scale) living under laws to which they did not give their consent. Moreover, I argue that in order to fulfil its normative aspirations, there must be changes made either to the design, or to the type of consent on which it is based. Such changes, I argue, would either render the model's implementation unrealistic and undesirable, or make it redundant.[8] This is not to say that the idea of reaffirming the constitution every generation is not desirable for other reasons. My argument refers only to the implausibility of the aspiration of legitimising the state by the consent of its citizens by using Jefferson's mechanism (or similar mechanisms).

After reaching this conclusion, I discuss whether implementing Jefferson's model, despite its defects, would still be an improvement over the status quo. Putting it differently, I discuss whether Jefferson's model would make modern democracies "more legitimate". I conclude that the Jeffersonian model is either not an improvement over the status quo, or not the best improvement available.

I argue that Jefferson's institutional design in particular, and thus the idea of reaffirming the constitution at fixed intervals by every new generation in general, fails to fulfil its own normative aspiration [...].

The paper is structured as follows. First, I present the "lost-generation" objection, according to which, even after implementing Jefferson's model, those who reached the voting age after the re-enactment would necessarily be unable to express their consent to past laws for a significant period of time. Second, I present the "majority consent" objection, namely that a majority-vote-based solution fails to ensure the legitimacy of past laws, since voters might not grant their consent for the vote itself (either by voting instrumentally or by not voting at all). Third, by exploring the option of "partial legitimacy", I discuss whether implementing Jefferson's institutional design would be an improvement over the status quo with regards to the legitimacy of modern states. Lastly, I conclude and discuss the practical implications of my analysis.

The "lost generation" objection

Suppose that a constitution is legitimately authorised by means of a majority vote by generation X at t_0. t_1 is the point in time 19 years later, when the majority of generation X has died, and the next generation – generation Z – participates in the re-enactment process. The problem is that all of the citizens who reach voting age between t_0 and t_1 – call them generation Y – would have to wait up to 19 years until they can express their consent to the laws in the reenactment process. Generation Y is thus a "lost generation" (see illustration).

Hence the objection: Jefferson's account fails to provide generation Y with the option to approve the state's laws for a significant period. Until generation Y votes with generation Z, instead of being governed by the dead, they would – on Jefferson's account – be governed by generation X, and would not be self-governing.

Such a problem, as acknowledged by Otsuka, stems, at least partially, from narrow consent-based views, which base the legitimacy of political authority solely on freely expressed consent.[9] Hence, it might be plausible to overcome it by allowing a broader scope of types of consent as the normative basis of legitimate political authority, namely to include *tacit or hypothetical* consent. In this section, I scrutinise both options and argue that neither a tacit-consent-based view nor a hypothetical-consent-based view could salvage Jefferson's proposal from the lost generation problem. In the last part of this section, I explore a different solution to the lost generation problem – shortening the length of the intervals between each vote – and argue that such a solution renders the implementation of the Jeffersonian model impractical and undesirable.

Tacit consent solution

Otsuka proposes overcoming the lost generation problem by the realisation of a Lockean ideal of free and equal tacit consent.[10] In order to legitimise political authority, actual consent need not necessarily be expressed, but could also be inferred from action.[11] For example, Locke argued that tacit consent to political authority can be inferred from residence within a state's territories, owning a land in a state, or enjoying benefits from the government.[12]

Jefferson's account fails to provide generation Y with the option to approve the state's laws for a significant period.

As Otsuka rightly notes, Locke's account makes subjection to political authority hard to avoid.[13] There are citizens who lack the economic means to move abroad. Others are bereft of the necessary cultural background or reasonable alternative political authorities to choose from. Their inaction must not be regarded as tacit consent. People, therefore, can reside in a certain state, own property or make use of the government's services, without consenting to it.[14] Had they had the opportunity – so they could claim – they would not have given their consent. Thus, in certain circumstanc-

es, inferring tacit consent could lead to a situation in which people who do not freely consent to being governed by a certain political authority are considered to have so consented.[15] In reality, most people do not give their consent, even tacitly, to a political authority just by residing or owning a property within its territory. That is because most people do not choose their place of residence, and cannot move elsewhere even if they wanted to, due to a lack of means or opportunity.[16]

To avoid this problem, Otsuka adds three provisos that must be fulfilled in a certain political association in order to infer tacit consent of its members to its laws:

a) *Egalitarian proviso:* there must be an egalitarian distribution of worldly resources, so that everyone has the means to move from one political association to another.

b) *Pluralistic proviso:* there should be sufficient decentralisation and pluralisation of political societies, so that everyone has alternative political authorities from which to choose.

c) *International order proviso:* the relations between the political societies must be regulated by an inter-political government body, which is "charged to oversee the drawing of boundaries between the societies, settle disputes and govern the disposition of possessions of worldly resources to ensure that it is in accordance with the egalitarian proviso."[17]

Under such circumstances, free and actual tacit consent could be inferred from residence, owning property or other actions, since everyone is free and able to live under a sufficient number of different political authorities.[18]

Assuming that Otsuka's reconstruction of Locke's tacit-consent-based view is indeed valid, and that only in such an ideal society one can infer tacit consent from residence, we are able to identify two plausible implications regarding Jefferson's institutional design:

i. *Ideal world scenario:* In Otsuka's ideal world, after the death of the majority of generation X, we can infer tacit consent by residence of both generation Y and Z, since everyone would have sufficient alternative options to live in, as well as the resources to move between political societies. In such a world, the Jeffersonian model would be rendered superfluous: we do not need the re-enactment process in order to provide people with the opportunity to express their consent, since we can infer tacit consent from residence.[19]

ii. *Real world scenario:* In the modern real world, Otsuka's conditions are clearly not met.[20] Thus, we cannot infer tacit consent from residence.[21] As such, we are left with the lost generation problem – we cannot infer generation Y's consent only by virtue of its members living in a certain country.[22]

These implications of Otsuka's tacit-consent-based approach show that tacit consent is not a viable option for vindicating Jefferson's account from the lost generation objection regarding real-world modern states.[23] However, since Otsuka is focused only on inferring tacit consent from residence, there is a third option that needs to be considered – a real world scenario in which there is indeed a way to infer tacit consent. I cannot think of an example of such an option. However, it is reasonable to assume that if there were a way to infer tacit consent without Otsukian ideal background conditions, then we could legitimise political authorities in such a way for all people, not just the lost generation, and without needing the Jeffersonian model.[24] Therefore, in all three possible worlds – (1) ideal world; (2) non-ideal world with an option for inferring tacit consent; (3) non-ideal world without an option for inferring tacit consent – tacit consent is either not an option or makes the Jeffersonian model redundant.

In reality, most people do not give their consent, even tacitly, to a political authority just by residing or owning a property within its territory.

Hence, assuming that in the real world tacit consent is, at least at the moment, not an option, there is a need for institutional designs that are based solely on *express* or *hypothetical* consent. Jefferson tried to do the former, but failed to solve the "lost generation" problem. In what follows, I discuss the latter.

Hypothetical consent solution

Both express-consent-based views and tacit-consent-based views purport to base the legitimacy of political authority on the actual consent of the governed.[25] If, for example, someone explicitly says that she does not give her consent to be governed by political authority X, then according to both views, she cannot be legitimately governed by X. The shift from express consent to tacit consent is necessary since getting the unequivocal express consent of all citizens is very hard (as the lost generation problem clearly shows), and tacit consent is instrumentally a more viable option for consent-based views.[26] Hypothetical-consent-based views do not purport to base the legitimacy of the state on the actual consent of the governed for all sorts of reasons. The governed might be wrong and give their consent to illegitimate political regimes; they might reject perfectly legitimate regimes and so on. By contrast, such views base the legitimacy of the state on hypothetical consent – namely on the consent that one would hypothetically give if one were rational, reasonable, or meet any other normative criterion. In Muniz-Fraticelli's words, hypothetical consent is "the normative supposition that an individual, if reasonable, *ought* to consent to a certain arrangement because of certain morally salient characteristics of the choice situation."[27] The normative focus of such views is the moral characteristics of the political authority and whether one should consent to it or not, rather than the actual consent itself.[28]

Therefore, according to such views, a plausible response to the lost generation problem would be that if a reasonable person would agree to be governed by the Jeffersonian state, then the lost generation could be considered a generation that hypothetically consents to be governed. However, as the tacit consent response, this response fails to explain why the Jeffersonian mechanism is necessary at all. We could justify the state's legitimacy for all generations according to a hypothetical consent criterion, without the need for reaffirming the constitution at fixed intervals, and thus the Jeffersonian model is, once again, redundant.

In sum, changing the type of consent from express consent to tacit or hypothetical consent in order to respond to the lost generation objection either is impractical (in non-ideal worlds where tacit consent cannot be inferred), or would make the Jeffersonian model superfluous.

A different solution: Shortening the intervals

There is a different plausible response on behalf of Jefferson to the "lost generation" objection. One could argue that it is true that the fact that a whole generation will not be able to give its consent to past laws is normatively repugnant. However, one may

add, shortening the length of the intervals between re-enactments could make the mechanism more plausible. Instead of 19 years, for instance, the re-enactment process could take place every four years. Living for four years in a democratic state under laws that you did not personally approve seems intuitively better, albeit problematic, compared to 19 years. If the regime is otherwise legitimate, and the cost is four years of waiting for the opportunity to participate in the re-enactment process, it seems like a much more negligible cost, which might not undermine the normative appeal of the Jeffersonian model as a whole (remember that for the non-lost generations the model is extremely appealing).

> As the tacit consent response, [the hypothetical-consent view] fails to explain why the Jeffersonian mechanism is necessary at all.

However, the problem of this response is that as the number of years between re-enactments decreases, the plausibility and desirability of implementing such institutional design decreases accordingly. Muniz-Fraticelli argued against Jefferson's proposal that its practical implications are undesirable.[29] That is to say, that re-enacting the constitution every 19 years will result in social instability; it would be impossible to initiate long-term projects, even when the benefits are extremely large; the political turmoil before each re-enactment will result in fear of anarchy that in turn will ignite aggressive, perhaps even violent, political struggles. Conversely, Otsuka claimed that this kind of pessimistic forecast is too hasty.[30] He defended the practicality of Jefferson's proposal on the assumption that a majority vote every 19 years would probably not jeopardise the country's stability, and will not lead to disastrous consequences and anarchy. In support of his claim, Otsuka points out that even today a number of legislatures around the world possess the power to change the constitution by a simple majority vote (e.g. Israel or Britain), and yet, they refrain from doing so; most laws endure and major reforms do not take place too often.[31] That is because "there are strong informal barriers that stand in the way of frequent and destabilising repeal of laws by majority vote."[32] According to Otsuka, there would probably be a bias in favour of the status quo, and thus the norm would be that only minor changes could be made during each re-enactment. Therefore it would be plausible to initiate long-term projects, and the polity would not suffer from exceptional instability.

I do not wish to determine which prediction is more accurate. Nonetheless, it seems reasonable to claim that the shorter the period between re-enactments, the more plausible Muniz-Fraticelli's prediction becomes. This is due to the costs of the process; the uncertainty as to the basic structure of the political society; and the frequent extreme political battles. All of these would take place more frequently, and thus political turmoil, as foreseen by Muniz-Fraticelli, would become more probable. Adding these costs of probable instability to the already normatively defective system decreases the desirability of the Jeffersonian model.[33]

It should be noted that the fact that Jefferson's proposal is impractical and politically destabilising does not render current stable, perpetual-constitution-based modern states legitimate. However, such fact could justify their existence *without Jefferson's model*, as a matter of necessity to preserve stability and refrain from anarchy (assuming that anarchy is undesirable). As Otsuka accepts, our right not to be governed by others "is not an absolute right, as there are circumstances in which it would be unreasonable to insist on its non-infringement."[34] Assuming Muniz-Fraticelli's predictions are correct regarding the modified version, states with perpetual constitutions guarantee stability, while the implementation of the Jeffersonian model could lead to anarchy and catastrophe. Considering such a trade-off, it is justified and reasonable to infringe people's rights for giving their consent to be governed. Thus, it is justified to govern people without their consent for the sake of stability, even though the state is still illegitimate from a consent-based view perspective.[35]

> It should be noted that the fact that Jefferson's proposal is impractical and politically destabilising does not render current stable, perpetual-constitution-based modern states legitimate.

To recap, Jefferson's model fails to legitimise modern states for all of their citizens due to the "lost generation" objection. Other types of consent are either impractical or make the model redundant. The model's improved version is objectionable due to its probable undesirable results. Thus, the model and its improvement fails to fulfil its normative aspiration to serve as an institutional design for legitimising the state on the basis of the consent of the governed.

The "majority consent" objection

So far, I have assumed that the re-enactment process by majority vote ensures the legitimacy of the re-enacted laws regarding those who participate in the process. In this section I scrutinise this assumption. A consent-based theory of legitimate political authority requires each *individual* to personally consent to the authority by which she is bound.[36] Thus, it is not enough, as Jefferson assumes, to conduct a majority vote in order to legitimise laws; a prior requirement has to be met. Every individual of the new generation needs first to grant her consent to be bound by the results of the majority vote itself. Only then would the majority vote have the normative force to bind every participant. Without such prior unanimous consent, each individual who does not consent to be bound by the results of the majority vote would be illegitimately governed. Therefore, to be able to legitimise the political authority of the state, Jefferson's mechanism should include a way to ensure that all citizens would unanimously give their consent to be obliged by the majority vote itself. If, as it turns out, Jefferson's mechanism cannot meet such a requirement while remaining practically feasible, then the objection – namely that those who do not consent to be obliged to the majority vote results would be illegitimately governed by the state's laws – would hold.

Jefferson could respond to the above-mentioned objection in the following three ways:

The "false interpretation" response

One could argue that Jefferson, and anyone who supports reaffirming the constitution at fixed intervals by every new generation, is not committed to consent-based theory, but rather to some kind of democratic-based justification of authority, by which democracy has intrinsic value, or that democracy is the best institutional design for collective decision-making.[37] Therefore the majority vote is the normative basis for the state's legitimacy, and not the direct consent of each and every one of its citizens, and this is the reason for re-enacting the constitution every generation. This is not a direct response to the "majority consent" objection, but rather a claim that undermines

the whole idea that the Jeffersonian model relies on a consent-based view of political legitimacy.[38] However, such a claim cannot explain the intergenerational concern that underlies the Jeffersonian model. If the laws of the old constitute a democracy, why would Jefferson insist on re-enactment? If the democratic institutions and procedures make a state legitimate, then it seems there is no need to re-legitimise what is already a democracy (assuming that generation X established a democracy). Moreover, specifically regarding Jefferson, he was explicitly trying to defend individuals' consent by arguing that "the rights of the whole can be no more than the sum of the rights of the individuals."[39] He does not mention democracy, but rather refers to the control of each and every individual over her own life. Thus, the proper and only plausible interpretation of the underlying normative motivation of the Jeffersonian model is consent-based. Therefore this response fails.

If the democratic institutions and procedures make a state legitimate, then it seems there is no need to re-legitimise what is already a democracy.

The "tacit consent by voting" response

Jefferson could respond by saying that the re-enactment process is a signal from which we can infer tacit consent; i.e. that by voting, one tacitly consents to be obliged by the vote's results. This response does not render Jefferson's account redundant (as the tacit-consent-based response to the "lost generation objection" did), since the re-enactment of laws every 19 years would still be needed. Albeit promising, this response fails as well. The following case illustrates the reasons for such failure:

Mohanad is a Palestinian who became an Israeli citizen after Jewish military forces[40] conquered his city in 1948, the year in which the State of Israel was established. Mohanad did not consent to be governed by Israelis (more specifically, by Israeli Jews). However, he wished to stay in his homeland and thus decided not to leave. Furthermore, even if he had wanted to leave the country, he did not have the means to do so. People like Mohanad, i.e. Palestinians with Israeli citizenship, have the right to vote. By voting, Mohanad increases the chances of the election of a representative who will promote his interests. Thus, he chooses to vote for instrumental reasons.

It cannot be inferred from Mohanad's instrumental participation in the vote that he gave his consent to Israeli laws and Israeli political authority. Similarly, in our non-ideal world, where most people cannot easily leave their countries, Jefferson cannot infer from participation in the re-enactment process that all participants have granted their consent. As Mohanad does, they could be voting in an instrumental manner, while not giving their consent to the political authority they are under at the moment. Lacking Otsuka's ideal provisions, which guarantee that people have the option to choose a different political authority, this response, which also relies on tacit consent, fails too. Moreover, it should be mentioned that even if it were plausible to infer tacit consent from voting, in order to legitimise the state on the basis of consent, there is a need for all individuals to give their consent without exceptions. Therefore a further assumption has to be made, namely that there will be 100% turnout every 19 years, for we cannot infer consent from those who do not vote.[41] Granting that such an assumption is extremely unrealistic – especially in the modern world – it follows that even if we could infer tacit consent from voting, there would still be a group of people (the non-voters) who would be illegitimately governed.

The modified model response

Jefferson could accept the objection and amend his model by adding a requirement for unanimous consent of the governed to be bound by the majority vote. The problem with this amendment, as rightly argued by Simmons, is that "if unanimous consent is required for legitimacy, no government will be legitimate."[42] If every individual can undercut the legitimacy of the state, it would be virtually impossible to achieve unanimous consent in modern states, which consist of millions of people. This is indeed a problem shared by all consent-based theories of legitimate authority.[43] Nevertheless, it is especially troubling for Jefferson, for even if we can assume that unanimous consent could be reached once by the country's founding generation, it would be highly implausible to expect that it could be reached every 19 years. Thus the modified account solves the problem, but it is extremely unlikely to result in a functioning state and would probably lead to anarchy. It is unreasonable to expect an unanimous consent of millions of people to a certain political authority every 19 years.[44] Moreover, as mentioned above, even if unanimous consent every 19 years were possible, there would also be a need for a 100% turnout every 19 years, in order to guarantee the consent of all people. Again, this is extremely unlikely to happen, a fact that makes this modified version of Jefferson's model even more unrealistic. If Jefferson's goal is actually, not theoretically, to ensure the legitimacy of the political authorities (which I believe it is), then this objection makes his model less compelling.

Should a Jeffersonian model be pursued despite its defects?

Up to this point, I have shown that if we were to implement Jefferson's model, and assuming no other type of consent-based theory is feasible (hypothetical or tacit), two groups of people would not be obliged to obey the state's laws:

(1) Generation Y (i.e. those who reached the voting age after the re-enactment of the new laws).
(2) People who vote and refuse to commit to the results of the majority vote reenactment process (that is assuming that everyone is voting; if some do not vote, then the non-voters are part of this second group).

Thus, if one still wishes to implement the Jeffersonian model, one has to decide between the following scenarios:

a) *Partial anarchy scenario:* If one wishes to avoid illegitimately coercing people who did not give their consent to the laws (namely the two groups aforementioned), one would have to accept that those people, who live under the state's territory, will not necessarily obey its laws. In such scenario, a "window of anarchy" would open in the country, since the rule of law would be undermined.[45]

b) *Coercive scenario:* One could accept the unfortunate fact that the model is limited, but still decide that in order to prevent anarchy and preserve the rule of law, there is a need to illegitimately force the people from these two groups to obey the state's laws, even without their expressed consent to it.

Assuming that most non-anarchists would reject the former option,[46] in the remainder of this paper I explore whether a Jeffersonian state as described in option (b) would be an improvement over current modern states, despite its defects.

After defending Jefferson's proposal, Otsuka states that he believes that "any actually existing democracy which adopted this proposal would more fully realise the ideals of democracy and the popular sovereignty of the living over the living."[47] Such a claim is controversial, both within and outside the Otsukian framework. Within the Otsukian framework, a legitimate state would fulfil the three provisos mentioned above. Thus, implementing Jefferson's mechanism should be considered an improvement if it would contribute to bringing modern states closer to such an ideal. Unfortunately, it is at least not clear if implementing the model would in fact bring modern state closer to the Otsukian ideals. The mere fact of conducting a re-enactment process every 19 years does not and cannot guarantee that the society would become more egalitarian, pluralistic, or that it would have any effect on international relations. On the contrary, as claimed by Muniz-Fraticelli, reenactment could lead to societies which are less equal and less stable.[48] Hence, it follows that implementing Jefferson's model would not necessarily be an improvement over the status quo, at least with respect to getting closer to the Otsukian ideal.

Even if we can assume that unanimous consent could be reached once by the country's founding generation, it would be highly implausible to expect that it could be reached every 19 years.

Having said that, I believe that Otsuka's claim regarding Jefferson's model being an improvement does not mean that the implementation of the model would bring contemporary modern states closer to an ideal, but rather that it would bring about a different kind of improvement, namely an improvement that makes current modern states "more legitimate" – although, as Otsuka himself acknowledges, not completely legitimate, due to the two objections. The question is thus whether legitimacy is a binary or scalar quality. Putting it in Simmons's words, the question is whether the concept of partial legitimacy is intelligible in the context of consent-based theories of political legitimacy.[49]

Consider the following two types of states and assume that each state consists of 100 people. Also assume that both states are very similar to current western democracies, i.e. that most people enjoy relatively satisfactory material welfare and that the regime is democratic and stable. In state A, there has never been a re-enactment process. Thus, none of state A's citizens have given their consent to being governed by it. In state B, on the other hand, 50 people have consented to the state's authority while the other 50 have not. Is state B "more legitimate" than state A?

An intuitive answer would be: "Yes, more people gave their consent, so state B is more legitimate." However, under scrutiny, this intuitive answer becomes questionable. The most salient principle underpinning consent-based theories is that the legitimacy of political authority should be founded upon the consent of each and every individual. As Locke argued: "nothing but the consent of the individual can make anything to be the act of the whole."[50] Without the overarching consent of all the people who are governed by a certain political entity, it is not permissible for such an entity to force someone to obey its laws. According to such a strict rationale, the aggregation of individuals who have consented should not make any difference; if the state infringes the right of one, then it is already illegitimate, and anarchy should be preferred over it, at least when focusing solely on the legitimacy of the state.[51] Under such strict view, legitimacy is a binary concept and thus the meaning of the fact that aggregation does not matter is that both states are equally illegitimate. Hence, the Jeffersonian model cannot be considered an improvement over the status quo.[52]

One could respond that this is a counter-intuitive view of rights, and that surely state B is more legitimate because its existence leads to fewer infringements of rights. Such a position would turn Lockean consent-based views of political legitimacy into "utilitarianism of rights" consent-based views. A utilitarian of rights would claim that if we believe that all people have a right not to be governed by a political authority without their consent, then we need to strive for an institutional design that *maximises the realisation of this right and minimises the number of infringements*.[53] Thus, if the best way to minimise the violation of right X in society is to actually infringe the rights of a small group within that society, then infringing the rights of the small group is justified. The best way to illustrate this point is to think about a case in which murdering one person would prevent the murder of five others. In such a scenario, according to the utilitarian of rights, killing the one is justified. Therefore, following such logic, Jefferson's mechanism is justifiable because even though it necessarily infringes both generation Y's right and the right of those who do not consent to be obliged by the majority vote to not be illegitimately governed, it is the institutional mechanism that minimises the violation of such.

The mere fact of conducting a re-enactment process every 19 years does not and cannot guarantee that the society would become more egalitarian, pluralistic, or that it would have any effect on international relations.

This response partially fails, because it does not take into account the possibility of anarchy. If there is no institutional design that ensures that all people are able to express their consent to the political authority that governs them, the design that will maximise the realisation of the right to be legitimately governed and that would minimise its violation, is no government at all. Thus a coherent utilitarianism of rights view would lead to the conclusion that anarchy is the best plausible solution – and not the Jeffersonian state. However, this response only partially fails. Although it is not the maximal improvement at hand, the Jeffersonian model is still an improvement over the status quo.

To recap, I presented two different views about the right to not be governed without consent. The first is a strict view that sees a state as illegitimate if it violates even one individual's right to be legitimately governed. According to such a view, both state A and state B are equally illegitimate, since the aggregation of people whose rights are not infringed does not normatively matter. Therefore both states should either find a mechanism to ensure the consent of all people under their authority; or open a "window of anarchy" for the people who refuse to give their consent; or not exist at all. The second outlook, a utilitarianism of rights view, also leads to the conclusion that anarchy would be better than implementing Jefferson's model (in terms of consent-based legitimacy), but it does consider the Jeffersonian model an improvement.[54]

Conclusion

I have argued that the underlying normative motivation of Jefferson's account is to legitimise all laws using the consent of all living citizens. I have established that

regarding real-world modern states, the original account of Jefferson fails to ensure that aspiration for two specific groups of people. I have also explored the question of whether a Jeffersonian state would be more legitimate than contemporary states, and argued that it would not be. Thus, a Jeffersonian state might be compelling, but not for reasons of legitimacy grounded in consent. The practical implications of such a normative analysis are of significance, since one of the underlying motivations of the intergenerational debates regarding perpetual constitutions is exactly the motivation that drove Jefferson to propose his model: the fact that the living are being ruled by the dead without their consent. Hence, if one holds a consent-based view of political legitimacy, and one does not have other reasons to pursue periodic constitutional re-enactments, then ideas such as Jefferson's should be off the table, and the intergenerational debate should focus on other solutions or on different theories of legitimacy.[55]

Notes

1 I am grateful to Michael Otsuka, Matt Hitchens, Chris Otero and Yonatan Levi and the jurors of the Intergenerational Justice Prize 2015/2016 for reviewing this paper and providing me with valuable comments.

2 I use the terms "laws" and "constitutions" interchangeably throughout the paper. By both terms I mean the set of political principles whereby a state is governed, e.g. the design of political institutions, the separation of powers, the conventions underpinning law making, the protection of human rights, etc. For the purpose of this paper, I do not make a distinction between written constitutions and constitutional statues (basic laws).

3 Jefferson 1984: 959-963.

4 Paine 2011: 74.

5 According to Jefferson's (1984) calculation, 19 years was the time needed to pass for a generation's majority to die. Otsuka (2003) amended this number to 20 years, according to current life expectancy.

6 Muniz-Fraticelli 2009: 380-382.

7 I wish to emphasise that there are other views concerning the basis of legitimacy of political authorities. If one does not accept consent-based theories to begin with, one should not be concerned with my argument or with the Jeffersonian model.

8 My argument is irrelevant to the question of whether Jefferson's model, as described by him, is practical or not. This question has been discussed both by Otsuka and by Muniz-Fraticelli. While Otsuka argued that Jefferson's mechanism could be practically implemented without colossal costs, Muniz-Fraticelli claimed that such a mechanism would result in economic and social instability, which makes Jefferson's proposal undesirable. My argument is different: I contend that Jefferson's mechanism fails to fulfil its own normative aspirations. In order to fulfil them, as I show later on, Jefferson would be required to make amendments to his model; and these changes, in turn, make the mechanism both impractical and undesirable. Thus, I do not discuss whether Jefferson's mechanism is practical in its original form, since I argue it is a normatively flawed mechanism regardless of its practicality. For the discussion regarding the practicality of the original model see Otsuka 2003: 139-141; Muniz-Fraticelli 2009: 386-391.

9 Otsuka 2003: 90.

10 Otsuka 2003: 147.

11 For a detailed review of different kinds of consent, see Simmons 1979: 75-100.

12 Locke 1988: 347-349; Simmons 1979: 83-84.

13 Otsuka 2003: 91.

14 According to Simmons, Locke also asserts that one cannot give even express consent to be governed by a tyrant or by an arbitrary government. Locke, in Simmons's interpretation, suggests that tacit consent could be given only to states which are established on the basis of some kind of a social contract and which do not violate the law of nature. According to such interpretation, residence, property ownership etc. are mere signs of consent, but are by themselves insufficient to establish it. In contrast, Otsuka argues that for Locke, giving consent to tyranny or arbitrary power is impossible, and therefore does not demonstrate that tacit consent is insufficient for subjection to legitimate political authority. According to Otsuka, tacit consent by residence "is a sufficient condition of subjection to legitimate political authority for as long as one owns land and resides or moves within the governed territory." My focus is not on interpreting Locke's argument, but rather on the possibility of solving the lost generation problem by referring to tacit consent. For this end, interpretational debates are irrelevant. See Otsuka 2003: 90-91 fn. 8; Simmons 1979: 83-95; Locke 1988: 347-349, 355-356.

15 Otsuka 2003: 91-92.

16 In the real world people do not "consent" to a political authority by residing within its borders. There could be a number of reasons for that, such as poverty, oppression, and lack of knowledge about other ways of life or alternative political institutions. In sum, people do not voluntarily choose to live where they do.

17 Otsuka 2003: 105-109; Otsuka 2006: 332.

18 Enoch 2006: 317-318; Otsuka 2003: 109-110, 149.

19 Otsuka 2003: 137.

20 Enoch, 2006: 318-319.

21 Otsuka, 2006: 334.

22 Otsuka is not alone in rejecting the idea of a tacit-consent-based solution under contemporary real world conditions. Jefferson himself rejected such a solution in reply to Madison's suggestion to base the constitution's legitimacy on tacit consent via non-repeal. Madison argued the following: "I can find no relief from such embarrassment but in the received doctrine that a tacit assent may be given to established governments and laws, and that this assent is be inferred from the omission of an express revocation" (see Madison 1904: 440 fn.). In effect, Madison maintains that if the living have the opportunity to repeal laws using a simple majority, then the fact that their elected representatives choose not to repeal a law is a sign of tacit consent of the whole population that the law is legitimate. Thus laws could retain their legitimacy via non-repeal by the living majority, and therefore there is no need to re-enact the constitution. As shown by Otsuka, Jefferson provided two responses to Madison's answer. First, for practical reasons, without a formal process of re-enactment people will find it harder to change or repeal existing laws: it is hard to assemble; people are not involved in politics; personal interests might lead representatives to act against the people's will, and so on. Second, Jefferson makes a substantive comparison between being governed by the dead and being governed by another state. Such comparison has force if we think of the following example. A foreign country declares that its laws apply to the United States. The fact that this foreign country provides American citizens with the opportunity to repeal its laws using majority vote does not eradicate the Americans' view whereby these laws have no authority over them. I do not elaborate on Madison's suggestion any further, since

the focus of this paper is Jefferson's model and not the objections of his adversary. For the full discussion between Jefferson and Madison and for Otsuka's interpretation see Jefferson 1984; Madison 1904; Otsuka 2003: 132-136.

23 I do not argue that Otsuka's consent-based account is flawless. I use it only to press the problematic issues in Jefferson's account. Enoch, Harel and Muniz-Fraticelli all highlighted problems with Otsuka's account and raised objections to it which are beyond the scope of this paper. For the discussion regarding Otsuka's consent-based account see Enoch 2006; Harel 2006; Muniz-Fraticelli 2009: 391-395; Otsuka 2006: 330-336.

24 One might argue that there is an action which is performed only by the lost generation and from which we can infer tacit consent. If we can indeed infer tacit consent from such an action in a non-ideal world, then it could serve as a solution for the lost generation problem. However, since the lost generation consists of a cross section of the population, I doubt such an action exists.

25 Muniz-Fraticelli 2009: 391-392; Simmons 1979: 80.

26 Muniz-Fraticelli 2009: 391-392.

27 Muniz-Fraticelli 2009: 392.

28 Such a position regarding political legitimacy has been embraced by many, most famously by Rawls in his "public reason" argument. Some, like Muniz-Fraticelli and Enoch, claimed that in hypothetical consent accounts, consent does not have much of a normative force, and that it is not what really matters for legitimacy, but rather the objective conditions in which the consent hypothetically should be given. Therefore, they argue, the objective conditions these theories argue for (e.g. the conditions that make it reasonable to consent to political authority) should be at the heart of such theories, not the consent itself. Thus one could argue that hypothetical consent-based arguments in general cannot serve consent theorists like Jefferson. Although one should bear such possibility in mind, the debate about the validity of consent theories in general and of hypothetical consent theories in particular is beyond the scope of this paper. My narrow claim is that even if hypothetical consent views were viable, they would not be able to justify implementing Jefferson's mechanism. For the full discussion see Enoch 2006: 322; Enoch 2015: 126-130; Muniz-Fraticelli 2009: 392-395; Rawls 2005: 48-54.

29 Muniz-Fraticelli 2009: 386-391.

30 Otsuka 2003: 140-141.

31 Both the UK and Israel are countries without written constitutions. Rather, their political systems are framed by constitutional statues which have the same legal status. That is of no significance to the point I am trying to make; namely that the fact their basic laws are easily alterable – requiring nothing more than a simple majority vote in Parliament – has not led to a state of instability.

32 Otsuka 2003: 140.

33 Albeit relatively negligible: four years of lost generation according to consent-based theories are still four years of unjustified coercion.

34 Otsuka 2006: 333.

35 According to Otsuka, even though he believes that the right not to be governed without consent is not absolute, he does clearly state that in order to override such a right, the circumstances need to be catastrophic. Therefore Otsuka could argue that even in the four-year version of the Jeffersonian model, the probable instability that would emerge is insufficient to reject Jefferson's model, assuming it legitimises the state's authority for all. However, as mentioned, even the four-year version of the model still suffers from the "lost generation" objection, and thus Otsuka would reject it on that basis alone. I have elaborated on the possibility of shortening the length of the intervals, in order to press the issue that even if shorter versions seem intuitively more plausible, they suffer from practical deficiencies that render them undesirable, and thus the response fails. For Otsuka's statement regarding the non-absoluteness of the right to be legitimately governed, see Otsuka 2006: 333.

36 Green 1988: 161; Simmons 1979: 57.

37 For Christiano's and Estlund's full accounts of democratic legitimate authority, see Estlund 2008; Christiano 2008.

38 Such a response could also be applied to the lost generation objection. However, I have decided to place it here because it is more directly related to the "majority consent" objection. That is because its focus is the attempt to explain why Jefferson has not taken into account the legitimacy of majority vote as the normative watershed of political legitimacy. In any case, this response fails with regard to both objections in the same way.

39 Jefferson 1984: 959.

40 Which after the establishment of the state of Israel have become to be what is known today as the Israeli Defense Forces (IDF).

41 The fact that we cannot infer consent from those who do not vote does not mean that the non-voters necessarily do not give their consent. It is an epistemic problem. Within the scope of logically plausible possibilities, it is tenable to claim that all of the non-voters do consent to be governed by the state. However, it is extremely unlikely. Furthermore, tacit-consent-based solutions purport to solve this exact epistemic problem by providing a mechanism to infer consent. If we cannot infer consent from some, then the solution fails. When we do not know whether someone gave their consent, we are obliged to get this information before governing them illegitimately.

42 Simmons 1979: 73.

43 Simmons 1979: 73.

44 If one succeeds in arguing otherwise, i.e. that unanimous consent is likely to be achieved, then it might be a good response to the majority consent objection, but recall that the "lost generation" objection still holds.

45 Otsuka 2003: 147.

46 I personally cannot imagine how a modern state could function where a whole generation is allowed not to follow the state's rules for a significant amount of time, up to 19 years, in addition to those who did not give their consent to the regime (especially when those who do not give their consent will sometimes have an interest to act against the state and the citizens who support it). If there is a plausible way to establish a state in which so many people do not follow the laws (without the state becoming an anarchy), then it is a plausible way to vindicate Jefferson's proposal.

47 Otsuka 2003: 146.

48 Muniz-Fraticelli 2009: 389-91.

49 Simmons 1979: 73 (footnote m).

50 Locke 1988: 98.

51 Nozick 1974: 26-33.

52 Although equally illegitimate, the Jeffersonian model should be implemented even under this strict framework under certain assumptions, but not for reasons of legitimacy. Imagine a scenario where you know that P1 and P2 are persons who are going to be murdered. One can only save P1. P2 will be murdered either way. In such a case, most would agree that one has an obligation to save P1, even though P2's rights would still be violated. Similarly, one can argue that implementing the Jeffersonian model,

or in other words choosing state B, is just like saving P1. That is if one is assuming the following: (1) Anarchy is not an option. (2) There is no better mechanism than Jefferson's that can ensure the state's consent-based legitimacy, and thus necessarily there will be people whose right to be legitimately governed will be infringed (i.e. the non-voters and generation Y). (3) Otsuka is right and Muniz-Fraticelli is wrong, and thus the Jeffersonian model would allow for stability. Under such assumptions, we have an obligation to respect the rights of those who voted in favour of the state's authority from generations X and Z, as we have the right to save P1, since generation Y's and the non-voters' rights will be infringed either way. In such a case, the Jeffersonian state would still be illegitimate in a strict Lockean sense, but it should be implemented in modern states because it would prevent the unnecessary infringement of the rights of generations X and Z.

53 Nozick 1974: 29-30.

54 Otsuka's left libertarianism rejects utilitarianism of rights, so I do not believe he would support such justification for implementing Jefferson's model.

55 There are, as I show in footnote 52, other reasons to implement the Jeffersonian model. Thus implementing it is still relevant, but not for the reason of legitimising modern states.

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Constitutions, Democratic Self-Determination and the Institutional Empowerment of Future Generations: Mitigating an Aporia

by Michael Rose

Abstract: Is the self-determination of future generations impeded by lasting constitutions, as Thomas Jefferson suggests? In this article it is not only argued that the opposite is true, but also that the question misses the point. It is demonstrated that the very demand for future generations' full self-determination is self-contradictory, and that it is impossible to achieve. Applying the all-affected principle to future generations, it is shown that we will always affect them, and that we should employ an attitude of "reflective paternalism" towards them. With the help of institutions reviewed in this article, the interests of future generations could be in-

troduced into today's political decision-making process. The role of constitutions is to provide the prerequisites for democratic self-determination and potentially also to facilitate the institutional empowerment of future generations.

Introduction[1]

Lasting constitutions and the self-determination of future generations are said to be in conflict, since future generations will be bound by laws they had no voice in and that can only be modified by supermajorities, if at all.[2] Hence the democratic self-determination of future, i.e. yet unborn generations[3] is a fragile value, for they will be affected by the policy impacts we bequeath them. To restore future generations' sovereignty, Thomas Jefferson unsuccessfully insisted on limiting the legal force of laws to 19 years from their adoption onwards, including the constitution.[4]

Before confronting Jefferson's controversial claim, as I intend to do here, we first of all should analyse the underlying issue of future generations' self-determination in greater detail. To this end, the so-called "all-affected principle" is employed to specify the notion of democratic self-determination regarding its normative democratic-theoretical basis, and the principle's applicability to future generations is discussed. Showing that future generations indeed are affected by today's laws and policies and that their right to self-determination is thereby infringed, Jefferson's proposition is taken up again and finally rejected. This is done by arguing that the perceived tension between constitutional and political stability on the one hand and the self-determination and sovereignty of future generations on the other is misplaced. On the contrary, at least stable constitutions can be understood as presuppositions of the self-determination of both present and future generations. It is argued that the demand for future generations' full self-determination is inherently contradictory, for it presupposes the very ethically universalistic standpoint it seems to reject. Making this universalistic standpoint explicit in turn helps to make the case for enduring constitutions. Furthermore, building on the analysis of the all-affected principle, it turns out that full self-determination is per se impossible, resulting in an aporia, i.e. an insoluble problem that can be worked on and mitigated, nonetheless. Recognising this fact and shaping its consequences by mitigating the aporia is what I call "reflective paternalism".

Following this, so-called "democratic presentism" is briefly introduced as the main barrier to mitigate the aporia. Given democratic presentism and employing the all-affected principle, scholars and activists call for institutions to introduce the interests of future generations into today's political decision-making process.[5] In the second part of the article I will give a brief review of the relevant approaches and present selected real-world institutions. Moreover, I will examine the potential roles of constitutions and civil society actors in institutionally empowering future generations today and give some advice regarding possible real-world applications. Taking the Jefferson debate as a point of departure, I thus will firstly establish the aporia of future generations' self-determination and secondly review approaches to mitigate it by institutionally empowering future generations today, thereby focusing especially on the (potential) role of constitutions.

Stable constitutions can be understood as presuppositions of the self-determination of both present and future generations.

Specifying democratic self-determination: the all-affected principle and its application to future generations

A fruitful specification of democratic self-determination is the so-called "all-affected principle". This principle is central in democratic theory, especially in participatory, deliberative and also representative models of democracy. The all-affected principle claims that everyone who will be affected by collectively binding decisions should be considered in these decisions.[6] Or, as Nadia Urbinati and Mark E. Warren state with reference to modern political theorists like Dahl, Gould, Habermas, Held, and Young: "democracy [is] any set of arrangements that instantiates the principle that all affected by collective decisions should have an opportunity to influence the outcome."[7] "Democracy [therefore] means *empowered inclusion of those affected by collective decisions*", as Warren and Castiglione define democracy.[8] For Anton Pelinka, the all-affected principle, as a defence against heteronomy, is an essential part of the basic ethics of democracy.[9] The battle call of the American War of Independence "no taxation without representation!" is an instance of the virtue of the all-affected principle, both in the history of ideas and in the history of the real world.

Is the all-affected principle applicable to future generations? The provisional answer is yes. Future generations will inevitably be affected by the collectively binding decisions made today, but they cannot raise their voice now, for the simple fact that they do not exist, yet. The members of future generations will be born tomorrow, or in one hundred years, and they will have to live with today's political decisions and their impacts. This can be demonstrated easily. Jonas, Birnbacher, Tremmel, Leggewie, MacKenzie and others show that the human scope of action has extended greatly since the 20th century.[10] We live, as Paul Crutzen claims in Nature, in the era of the Anthropocene.[11] This is evident in the human capacity for global self-destruction with the help of NBC weapons, the human role in climate change, genetic engineering with irreversible impacts on the ecosystem, long-term effects of nuclear waste disposal, and much more. In general, it is not even necessary to evoke extreme cases such as those mentioned above. Indeed, every reasonable political decision will work into the future, and every law is made to bind the future.

First objection: future generations will be better off

Nevertheless, the application of the all-affected principle to future generations comes under pressure from two directions: In the first critique, Geoffrey Brennan questions the relevance of the problem by stating that "over the past three centuries or so it has been pretty much routine that each generation has done better than its predecessor."[12] The idea behind this statement is that future generations are only positively affected and that therefore the political consideration of future generations is dispensable. Having said that, even if there is an intergenerationally increasing prosperity, this does not suspend the all-affected principle and its application to future generations, for an empirical argument cannot invalidate a normative argument. This can be easily illustrated by an analogy: from the perspective of democratic theory, a well-intentioned dictator is not democratically justified by the fact that he successfully cares for the material well-being of his subordinate citizens. From the perspective of the all-affected principle, both dictatorship and the exclusion of an affected group imply a democratic deficit.

Nevertheless, if Brennan is empirically right, this would weaken the problem of

future generations' self-determination and the demand to mitigate it from an everyday-morality point of view. There are three points to be made here. First, even if Brennan's evaluation of recent history is right, this positive evaluation should not be universalised and extrapolated.[13] Many philosophers as well as scientists do not share Brennan's optimism regarding the future.[14] Second, the developments in recent history were contingent. The Cold War, for example, could have become much more dangerous and destructive than it did. And history shows no linear positive developments in all cultures. Third, if we apply our definition of current and future generations, Brennan's hypothesis does prove wrong if we refer t_0 to, for example, the year of 1933 in Germany. The political decisions of the current generation (people alive at t_0) did affect large parts of the first future generation (people born shortly after t_0) quite negatively.

Second objection: future generations will not be legally bound

In the second critique, Ludvig Beckman questions that future generations will be affected by policies in which they had no voice.[15] For this purpose, Beckmann differentiates the all-affected principle into two versions, using two interpretations of "being affected": First, "A person is […] affected by a decision to the extent that it has a causal effect on his or her welfare or opportunities", or second, "the decisions made by governments and legislatures define the entitlements, duties and benefits that *apply to the subjects as a matter of law*", i.e. being affected means being subject to a certain jurisdiction's legal order.[16] Scholars like Thompson or Dahl seem to prefer the second, legalistic, interpretation, whereas Goodin vehemently argues for the first, i.e. causal, interpretation.[17]

Future generations will inevitably be affected by the collectively binding decisions made today, but they cannot raise their voice now, for the simple fact that they do not exist, yet.

Beckman solely employs a strict *legalistic* interpretation of the all-affected principle and states that the current generation cannot legally bind unborn persons, who therefore cannot be affected by today's political decisions in this sense.[18] An important underlying condition of this proposition is Beckman's understanding of liberal democracy. According to Beckman, the sovereignty is owned by the people, and the people exert its sovereignty, mediated through elections, through the majority of its representatives.[19] So, future people will be democratically self-determined, and, as sovereign, they will have the right to actively or passively approve or change the law by majority vote (or some qualified majorities).[20] Beckman therefore argues that "the only laws that apply to posterity are those affirmed by future people themselves."[21] He closes his argumentation with the following statement: "Generations cannot rule one another; hence there is no basis for introducing the political representation of the unborn following the legal version of the all affected principle."[22]

As a result, the intuitive argument that a legal order always binds not only current but also future citizens, and that the current generation therefore wields power over future generations, is rejected by Beckman. However, Beckman's conclusion is implicitly based on the premise that the lifetimes of members of the current generation will not overlap with the lifetime of members of future generations. But this understanding of generations is not a general consensus; it is abstract and impractical, and at the very least it is in conflict with the definition of future generations employed in this article. If we employ this article's definition, we end up at a quite different evaluation of Beckman's argument.

Beckman equates the sovereign with the majority of the representatives, and, via the electoral procedure, with the majority of the voters, since democratic elections are the mechanism through which the majority of representatives, elected by the majority of voters, legitimately exerts the sovereignty of the people.[23] But every political decision, taken at t_0, legally does not only bind the population whose majority indirectly legitimised the concerned decision. It also legally binds people born after t_0, living in that jurisdiction. Those who are born after t_0 are not part of the sovereign entity existing at t_0. Furthermore, they will not become sovereign, that is democratically self-determined, for the time being, because they can neither actively nor passively make any majority decisions regarding the validity of the legal order adopted at t_0. Solely a majority decision of the currently living is legitimate, according to Beckman.[24] For a legitimate majority decision of the future contemporary living, the people born immediately after t_0 will depend in large part on the future selves of current generation's members, because the people born immediately after t_0 will be a minority in the society existent soon after t_0. Only after the point in time at which the people born after t_0 will outnumber the people who were already alive at t_0 will the former be allowed to exert their sovereignty. Up to that demographic turning point, the current generation will wield the same power over members of future generations that is negated by Beckman. Since every law is made to bind the future, at least those who are born timely after t_0 should be considered in the democratic decision-making process.

Having said that, if one remains in Beckman's shoes, one might still argue that the legalistic version of the all-affected principle should not be applied to later future generations that will come into existence in, say, 60 years.

Still, there is a further, rather empirical argument against Beckman's claim: Beckman's theoretical argument is far from realistic. In reality, politics is first and foremost inherited from the political ancestors, a fact that in turn strongly constrains the political scope of action of the present rulers.[25] The asserted self-determination of future people, be

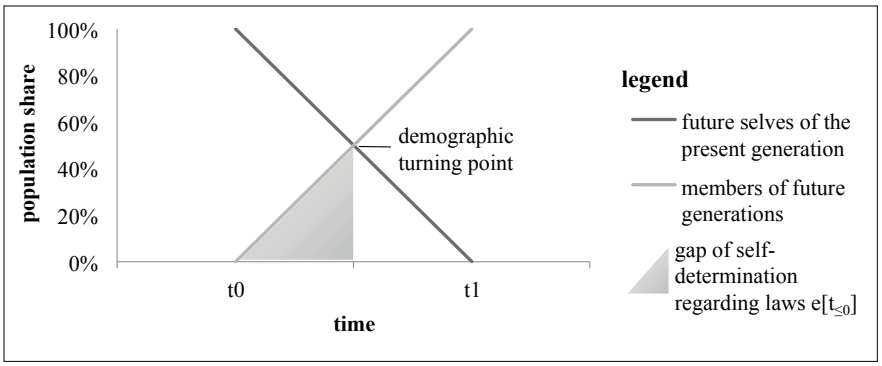

Figure 1: Gap of self-determination, applying the legalistic version of the all-affected principle. Source: own illustration

they born shortly or a long time after t_0, is a very constrained form of self-determination from an empirical point of view.

> [Politics] is first and foremost inherited from the political ancestors, a fact that [...] strongly constrains the political scope of action of the present rulers.

However, most of the literature on intergenerational justice refers, be it implicitly or explicitly, to the *causal* version of the all-affected principle, which seems to be not only more intuitive and demanding, but also ethically superior.[26] Policy outputs do not only have legal consequences for, but also causal impacts on future generations. Future generations will be affected by our political decisions, as we are affected by the political decisions of our ancestors.

Constitutions and the aporia of future generations' self-determination

According to the application of the all-affected principle to future generations, Jefferson was right in being concerned about future generations' self-determination. Limiting the legal force of laws (including the constitution) to 19 years is not a suitable solution, however.[27] Hence Madison and others objected that this would bring about political and social instability and violence and would thwart long-term investments, obligations and progress.[28] Furthermore, it is argued against Jefferson that in order to change the norms of a political community one should be able to rely on already-existing, not expired institutions that regulate this process.[29] Referring to Jefferson's calculation of the above-mentioned 19 years with the help of mortality tables, one could additionally argue that while citizens are mortal indeed, societies are not, or at least not in the same way.[30] The same should be true for society's fundamental institutions.

Jefferson's controversial claim illustrates the perceived tension between constitutional and political stability on the one hand and the self-determination and sovereignty of future generations on the other.[31] It should have become clear in the preceding paragraphs that this tension is somehow misplaced. As several authors convincingly argue, constitutions can be understood as a necessary precondition for the self-determination of both present and future generations.[32] Since constitutions establish the fundamental rights, obligations and institutions of democratic self-determination, destabilising those constitutions by temporally limiting their legal force purportedly for the sake of future generations' self-determination would also undermine the very value of self-determination we seek to save for them. We cannot create self-determination tomorrow by jeopardising the working of democratic self-determination today. Instead, if we want to facilitate the self-determination of future generations, we should perpetuate the basic institutions of democratic self-determination and protect them by constitutional law against their misuse or abrogation. The right of self-determination is an essential element of liberal democratic forms of government, and this form of government is usually enshrined in the nation's constitution.

The universalistic premise of the claim for future generations' full self-determination

Admittedly, this argument is based on the assumption that there are universal rights and values, one of these being "self-determination". Such universal rights are often placed beyond the reach of simple democratic majorities, since their source of legitimacy is not the affirmation by majority, but, for example for Jefferson, natural law, or other universalistic ethical concepts. From this point of view, it seems to be legitimate to bind current and future generations to these rights and values, and to establish basic institutions that are determined to guarantee them. Consequently, a special constitutional protection of these rights and institutions seems to be legitimate, too. However, both the very substance and the degree of abstraction of these constitutional commitments are disputed, and there are good reasons for keeping such constitutional regulations as parsimonious as possible in order to avoid *unnecessary* restrictions on future generations' right of self-determination.

> We cannot create self-determination tomorrow by jeopardising the working of democratic self-determination today.

If we would leave our universalistic standpoint, we would eliminate the very problem of future generations' self-determination at the same time. The claim not to bind future generations at all for the sake of their right of self-determination is inconsistent and not thought through to the end. First, if we would truly believe that we are not allowed to impose any of our values on future generations in order to allow them the full amount of self-determination, in doing so we would implicitly break our own rule and impose on them our values, specifically: the value of self-determination. How do we know that future people would like to be fully self-determined? Perhaps they will be happy with their heteronomy by their ancestor's constitution; maybe they will appreciate having less choice. Second, if we guarantee the full self-determination of the next future generation, how do we safeguard the full self-determination of later future generations? By not binding the next future generation at all, they will be allowed to decide for themselves to bind and affect their next future generation as they please.[33]

Inevitable dependencies

What is furthermore often ignored is the fact that the problem of the self-determination of future generations is not so much a trade-off between different values or aims but an aporia, an insoluble problem that can be worked on and mitigated, nonetheless. Like the present generation, future generations will never experience the *full* amount of self-determination, since this would require a tabula rasa and the concurrency of all people. But since time flows unidirectionally, there is an asynchronicity of being, and this brings about dependencies of the present on the past, and of the future on the present, as was demonstrated in the analysis of the applicability of the all-affected principle to future generations. These dependencies include the very being and identity of future individuals (see non-identity problem[34]) and the political, ecological, economic and social living conditions of future generations. We do affect the yet-unborn by our actions, policies, laws and constitutions, and there is no way out of this kind of paternalism. These manifold dependencies yield various responsibilities. Following Jefferson in focusing on constitutions as a perceived threat to future generations' self-determination hence may obscure our view on the actual broader issue at hand.

Reflective paternalism and democratic presentism

If we acknowledge these dependencies and the concomitant paternalism, we are free to work on the aporia and to establish something I would like to call a "reflective

paternalism" towards future generations. Reflective paternalism, reaching beyond the narrow constitutional problem, is an attempt to take into account future generations' future right to self-determination today,[35] knowing that we will always affect their lives, regardless of whether we ignore or reflect that fact. What this could mean in practice will be elaborated on in the next sections.

From this perspective, democratic presentism, a rather unproblematic quality of modern democracies if we think that future generations will not be bound by us,[36] becomes an obstacle to intergenerational justice and hampers reflectively paternalistic politics which may mitigate the aporia. According to the theory of democratic presentism, "democracies are systematically biased in favor of the present."[7] Democratic presentism has several mutually reinforcing causes: election cycles pressure the government to display political outputs, outcomes and impacts within the parliamentary term in order to increase their prospects of re-election.[38] Human beings as such are said to be short-sighted and to unduly discount the future.[39] Future generations are per se anonymous; we do not see them in our mind's eye, and they are not able to affect us causally.[40] That is why the present generation has a first-mover advantage which allows it to optimise its own welfare without considering the consequences for future generations.[41] Gardiner calls this with reference to Hardin the 'real tragedy of the commons'.[42] Furthermore, the complexity of long-term policies and the uncertainty about future economic, societal, natural and political developments, policy impacts, future problems and the interests of future generations as well as the lacking salience of future problems, foster democratic presentism.[43]

Empowering future generations today

With reference to the all-affected principle, and facing democratic presentism's disregard of future generations' interests, many scholars demand to consider future generations explicitly in today's policies.[44] Leggewie criticises an untenable spatial as well as temporal divide between decision-makers on the one hand and those affected by these decisions on the other hand.[45] According to Tremmel, this representation gap implies that conflicts of interest are decided by the majority of eligible voters, not by the majority of the affected.[46] At the same time, democracy is said to be the only decision-making regime that incorporates obligations towards future generations in the form of the all-affected principle as a guiding principle.[47] It is the democratic all-affected principle that actually takes democratic presentism and reflective paternalism seriously, showing that the interests of future generations need to be taken into account already today, since they also are affected by today's political decisions, but are usually politically neglected due to democratic presentism. In contrast, trying not to bind future people at all would be a mission impossible.

> Reflective paternalism [...] is an attempt to take into account future generations' future right to self-determination today, knowing that we will always affect their lives, regardless of whether we ignore or reflect that fact.

Is there any partial solution to this aporia of future generations' self-determination? Consistent with the diagnoses above, several academics and activists call for democratic innovations designed to consider the interests of future generations institutionally. To meet the demands of the all-affected principle, the presentist institutional incentive system of the democratic decision-making process needs to be modified. Gregory Kavka and Virigina Warren put it like this: "[I]n current democratic systems, no special institutional mechanism exists to secure representation of future people's interests, and representatives naturally focus their attention on promoting the interests of those who have the power to vote them into, or out of, office; that is, present citizens. […] [T]he interests of the nation's future citizens – whose lives will be critically affected, for better or worse, by present government action – [ought to be] directly represented in the democratic political process."[48]

Hence it is somehow surprising that up to now, intergenerational inequality has been widely uncared for in large parts of political science and the wider social sciences. It is only in political philosophy, facilitated largely by John Rawls's *Theory of Justice*, that the issue of how the interests of future generations can be taken into consideration politically is discussed today – as is exemplarily evident in the quote by Kavka and Warren (see above) or in the more contemporary works of, for example, Dieter Birnbacher, Axel Gosseries, and Jörg Tremmel.[49]

Proposals for institutions for future generations

Literature is actually replete with more or less specific conceptual proposals of how the interests of future generations could be institutionally considered by the political systems of today. Since future generations themselves are, by definition, currently not among us, this is only possible through proxies or specific procedures. I will review these briefly in order to elucidate the full spectrum of possibilities for politically empowering the affected interests of future generations today.

Ombudsmen, Guardians, Trustees, Commissioners, and Councils for Future Generations

The first category of proposals includes concepts of institutions that largely refer to the executive (i.e. the government) or have other, rather diffuse, addressees. They are called 'Guardians', 'Ombudsmen' or 'Trustees'. One of the most famous approaches is laid down by Edith Brown-Weiss in her book In Fairness to *Future Generations*.[50] Here, she introduces three principles and five obligations of intergenerational fairness. For their implementation, she calls for the institutionalisation of a specific *Guardian* at the international level. Collins transfers this claim to the European Union.51 Brown-Weiss also argues in favour of *Ombudsmen for Future Generations*.[52] These Ombudsmen are meant to review the implementation of laws that require the compliance to the three principles. They will act as complaints offices for citizens, exert investigations, and call attention to threats to the planetary heritage. Furthermore, they are to be established in order to generally introduce the interests of future generations into political decision-making processes and to inform both politics and society on their actions' collateral impact on future generations. Ideally, the ombudsmen are to be established on all political levels, from local to international, and as special ombudsmen for different policy fields.

> To meet the demands of the all-affected principle, the presentist institutional incentive system of the democratic decision-making process needs to be modified.

The figures of the Ombudsman and the Guardian are taken up by many proposals. For example, the Science and Environmental Health Network (SEHN) – together with the International Human Rights Clin-

ic at Harvard Law School (IHRC) on the basis of a brief analysis of existing institutions – has developed a blueprint, as it were, of such a guardian or ombudsman.[53] According to their proposal, the Ombudsman for Future Generations would be obliged to ensure that all kinds of policies protect and promote the juridified environmental interests of future generations.[54] In order to fulfil these tasks, impact assessments are to be conducted.[55] The Ombudsman, appointed by the government, would furthermore be allowed to access all necessary information and to speak before all relevant decision-making bodies.[56] The affected parties compulsorily would have to answer the Ombudsman's evaluations and reports in written form, and the Ombudsman in turn would have to be given the opportunity to respond to their answers.[57] The figure of the *Guardian*, also sketched by SEHN and IHRC, is quite similar to that of the ombudsman.[58] The Guardian is understood as more of a legal custodian who would be allowed to legally represent future generations before governments and courts, however.[59]

The concept of an ombudsman or guardian for future generations is also promoted by the World Future Council, which advocates their institutionalisation at the UN, the EU, and nation state levels.[60] The task of this *Ombudsman* would be to introduce citizens' requests concerning future generations into the political decision-making process and to take action him- or herself. The office and the incumbent would have to be legally independent, transparent, allowed to decide legally enforceable issues, and should be enjoying public support and access to information and to all relevant stakeholders. Van Parijs, in particular, promotes the institutionalisation of a *Guardian* to represent the interests of future generations in the political decision-making process at the national level.[61] This Guardian, in turn, is meant to be heard primarily by political actors and should be supported by a staff of independent scientists. Padilla argues in favour of *Keepers of the Rights of Future Generations* for all political levels.[62] Those Keepers are intended to serve as agencies that monitor and sanction sustainability practices of the government and the economy. They are also tasked to manage financial compensations for the benefit of future generations and to promote and fund several sustainable practices.

Birnbacher promotes the *Advocatory Representation of Future Generations* in order to introduce their interests in political planning decisions.[63] Tremmel as well as Hubacek and Mauerhofer call for Advocates that are appointed to represent the rights of future generations nationally and internationally.[64] Gesang calls for *Future Councils* which are to be authorised to initiate referendums and legislative initiatives and to gather and publish information.[65] Furthermore, they will have suspensory or extensive veto powers. The Councils' staff is to be nominated by, *inter alia*, environmental groups, universities and journalists' associations and is expected to be voted into office by the regular electorate for a term of eight to ten years. Their task is to introduce future generations' interests in today's legislative process.

> Since future generations themselves are, by definition, currently not among us, [taking them into consideration institutionally] is only possible through proxies or specific procedures.

Thompson develops the concept of a *Trustee* which could be institutionalised in the form of a commission (tribunate for posterity) or a constitutional convention.[66] Echoing this article's focus on the value of self-determination, the Trustee's task is to represent the interest of future generations in the maintenance of the democratic process itself. Thompson suggests that the Trustee may intervene if the future capacities of the democratic process are endangered and that the Trustee may be allowed to request the government to assess the expected impact of its policies on posterity's democratic capacities. Furthermore, Thompson proposes that the Trustee may convene constitutional conventions in order to adapt democratic rules to current needs, thereby constraining the dominion of the past over the present and the future.

Shlomo Shoham, former Parliamentary Commissioner for Future Generations in Israel, calls for the institutionalisation of a "*Sustainability Unit*", consisting of two entities for substantial analysis and political action, respectively.[67] Along the same line, Spangenberg and Dereniowska develop a so-called "archetype", an independently funded Future Council with suspensory veto power against laws that are expected to be harmful to the future.[68] Minsch et al. argue in support of a *Minister of State for Sustainability* at the Federal Chancellery.[69] Monaghan and Welburn add the idea to appoint an *EU Commissioner for the Future* whose task it would be to examine the long-term impact of the Commission's proposals.[70] For the UK, Roderick suggests to instate an advisory "*Office for Future Generations*" within the executive.[71]

For Germany, Rehbinder proposes an Ombudsman for future questions and an advisory *Sustainability Council*.[72] The latter's task would be to generate and organise future knowledge and to facilitate a societal discourse on the values and interests in relation to the future. The Council is supposed to consist of scientists and politicians who are appointed in separate procedures for a rather long term. Additionally, the Council could be equipped with suspensory veto power for certain bills. The German Advisory Council on Global Change (WBGU) opts – in its flagship report 'World in Transition' – for the idea of *Deliberative Future Chambers*, whose members are to be selected by lot.[73]

In the 1990s, additional proposals for so-called *Ecological Councils* were making round in Germany. Those Councils, as representatives of future generations with the task to safeguard natural resources, were meant to be independent and predominantly advisory in form. Manifold variants of the ecological council were developed by Kirsch, Minsch et al., Rennings et al., Rux, and Weppler.[74] Today, the German Foundation for the Rights of Future Generations (SRzG) advocates a *parliamentary representation of future generations*.[75] In Norway, the youth organisation Spire has campaigned for the institutionalisation of an *Ombudsperson for Future Generations* since 2012; and in the Netherlands there is a similar initiative, too.[76]

Parliamentary and electoral reforms

Besides guardians, ombudsmen and councils, there are also concepts that are especially tailored to the legislative. In 1996, Andrew Dobson proposed the idea of a proxy electorate of sustainability experts that might elect a selection of candidates into parliament.[77] A similar approach is promoted by Wells.[78] In his concept, charitable NGOs with a membership number above 50,000 act as trustees of future generations and jointly constitute 10% of the electorate. Wells hopes that this would force the political candidates to indirectly attract the votes of future generations. According to Ekeli, 5% of the parliamentary seats ought to be reserved for representatives of future generations, either elected by the citizens or ap-

pointed by the president.[79] A qualified majority of these *special representatives* would be allowed to postpone harmful bills up to two years. A very similar suggestion was already made by Gregory Kavka and Virginia Warren in 1983, who also proposed to reserve a share of parliamentary seats for *Representatives of Future Generations* to be elected either by the people or appointed by the Head of State.[80] For South Korea, Yongseok likewise recommends to reserve 20% of the parliamentary seats for delegates of future generations.[81] Those parliamentarians are meant to have a regular MP-status and are to be elected via separate party tickets. Every single voter would then have two votes, one for his own present generation and one for future ones. As an alternative, Ekeli introduces the idea of *sub-majority rules*.[82] According to this proposal, a qualified majority of all regular Members of Parliament would be allowed to suspend bills that are expected to harm the future until the next election, or alternatively be permitted to initiate a referendum on the issue at stake.

However, special seat shares and alternative electorates are not the only ways to reform parliaments for the assumed benefit of future generations. Roderick presents several options to modify the British Parliament.[83] First, one could establish a *Third Parliamentary Chamber for Future Generations* with veto powers. Second, one could institutionalise a *Parliamentary Committee for the Future* that participates in regular law-making. Third, Roderick proposes a Parliamentary Commissioner for Future Generations with comprehensive competences. Institutionalising a strong Parliamentary Committee for Sustainability is also suggested by Minsch et al. for Germany.[84] Monaghan and Welburn call for a committee within the European Parliament with the task of reviewing policies regarding their impact on future generations.[85] And Tremmel suggests expanding the three-power-model by a *Fourth Power*, a so-called future power which would represent future generations.[86] According to his idea, this fourth power should merge the already-existing sustainability bodies at the German federal level, which are the German Council for Sustainable Development, the German Advisory Council on Global Change, the Parliamentary Advisory Council on Sustainable Development and the German Advisory Council on the Environment. Instead of exercising only veto powers, the fourth power would even be allowed to initiate bills.

Constitutions, courts, and criminal law

The conceptual proposals presented so far focus on the executive or the legislative. But of course constitutions and courts may also play important roles in empowering future generations today. There are many proposals of how to lay down the rights of future generations in constitutional articles.[87] Doeleman and Sandler consider the proposal to codify quantified standards of natural goods that are to be sustained for future generations in the world's constitutions.[88] Similarly, Ekeli advocates the constitutional codification of the preservation of critical natural resources for the benefit of the physiological needs of future generations.[89]

Göpel as well as Jodoin furthermore argue the case for the statutory offence of a "*Crime Against Future Generations*" that is expected to be prosecuted as a human rights violation.[90] These crimes are military, economic, cultural or scientific activities that were carried out or authorised despite the knowledge of their harmful and irreparable impacts on the health, security or survival of future generations, or conscious of their threat to the survival of whole species or ecosystems. Pelinka calls for a *Judicial High Council* that reviews parliamentary majority decisions regarding infringements of the basic interests of future generations.[91] For the US, Tonn, as well as Pollard and Tonn, propose a Court of Future Generations which would be granted the right to file indictments to the Supreme Court.[92] Following Brown-Weiss, Birnbacher argues in favour of an International Court for the Future, based on an interpretation of the UN's Universal Declaration of Human Rights that extends the declaration into the future.[93] And finally, Iliescu makes a case for a *Jury for Intergenerational Justice* that reflects and weighs up for specific policies the interests of the current generation with the impacts on future generations.[94]

Proposals beyond the three branches of government

Some authors imagine the political consideration of future generations beyond the executive, legislative or judiciary. Thompson and Massarrat think about how to empower (international) *NGOs* that take long-term responsibility for long-term goals, engage in democracy and environmental protection and strengthen international civil society.[95] Monaghan and Welburn ask the EU to support groups which promote the interests of future generations.[96] And Robert E. Goodin hopes that voters and politicians could internalise the interests of future generations into their own preferences and consider them internally-deliberatively in their own reflections.[97]

Meta-policies

Besides the institutionalisation of organisations, the interests of future generations may also be taken into account by *meta-policies*, i.e. special provisions that apply to the political decision-making process. MacKenzie is concerned with *Policy Impact Assessments* for future generations.[98] Krishnakumar calls for a "*Representation Reinforcing Framework Statute*" that would commit the US Congress to review the impact of bills on, *inter alia*, future tax payers.[99] Hinrichs explains how to measure, with the help of *Intergenerational Accounting*, the impact of policy intentions on intergenerational fairness regarding public debt, taxation and redistribution, i.e. the net payments of present and future citizens.[100] Roderick would like to legally require the UK to conduct comparative Intergenerational Analysis for all policies.[101]

Proposals for extensive revisions to our democratic institutional systems

In addition, there are proposals for extensive revisions to our democratic institutional systems. For the US, Mank describes a so-called "*Superagency*" within the executive to cast influences on all public authorities.[102] The agency's task would be to represent future generations and to send legal representatives to all organisations and assemblies. Tonn's approach is even more radical by designing a future-oriented government almost from scratch.[103] In his proposal, the already-existing American institutions are to be supplemented with a *Court for Future Generations* (diagnostic function), a *Future Congress* (decision function), a *Future Administration* (information and support function), a *Coordination- and Mediation-Service* (implementation review and conflict management) and a *Commission for Future Problems* (issuing directives). In 2006, Tonn and Hogan put forward a proposal for the reform of the British House of Lords and the establishment of a *Special Committee for the Future* that has a reporting function and is equipped with suspensory veto power.[104] The new House of Lords shall be responsible for the heirs of the United Kingdom. Read would like to institutionalise a third parliamentary chamber, a *Council*

of the Guardians for Future Generations in the UK.[105] The Council would be allowed to veto bills, analyse laws, review their implementation and initiate bills by itself. Its members would be elected by lot for a single term, and they would enjoy an advanced training for their task.

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Even for the US state of Hawaii there is a separate proposal of a *Fourth Branch* which would be responsible for future generations.[106] This fourth branch is designed to research the future, develop social targets for Hawaii as benchmarks for law-making, initiate public discourse, and generally watch out for the interests of future generations. Its members are to be selected equally by elections and by lot. Moreover, Caney develops a five-fold package of institutions for the political representation of future generations: A *Governmental Manifesto for the Future* (presentation of long-term trends, challenges and options), a *Parliamentary Committee for the Future* (reporting and evaluation of policies), a '*Visions for the Future' Day* (critical and public review of the Manifesto for the Future), an Independent Council for the Future (impact analysis and long-term trends; staffed by natural scientists, social scientists and relevant humanities scholars) and *Performance Indicators*, employed by the Council and government bodies to document the attainment of long-term targets and to evaluate long-term performance.[107]

A brief assessment of the proposals

It comes as no surprise that not all of these numerous conceptual proposals are suitable mitigation strategies from a political science point of view. It is conspicuous that some of the proposals are rather insensitive regarding the conditions of and effects on the political system they are addressing. For example, *ombudsmen* are demanded for all kinds of political levels and different nations, including Germany, but some countries (like Germany) do not have any tradition of high-level ombudsmanship to build upon. Furthermore, ombudsmen traditionally are persons or functions that usually receive complaints by affected parties (in most cases ordinary citizens), investigate them, and submit them to the respective government bodies. Since future generations cannot make any complaints today, the notions of a "*guardian*", "*trustee*" or "*advocate*" as examples also found in the literature are much more appropriate than the notion of an ombudsman, notwithstanding the fact that the competences and characteristics of ombudsmen – such as the right of investigation, information, evaluation and independence – may be expedient. Admittedly, some of the ombudsman concepts, referring back to the original idea, indeed want the ombudsman first and foremost to receive petitions of the citizens regarding the rights and interests of future generations. In these cases, however, it should not be taken for granted that ordinary citizens are more qualified and legitimised to speak in the name of future generations or are less presentist than any other actors.

Ekeli and others propose to elect a certain number of *representatives of future generations* to the parliament, or to employ certain sub-majority rules. Again, the political conditions and effects of the proposal do not receive full consideration by the authors. The institutional incentives that affect these representatives of future generations do not differ significantly from the ones of regular MPs, and the additional (suspensory) veto rights and other instruments may lead to political gridlock and will not necessarily help future generations. The latter is a significant danger of all approaches that aim to establish additional veto points and players, such as proposals to establish new chambers with veto power or to *extensively revise the democratic institutional system* of a country. Such undertakings may lead to even more "inheritance without choice" (Rose 1992) and constrain present and future democratic self-determination. Anyway, due to political-institutional inertia, such massive modifications are highly unlikely to be implemented in contrast to humbler, incremental approaches.

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On the downside, institutions that are too weak, having little resources and competences – such as mere *advisory bodies* – are at risk of becoming a substitute for the actual consideration of future generations' interests in the political decision-making process. Designing institutions to mitigate the aporia thus is a challenging balancing act and needs to take into account the specific political context.

Employing *meta-policies* to introduce future generations' interests into the political decision-making process may fit smoothly into already-existing institutional arrangements, but may require back-up staff-wise and competence-wise to be implemented, for comprehensive additional tasks such as sustainability impact assessments are quite resource-consuming if done properly. This is also why it might be wise to combine different institutions in order to mitigate the aporia. This may also include approaches that focus on the *judiciary*, which have their merits in being rather disengaged from presentist pressure. However, these approaches also may contribute to an undesirable politicisation of the judiciary.

Examples of actual institutions for future generations

The list above shows that there are numerous specific concepts of how to politically consider future generations today. Many of these concepts have models in the real world. One of the most famous institutions is the *Hungarian Parliamentary Commissioner (Ombudsman) for Future Generations*. The office of the Ombudsman was established in 2008 and was downgraded by the right-wing Orbán administration to a sub-office at the end of 2011, in the course of a constitutional reform.[108] The Ombudsman looked especially after environmental issues and had several options to influence the political decision-making process: he was allowed to give his view in front of the parliament, to propose bills and to review and partially suspend certain political decisions and administrative acts. He had to be consulted for all policy initiatives that concern the environment. Moreover, he could bring to court already-existing laws that endangered the right to a healthy environment. He received petitions from citizens, was able to initiate investigations and made recommendations that had to be answered by the affected parties. He also maintained a large team and connected with the media and with NGOs.[109] Today, the Ombudsman for Future Generations is still an important institution, but the position has lost its independence, as well as some of its staff and competences.[110]

The second model institution is the *Knesset Commission for Future Generations*. The

commission existed between 2001 and 2006 in Israel and was officially abolished in 2010, officially due to budget constraints. Unofficially, MPs increasingly found it problematic that an expert commission should be powerful enough to intervene in genuinely political decision-making processes.[111] The Commissioner was allowed to review almost all bills and decide autonomously which bills were of concern for the interests of future generations. He could also join most of the debates in the Knesset Committees and issue written recommendations that were able to delay the law-making process considerably. The Commissioner also participated actively in drafting new bills to the assumed benefit of future generations and enjoyed a permissive access to state information. Further tasks were public relations activities and collaboration with academia, civil society and media actors.[112]

Since this year Wales has a *Future Generations Commissioner for Wales*. The Commissioner is provided with four kinds of political instruments. Firstly, advice, help, and support of public bodies regarding the attainment of Wales' sustainable welfare targets. Secondly, research on sustainable development and welfare. Thirdly, investigations of public bodies regarding their activities in preserving the possibilities of future generations to fulfil their needs and in considering their actions' long-term impacts. Based on her investigations, the Commissioner can issue public recommendations that have to be answered by the addressed public body. The binding recommendations are limited to the realm of measures in accordance with the welfare targets and the sustainability principle. Fourthly, the Commissioner is tasked with issuing several reports to the government and the parliamentary assembly.[113]

There are numerous specific concepts of how to politically consider future generations today. Many of these concepts have models in the real world.

A further, (at least formally) rather strong institution is the *Belgian Federal Council for Sustainable Development*. Established in 1997, the Council consists of representatives of civil society, environmental groups, development assistance groups, academia, and federal and regional governments. The main task of the Council is to issue recommendations on sustainable politics at the request of state secretaries, the House of Representatives, or the Senate. Alternatively, the Council can prepare recommendations on its own accord. The government has to report to the Council how it has implemented the recommendations, and in case of deviations the government needs to justify its alternative line of action. Moreover, the Council serves as a discussion forum on sustainable development, conducts scientific research on questions of sustainable development, and promotes the participation of public and private organisations in achieving objectives of a sustainable development.[114]

Noteworthy, finally, is the so-called Sustainability Check of the German Land (state) Baden-Württemberg. As a meta-policy, it legally prescribes in detail the assessment of the long-term impacts of regulatory initiatives. For this purpose, the sustainability indicators and targets of the regional sustainability strategy are employed, and the results of the assessments are published.[115]

The role of constitutions in the institutional empowerment of future generations

Democratic presentism usually is a bar to the political consideration of future generations today. Constitutions as well as institutions such as those described above therefore may serve as credible commitments of the present politicians and citizens – i.e., as self-binding tools against the incentive *not* to consider the interests of future generations in today's political decisions due to democratic presentism.[116]

Several countries include provisions for future generation in their constitutions.[117] However, as Chilton and Versteeg recently discovered, constitutional rights are more likely to be respected if they are organisational rights, i.e. if they help to establish organisations that have both the means and the incentive to protect the respective rights and thereby making them self-reinforcing.[118] Since future generations themselves are not here today, it is plausible to establish institutions that at least partially compensate this drawback and help enforce their constitutional and/or moral rights. If the existence of such institutions is prescribed in the constitution, as was at least indirectly the case in Hungary, the future rights of future generations as well as the enforcing institutions gain both a solid supermajoritarian legal basis and normative power in relation to other political actors. Constitutional entrenchment then would strengthen the commitment of politics and society towards future generations without substantially further reducing the amount of direct self-determination future generations will enjoy. Constitutions thus could have two supporting roles in mitigating the aporia: first, to provide the very legal and institutional prerequisites for present and future democratic self-determination (however constrained), and second, to authoritatively enshrine the rights of and obligations to future generations and thereby backing up other institutions that are designed to introduce the interests of future generations into today's decision-making process. The existence of such institutions may also be laid down in the constitution.

Constitutions [...] may serve as credible commitments of the present politicians and citizens – i.e., as self-binding tools against the incentive not to consider the interests of future generations [...].

Empirically, the constitutional entrenchment of institutions empowering future generations is rather vague, if it exists at all. In *Hungary*, the Ombudsman referred to the constitutional right to a healthy environment, since future generations were not explicitly mentioned in the Charter of Fundamental Rights. Nonetheless, the Constitutional Court decided that the state is obliged to sustain the quality of the natural living conditions for future generations. Furthermore, it claimed that the fundamental right to live and human dignity generate an obligation for the state to provide institutional protection for the living conditions of future generations.[119] In *Israel*, the legal basis of the Parliamentary Commission for Future Generations was laid down in the Knesset Law that regulates the modes of operations of the Israeli parliament. In contrast, the Future Generations Commissioner for *Wales* is specified in the Well-Being of Future Generations (Wales) Bill, which is a regular statute.[120] In the first bill regarding Welsh Devolution, it is codified that the Welsh Assembly has to develop and track a sustainability plan.[121] The same is true for the Government of Wales Act of 2006.[122] In Belgium, the Council also works on the basis of a regular statute.[123] Nevertheless, the *Belgian* constitution (art. 7) generally states that the government strives for sustainable development and considers the solidarity between the generations. The sustainability check of *Baden-Württemberg*

is legally based on the standing orders of the government and an administrative regulation.[124]

Mitigating the aporia with institutions for future generations

As I have already mentioned, the full self-determination of future generations is an impossible endeavour, for we always will affect future generations with our present-day political decisions, independent of whether or not we are aware of this. More basically, looking at world history and longer time frames, both the value of self-determination and democracy should not be taken for granted, so their long-term promotion und stabilisation seems to be a necessary endeavour, and constitutions can be seen as useful tools in doing so.

Furthermore, to approximate the normative standard of the all-affected principle nevertheless, I suggested the concept of reflective paternalism. Therefore we need to consciously consider the interests of future generations in today's political decision-making process. For that purpose, many concepts and some real-world cases of institutions empowering future generations today were presented briefly. I argued that constitutionally prescribing the existence of such institutions would foster the impact potential of the respective institutions and facilitate at least proxy self-determination of future generations. From these perspectives, constitutional and institutional self-binding and the binding of future generations seem to be legitimate and, to paraphrase a *bon mot* of Churchill, to be the worst form of future generations' self-determination, except for all the others, as aporiae are not fully dissolvable.

When it comes to institutionalising a specific institution for future generations in a specific country, there are no one-size-fits-all-models but a variety of more or less suitable components that became visible in the descriptions above. In *competitive political systems* like many majoritarian democracies and in countries with a dominant culture of a separation of powers, independent oversight agencies with monitoring tools and suspensory vetoes might be a good idea, as long as they do not lead to a gridlock of the system. In contrast, internal deliberative parliamentary committees with a right to initiate bills may work in *consensual democracies* that emphasise cooperation. On the other hand, to install an ombudsperson for future generations in a country with no tradition in *ombudsman schemes* might hamper the acceptance and the influence of the new institution. In *economised political systems* that rely on expert panels, impact assessments and cost-benefit-analysis, advisory bodies such as councils and meta-policies such as sustainability checks and intergenerational accounting may fit into the system. The design of the institution should also take into account which of the three powers is politically dominant in a particular political system in order to get *sufficient access to the political decision-making process*. Furthermore, a *sufficient provision with financial, staff and knowledge resources and infrastructures* is crucial, since the tasks to research the interests of and the impacts on future generations are especially challenging because of to the high level of uncertainty.

When it comes to institutionalising a specific institution for future generations in a specific country, there are no one-size-fits-all-models but a variety of more or less suitable components [...].

Overall, it also may be promising to include *non-profit civil society* actors in the overall design of the empowerment of future generations, for they could alleviate democratic presentism and support the generation of a broad acceptance of the institutionalised idea of politically considering future generations already today. They may also be helpful to give more attention to the issue of intergenerational justice and may help to hold institutions for future generations accountable. *Youth participation* may yield some legitimising symbolic power, since the future selves of the young share many well-understood self-interests with the first future generation. However, it should be noted that young people are not per se less presentist than the old ones.[125]

Empirically, civil society organisations sometimes play a central role in promoting institutions for future generations, for example in Hungary where the NGO Védegylet (Protect the Future) finally succeeded with its long-standing campaign to institutionalise the ombudsman.[126] In Wales and in Baden-Württemberg there were broad participation processes that were initiated by the governments. The Belgian Federal Council is staffed with many representatives of civil society organisations. In contrast, the Knesset Commission was launched by a single Member of Parliament who convinced his fellow MPs completely without any civil society support.[127] However, this remains an exception.

Notes

1 The author would like to thank the two anonymous IGJR reviewers for their valuable comments. Parts of the research were supported by a PhD scholarship of the graduate programme Linkage in Democracy (LinkDe), Institute of Social Sciences, University of Düsseldorf.

2 See, e.g., Auerbach/Reinhart 2012: 19; Dreier 2009: 27.

3 An elaborated discussion of the terms of future generations and intergenerational justice can be found, e.g., at Tremmel 2009, ch. 3. Therefore it is not necessary to repeat this exercise. I agree with Tremmel that it is most reasonable to say that a generation should be "referred to as a 'future generation' if none of its members is [not yet] alive at the time the reference is made" (Tremmel 2009: 24, bracketed words added by the author). Who is a member of a future generation depends on the timing of the observer's speech act, in the following referred to as t_0. Whoever is born immediately after t_0 (in the following referred to as "first future generation"), or, e.g., a hundred years later (in the following referred to as "later future generations"), is a member of future generations. Intergenerational Justice then is "justice between people who lived in the past, people alive today, and people who will live in the future" (Tremmel 2009: 22), whereby in the context of this article we will not discuss our moral relationship with the dead, but the one with people who will be born in the future.

4 Jefferson 2000.

5 This presupposes that future generations have interests which are to be understood as transtemporal (Feinberg 1980: 167; Kavka/Warren 1983: 24). This means that interests depend on the *existence* of interest holders, but not on their continual co-existence. As long as the interest holders exist or will exist in time and space, their interests can be affected even if they do not yet exist at the time when the respective effect is initiated or emitted. In this article I focus primarily on the *procedural* dimension of the issues in question. Therefore I will not discuss the substantial interests of future generations or the question of what (and how much) to pass on to them.

6 Beckman 2013; Goodin 2007; Tännsjö 2007; Thompson 2005.

7 Urbinati/Warren 2008: 395.

8 Warren/Castiglione 2006: 18, original emphasis.
9 Pelinka 2009: 188.
10 Jonas 1984; Birnbacher 1988; Tremmel 2009; Leggewie 2011; MacKenzie 2013.
11 Crutzen 2002.
12 Brennan 2007: 277.
13 Lagerspetz 1999: 152.
14 See, e.g., Gardiner 2006; Jávor 2009; Pellegrino/Di Paola 2014.
15 Beckman 2013.
16 Beckman 2013: 779, my emphasis.
17 Thompson 2005: 245; Dahl 1989: 120; Goodin 2007.
18 Beckman 2013: 781.
19 Beckman 2013: 783.
20 Beckman 2013: 785.
21 Beckman 2013: 781.
22 Beckman 2013: 786.
23 Beckman 2013: 783.
24 Beckman 2013: 783.
25 Rose 1990.
26 Goodin 2007: 49, 53-55.
27 Jefferson 2000.
28 Kley 2003: 511-512; Muniz-Fraticelli 2011: 386-388; Wolf 2008: 14.
29 Muniz-Fraticelli 2011: 387.
30 I borrow this argument from Lagerspetz (1999: 149), who brought it up in the context of the question whether discounting of future benefits is allowed in social long-term decisions.
31 This tension is mentioned in, e.g., Auerbach/Reinhart 2012: 19; Dreier 2009: 26-29; Gosseries 2008a: 32.
32 Gosseries 2008a; Muniz-Fraticelli 2011: 387; Thompson 2005: 245.
33 See also Muniz-Fraticelli 2011: 387.
34 The non-identity problem states that future individuals cannot be morally wronged by us since their very identity depends on today's public policies, inasmuch as these policies indirectly causally contribute to the compilation of genes that determines the specific future individual that will come into existence. According to this proposition, which specific sperm fertilises at what time which ovum depends on many factors, some of which are influenced by policies. Therefore, even if we massively compromise the quality of life of future individuals by, let's say, damaging the environment, these specific future individuals would not even come into existence without our damaging policies, and that is why they cannot be wronged if they still live a life that is worth living (Kavka 1982; Parfit 1982; Schwartz 1979). However, literature provides several good arguments how to uphold the moral relevance of future generations in the face of the non-identity problem. See, for example, Ariansen 2013; Heyward 2008; Reiman 2007; Tremmel 2013a.
35 There is a discussion on whether future people do have rights, as they do not yet exist (Beckerman 2004, 2006). At least, it can be argued that they will have rights once they will exist, and that these rights are to be safeguarded today (Gosseries 2004, 2008b; Tremmel 2009: 48; Unnerstall 1999).
36 Beckman 2013.
37 Thompson 2005: 246.
38 Thompson 2010: 19.
39 Thompson 2010: 17-19; Lagerspetz 1999: 149.
40 Birnbacher 2008: 29-30.
41 Doeleman/Sandler 1998: 1.
42 Gardiner 2001.
43 Jacobs/Matthews 2012; Lagerspetz 1999.
44 Cf., e.g., Thompson 2010: 18; Tremmel 2015: 214-115, 219-220.
45 Leggewie 2011: 26.
46 Tremmel 2013b: 2.
47 MacKenzie 2013: 133.
48 Kavka/Warren 1983: 21.
49 Rawls 1971; Kavka/Warren 1983; Birnbacher 1988, 2008, 2014; Gosseries 2008a, 2008b; Tremmel 2006, 2015.
50 Brown-Weiss 1989.
51 Collins 2007.
52 Brown-Weiss 1989: 120-126.
53 SEHN/IHRC 2008b.
54 SEHN/IHRC 2008b: 25.
55 SEHN/IHRC 2008b: 26-27.
56 SEHN/IHRC 2008b: 26.
57 SEHN/IHRC 2008b: 27-28.
58 SEHN/IHRC 2008b: 30-33.
59 SEHN/IHRC 2008b: 31.
60 Göpel 2010, 2014; Göpel/Arhelger 2011; Nesbit/Illés 2015.
61 Parijs 1998: 319.
62 Padilla 2002: 80.
63 Birnbacher 1988: 266-268.
64 Tremmel 2009: 52; Hubacek/Mauerhofer 2008: 419.
65 Gesang 2015.
66 Thompson 2005, 2010.
67 Shoham 2010: 76.
68 Spangenberg/Dereniowska 2015.
69 Minsch et al. 1998: 273.
70 Monaghan/Welburn 2012: 8.
71 Roderick 2010: 37-38.
72 Rehbinder 2008: 136.
73 WBGU 2011: 228.
74 Kirsch 1996; Minsch et al. 1998: 263; Rennings et al. 1996: 55-56; Rux 1999, 2003; Wepler 1995: 33-39.
75 SRzG 2015.
76 Sandnaes 2013; Worldconnectors 2015.
77 Dobson 1996: 132.
78 Wells 2014.
79 Ekeli 2005: 434.
80 Kavka/Warren 1983: 34-35.
81 Yongseok 2015.
82 Ekeli 2006; 2009.
83 Roderick 2010: 27.
84 Minsch et al. 1998: 268-269.
85 Monaghan/Welburn 2012: 8.
86 Tremmel 2015.
87 See Doeleman/Sandler 1998; Gründling 1990; Padilla 2002: 78; Pleschberger 2007; Raffelhüschen 2008; SEHN/IHRC 2008a; Tremmel 2004, 2005.
88 Doeleman/Sandler 1998: 12.
89 Ekeli 2007.
90 Göpel 2009: 16-17; Jodoin 2011.
91 Pelinka 2009: 193-194.
92 Tonn 1991; Pollard/Tonn 1998.
93 Brown-Weiss 1989; Birnbacher 2014.
94 Iliescu 2015.
95 Thompson 2005: 258-259; Massarrat 2003.
96 Monaghan/Welburn 2012: 8.
97 Goodin 1996, 2000.
98 MacKenzie 2013: 194-195.
99 Krishnakumar 2009.
100 Hinrichs 2002: 54-55.
101 Roderick 2010: 34.
102 Mank 1996: 494-496.
103 Tonn 1996.
104 Tonn/Hogan 2006.
105 Read 2012: 9.
106 Kim/Dator 1999: 8-9.
107 Caney 2015.
108 OCFR 2013.
109 Ambrusné 2011; PCFG 2012.
110 OCFR 2014.
111 Lavi 2014.
112 Shoham 2010; Shoham/Lamay 2006; The Knesset 2003.
113 National Assembly for Wales 2015a.
114 CFDD 2014; Premier Ministre 2014.
115 Ministry of the Environment, Climate Protection and the Energy Sector Baden-Württemberg (MUKE) 2015.
116 Birnbacher 2008: 34-36.
117 This applies especially to Japan, Norway and Bolivia. For a comprehensive overview see Gosseries 2008b: 448; Häberle 2006; Tremmel 2012: 107-111; World Future Council 2012: 5-10.
118 Chilton/Versteeg 2016.
119 Ambrusné 2011: 22.
120 National Assembly for Wales 2015b.
121 Parliament of the United Kingdom 1998, art. 121.

122 Parliament of the United Kingdom 2006, art. 79.
123 Premier Ministre 2014.
124 MUKE 2015.
125 Vehrkamp et al. 2014.
126 Ambrusné 2011: 20-21.
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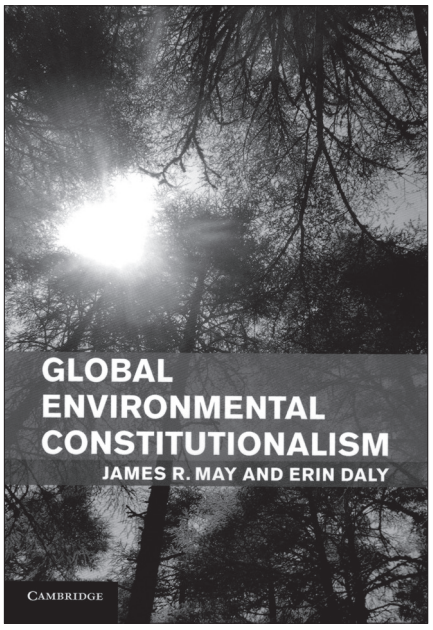
James R. May and Erin Daly: Global Environmental Constitutionalism

Reviewed by Bruce E. Auerbach

Global Environmental Constitutionalism is a survey of the diverse approaches to constitutionalising environmental rights and obligations in national and subnational constitutions around the world. It is also an analysis of the impact and effectiveness of these different approaches to environmental constitutionalism. As the authors point out, their goal is not make a normative argument for constitutionalising environmental rights, but to write a "comprehensive guide to and examination of current trends in environmental constitutionalism" (3). Their analysis of the varying approaches found in different nations leads to an understanding of the role constitutional protections for the environment can play, and what forms of protection are likely to be most effective.



The authors are systematic in their examination of the different approaches to protecting the environment found in constitutions throughout the world. The work is impressive in its scope. They survey some 140 contemporary constitutions with some form of environmental protection or rights, looking at the advantages and limitations of the different approaches to constitutionalising environmental rights and obligations. The authors' survey of contemporary environmental provisions does not lend itself to detailed policy recommendations, but rather to general guidelines for enhanced protection for the environment and environmental rights.

One might question the authors' decision to eschew organising their work around the defence of a particular approach to envi-

ronmental constitutionalism, or perhaps a limited range of approaches. Such a thesis would have been a useful organising tool. Moreover, it is clear from their analysis of the range of provisions contained in the constitutions of different nations that the authors are convinced that some ways of protecting the environment and environmental rights are superior to others. But the authors leave it largely to the reader to put together these conclusions.

In their defence, the history and traditions of different nations differ so much that even if one could develop and defend an ideal model of environmental constitutionalism, this model might well be unacceptable to many nations with different legal traditions. Thus, rather than analysing the question of environmental constitutionalism from the top down, the authors approach it from the bottom up. There is a logic, perhaps even a compelling logic, to this method. But it renders their book somewhat less accessible to the reader – though I would hasten to add, eminently worth the effort.

On balance, May and Daly are more optimistic about the capacity of the judiciary to enforce constitutional environmental rights than some who have written on this subject. For example, in "Environmental rights and future generations,"[1] Hong-Sik Cho and Ole W. Pedersen argue courts have a limited capacity to enforce environmental rights. Instead, they argue that the legislature is generally better able to fashion the trade-offs necessary to develop effective environmental policy.

A limitation of *Global Environmental Constitutionalism* is that the work is likely to feel dated within a relatively short time, as constitutions continue to be amended or rewritten to incorporate different forms of protection for the environment and environmental rights. This is clearly not a failing of the authors, but it does suggest that revised and updated editions will be needed every decade or so.

Indeed, what is striking about May and Daly's work is the extent to which global environmental constitutionalism is a continually evolving subject. The entire field is less than fifty years old. In the last fifty years, approximately 140 national and subnational constitutions have been amended or rewritten to include some statement protecting environmental rights. Some of these statements are hortatory, unenforceable in a court of law. Others, however, are statements of individual rights that courts have understood to be self-enforcing. This is to say that the environmental rights protected by the constitution may be adjudicated in court without the need for additional legislation. Almost all of these provisions date from 1972 or later.

The authors make a strong case that more recent constitutions, and more recent revisions of constitutions, have benefited from lessons drawn from other nations' efforts to protect the environment through constitutional guarantees of, and protections for, environmental rights. Since later constitution writers often draw on the examples of constitutions adopted in other nations, to the extent that nations learn from evaluating these efforts of other nations to constitutionalise environmental protections – both from their successes and their failures – May and Daly's work makes an indirect but powerful case for revising a nation's constitution at regular intervals.

The United States Constitution contains no provisions protecting the environment, nor the rights of persons to a healthy environment (the latter is contained in the constitution of the State of Montana). This is hardly surprising given the era in which the US Constitution was written, and the difficulty of amending that constitution. But one cannot help but wonder what the US Constitution might look like if Jefferson's view that the Constitution should be rewritten every generation had prevailed over James Madison's more cautious approach. Would the United States have a modern constitution with protections for the environment and environmental rights, and perhaps for the rights of posterity?

It is also important to note that there is a close relationship between the protection of the environment and intergenerational justice. Indeed, it can be argued that there is no more important obligation to future generations than the preservation of the environment. Because damage to the environment is often cumulative, distant future generations are likely to be benefited even more than proximate generations, by efforts to halt environmental degradation.

On the other hand, environmental justice and intergenerational justice are not interchangeable concepts. Intergenerational justice is at heart anthropocentric. At its base, is the belief that obligations are owed to those *people* who will live in the future. By contrast, some of the most interesting contemporary approaches to environmentalism eschew anthropocentrism, focusing instead on the environment as a self-contained system. Still, if the concepts do not coincide perfectly, there is a significant area of overlap.

There may be special difficulties in making constitutional protection for intergenerational justice self-enforcing. Unlike the right to a safe and healthy environment – which, while especially important for future generations, is also valuable to the current generation, and thus adjudicable by them as a personal right, it is often unclear who can represent the interests of future generations in pressing more general claims to intergenerational justice. To the extent that the present generation benefits from shifting costs of current policies onto future generations, establishing an effective voice for the rights of future generations is a more complex issue. Still, there is great benefit in considering carefully May and Daly's *Global Environmental Constitutionalism*, both for those interested in environmental protection and in intergenerational justice.

Notes

1 Cho, Hong-Sik Cho / Ole W. Pedersen (2013): Environmental Rights and Future Generations. In: Tushnet, Mark / Fleiner, Thomas / Saunders, Cheryl (eds.): Routledge Handbook of Constitutional Law. London: Routledge 401-412.

May, James R. / Daly, Erin (2014): Global Environmental Constitutionalism. Cambridge: Cambridge University Press. 414 pages. ISBN: 978-1-107-02225-6. Price: £65.

Youth and Politics: Political Education and Participation among Youth

Reviewed by Christof Wittmaack

The discussion about youth and politics is widely popular among scholars, in the media and in public debate. In their anthology *Youth and Politics: Political Education and Participation among Youth* Aydin Gürlevik, Klaus Hurrelmann and Christian Palentien (eds.) give a systematic overview of different fields of the debate. In 25 articles, including the introduction, the authors address popular claims – such as young people being "unpolitical" or their alleged inability to make well-founded political decisions – and they lay out different models to stimulate youth participation.

The anthology is divided into five parts. In the first part theoretical basics are presented, while the second part examines youth participation empirically. The third part presents different models to enhance youth participation and is in turn divided into three chapters – 1) the right to vote, 2) different forms of youth advisory councils such as youth parliaments, and 3) youth ombudspersons. All of the approaches are subsequently evaluated in the fourth part before the anthology concludes in Part 5 with a look at the future of youth participation. Given the large number of articles in the anthology, this review limits itself to discussing only a selection of them.

In Part 1 of the anthology several scholars discuss widespread concerns about young people's right to vote and warn of simplifications and generalisations. For instance, Marc Paretzke and Andreas Klee as well as Jürgen Gerdes and Uwe H. Bittlingmayer point out imprecise definitions of "political participation", "youth" or "politics", which are often used in everyday discourse, but which by no means describe discrete entities. Therefore, claims such as "more participation equals more democracy" or "a right to vote for children and youth equals more participation" need to be handled carefully (41), given the fact that trends ascribed to youth can often be observed throughout society as a whole.

The most prominent concern opposing the children's right to vote is the claim that they simply lack the cognitive abilities to make well-founded political judgements. However, Rolf Oerter points out that youths are, in fact, able to think logically at a young age but are still developing the ability for complex and dialectic thinking by adopting further cultural knowledge. Besides, he emphasises that, while knowledge is indeed necessary to make mature decisions, the variety of political decisions might also be limited by excluding new perspectives (74-75). Consequently, he advocates in favour of a partial enfranchisement of children and youth in spheres which are easier to fathom than federal or foreign politics, for instance in schools or families (81). Despite providing a balanced analysis of children's ability to vote, parts of Oerter's argumentation remain unclear. Even though he makes it a point to address both, the better comprehensibility of small political constructs, especially for young children, as well as the possible gain by adding unprejudiced perspectives to the political debate – the reason for which he favours the first argument over the second – is elusive.

Despite the unquestionable importance of youth for political socialisation, Heinz Reinders demands more differentiated research on the question of how childhood and youth influence political socialisation (97). Thus he observes a one-dimensional focus on youth in research on political socialisation. Moreover, he dismisses claims of an alleged political apathy among youth and stresses the importance of other means of participation in order to evolve political socialisation.

Fundamental political rights are granted to every citizen – including youths – by the German constitution. However, in his article Ingo Richter discusses in how far young people are constrained in exercising their rights in families, at school, or at work, and he highlights how fundamental rights conflict with one another. He evaluates several interpretations of when children come of age – upon turning 18, when they are born, or when they are "mature" enough (148-152). With respect to education, Richter examines the kinds of situations in which the right and duty of parents to educate their children might conflict with the children's right to freely develop their personality and to exercise their political rights autonomously. Because of the freedom of children to have an autonomous opinion, parents are not allowed to impose their views on their own children. However, as soon as any legal obligations result from young people's opinion, for instance by obtaining membership in a political party, or if there are any possible dangers involved, such as violence at a rally, parental approval is needed (155-156). Concerning education at schools, the matter is not as difficult. While schools cannot fulfil their duty to political education by depriving the students of their political rights, students are not allowed to use the school premises for their political goals without the school's permission (157).

While the first part of the anthology is mainly about the theory of political participation, the second part sheds light on the empirical research on political participation among young people. The lack of political interest and participation and a general trend

of political apathy among the young have been a constant point of debate for many years. However, Martina Gille, Johann de Rijke, Jean Philippe Décieuy and Helmut Willems show that unconventional forms of political participation are increasingly important and should therefore be recognised and supported as such (188). Moreover, young people often do not feel that their voices are being heard by politicians, and they lack trust in politicians and political institutions. Ursula Hoffmann-Lange and Martina Gille distinguish between four different characters of political mobilisation – in a range from a politically alienated person to a mobilised citizen – and conclude that young people do in fact participate if there is an important decision to be made and their interests are taken seriously.

By introducing three different models of how to stimulate youth participation, the anthology then proceeds to give a comprehensive impression of the diversity in the field. The first model concerns different forms of the right of children and young people to vote.

Kurt-Peter Merk's article on the abolition of an age limit in the franchise is set out in a factual and clearly structured manner, presenting both judicial as well as normative arguments. While questioning whether the age limit ought to be considered a constitutional contradiction or a *lex specialis*, he dismisses common reservations towards the franchise for minors such as their manipulability, their lack of reasoning skills and their lack of interest in politics. He does so by emphasising that all of these reservations apply to adults as well (292-295). The only legitimate concern – a lack of experience – he claims, could be solved by a parental right to vote, which might be combined with an option for youths to register to vote as soon as they are willing to. Concerns that such models might conflict with democratic principles such as "one man, one vote" or the necessity for voters to cast their ballots themselves are all dismissed by emphasising the superior principle of universality with regard to voting. Besides, these values are already undermined by absentee ballots (295-297).

Merk thus stresses the necessity to abolish the age limit from a democratic point of view. He holds that, by neglecting the interests of future generations, democratic principles are violated, particularly given the irreversibility of many contemporary political decisions. The resulting failure of the intergenerational contract could only be prevented if minors finally had a right to vote. However, while Merk appears to support the case of sustainability and well-being of future generations by abolishing the age limit, it would seem that changing the franchise cannot and should not be based on preconceptions to support a certain political agenda, but on democratic principles alone. Moreover, even though his warning of the end of the generational contract is valid, it is far from certain that the most important reason for parents to have children is to secure their own care in their old age.

To conclude this part, Klaus Hurrelmann advocates lowering the age limit of the franchise to 14 years because of the increasing independence and, by extension, the higher level of maturity among today's youth. However, he stresses that this would by no means be an effective instrument to stop political apathy or contribute to a change in the way politics is done today. Instead, the right to vote should be juxtaposed with other forms of political participation.

The second model addresses different ways of political participation for the youth outside of public elections. All articles emphasise the fundamental willingness of young people to participate in the political arena, and the importance of taking their concerns seriously. The article by Jasmin Bastian, Timo Burger and Marius Harring describes the web 2.0 as a decent instrument to respond to an increasingly individualised and particularised social structure. Therefore they suggest promoting a wide variety of participation opportunities in specific areas of interest. Above all, it is necessary for political decision-makers to take the ideas articulated on the internet into their consideration. In his article Michael C. Hermann discusses the progress youth parliaments have made in the last 30 years since their first introduction. Throughout the years, a wide variety of youth parliaments has developed, with their precise form depending on local structures. Despite being an institutionalised form of participation, this flexibility is necessary in order to adapt to a changing youth. Nevertheless, the little impact youth parliaments actually have on local politics is often a matter of concern. Besides, a social selection of members according to their background and education level can be observed. Despite assuming the positive impact of youth parliaments on political participation, Hermann emphasises the necessity of longitudinal analyses for further evaluation.

The third model concerns ombudspersons for youth participation. In view of the gap between political goals and the reality of youth participation, Ulrich Ballhausen and Dirk Lange promote the concept of ombudspersons in order to strengthen youth participation. All too often there is a lack of reliable opportunities for participation that are independent of specific situations or persons (376). By implementing an ombudsperson, they seek to create a sustainable structural change, and thus support children to express their political citizenship. However, the success of this kind of institution is highly dependent on the person actually doing the job. Ballhausen and Lange recognise the danger of an ombudsperson becoming an alibi of government institutions and merely administering the children's interests, but they fail to show possible solutions and to sufficiently emphasise the limitations of their own proposal. For instance, they leave unanswered the question of how children should learn democracy if the person representing them is not even elected, but simply appointed (378). Moreover, it remains unclear how it could be guaranteed that the person who most appeals to the children's interests will be hired, not the person who most appeals to the administration.

In the fourth part of the anthology, the different models of youth participation are evaluated. Waldemar Stange and Hans Peter Lührs offer a profound analysis of youth parliaments and councils by addressing a total of eleven potential risks and how they might be turned into opportunities for youth participation. Their analysis of potential risks is particularly comprehensive – from neglect of children and youth councils, to the mistrust in children's ability to participate, the social selection of participants or the inadequate qualifications of adults mentoring the youth parliaments. However, not every solution offered is an actual solution to the underlying problem. Instead, potential risks are often turned into the desirable state of affairs without even mentioning the issue of how to get there. Unlike other authors, Stange and Lührs emphasise the importance of having realistic expectations and clearly set priorities, and thus of accepting the fact that there will always be young people who are not interested in political participation – regardless of the quality of the opportunities provided.

Instead of worrying whether young people from all social backgrounds participate, they argue that structures of democracy for children and youth should be institutionalised first. While there is some validity to this claim, their implication that youth participation works solely as an elite activity is pretty harsh. Despite these limitations, the authors' well-structured and comprehensive approach to participation in youth parliaments is very enriching.

In his article, Hans Fraeulin evaluates the role of children and youth lobbies, drawing from his experience as a youth ombudsman in Graz, Austria. While providing interesting insights about the deficits youth ombudspersons face in their work, such as a limited budget or bureaucracy, the article is rather disappointing. Not only is it clearly out-dated – judging from his sources (with one exception all his sources were published in 1996 or earlier) or the examples that he uses, such as youth magazines or organisations which no longer exist – but he constantly uses terms such as "recently" or "this year" despite referring to his time in office in the mid-1990s. Given the changes in youth participation over the last 20 years, this is inadequate. Another point of criticism is the lack of neutrality in his writing, on the one hand, and the attempt to create objectivity, on the other hand, by referring to himself in the third person, and thus generalising his experience.

In Part 5 several views on youth participation are discussed. Aydin Gürlevik and Christian Palentien emphasise the relevance of lowering the age limit of the franchise in order to support the political socialisation of youth. Like many authors before them, they argue that young people do not trust politicians to solve problems in their areas of interest. Moreover, they observe a lack of clear political vision in the political debate. Because of cuts in the educational sector, young people are confronted with limitations at an early stage of their lives. Gürlevik and Palentien argue that by allowing them to have a say in politics – by franchise as well as several other forms of participation – political apathy could be averted. This way, not only could the situation of young people be changed, but also their perception of political stakeholders. Nonetheless, general problems – such as the complicated language used by politicians, corruption, unfulfilled campaign pledges, the influence of powerful lobbies or a freezing of investment in education – remain counterproductive in the quest for stronger youth participation.

To conclude Part 5 – and the anthology – Christian Lueders and Thomas Rauschenbach take a slightly different approach to youth politics by addressing the entire field and not just particular measures. They observe a general trend in German youth politics to shift the focus from underprivileged youth to participation and supporting capabilities and proclaiming "independent youth politics". However, in their article Lueders and Rauschenbach challenge this proclamation. In view of a lack of clarity in analysing which age groups are addressed by youth politics, they emphasise the risk of a competition between children's and youth politics. Moreover, by pointing out the overlap with other policy fields such as education, employment, health care, security, gender, and immigration, they conclude that youth politics cannot be considered an independent policy field just yet (511). In order to promote a dialogue about an independent youth policy, they develop a concept which unites four policy dimensions: protection and support, enablement, participation, and generation (515). Moreover, they emphasise the necessity for youth politics to articulate clear goals as well as the need for lively academic discussion about how youth politics should be shaped.

To evaluate the anthology, it is important to remember its purpose. Given the wide debate on youth and participation, the authors aim to provide an overview of the field. For this reason, spectacular new findings should not be expected. However, the anthology is a comprehensive entry point for newcomers to the field.

Considering its aim, the structure of the anthology is admirable. Several theoretical assumptions as well as stereotypes about youth participation are addressed and backed up by empirical evidence. Moreover, the reader gets a good overview of all the different concepts devised to improve youth participation, which stimulates the interest in further reading. Given this, the anthology's neglect of concepts such as youth quotas is reasonable. By discussing already implemented frameworks and ideas, an important link between theory and practical experiences is established.

Even in the academic debate, youth participation is an emotional topic. Nevertheless, most authors in the anthology avoid polemicising and present their arguments in a factual manner, which is clearly beneficial to readers. While it is common to perceive youth participation as essential for a vital democracy, the authors present quite different ideas on how to stimulate it. However, as Hurrelmann and others correctly point out, a difference can only be made by combining several approaches. Another important claim is the need to transform the political culture in order to fight political apathy (or rather disenchantment with politicians) not only among youth, but among society as a whole.

Undoubtedly, improving youth participation is an infinite process which will always require further academic as well as public debate. Meanwhile, the anthology *Youth and Politics* is well equipped to motivate the next generation of thinkers to further develop youth participation.

Gürlevik, Aydin / Hurrelmann, Klaus / Palentien, Christian (eds.) (2016): Jugend und Politik: Politische Bildung und Beteiligung von Jugendlichen. Wiesbaden: Springer. 528 pages. ISBN: 978-3-658-09144-6. Price: €49.99.

Gerhard Bos / Marcus Düwell (eds.): Human Rights and Sustainability: Moral Responsibilities for the Future

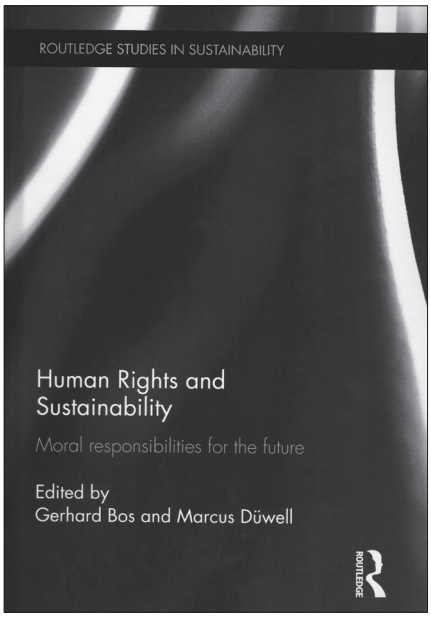
Reviewed by Julia Flegel and Maria Lenk

Should we, the existing people, be held responsible for the environment we leave behind for generations to come? Our intuition may lead us to say "yes". However, reading the book at hand will prompt the reader to question this answer as she becomes immersed in the relationship between human rights, ecological challenges and our responsibilities to future generations.

The collection of 16 articles consists of interdisciplinary works by European scholars from the fields of law, philosophy and political theory. It explores whether human rights practices include a protection of the basic interests of future people and applies these reflections to the topic of climate change. All contributions ask whether human rights imply long-term environmental responsibilities to ensure future people's well-being. And although all authors agree that there is an urgent need for progress on climate policy, they answer this question in many different ways. According to the editors themselves, in order for human rights to adequately respond to ecological challenges, they must be reinterpreted – which is why all articles are written with a philosophical scope.

Previous researchers have focused on explaining the importance of the moral aspects concerning sustainability and environmental problems, for instance Gilroy (2002), Potthast (2012) and Attapattu (2015), to name but a few. There are also a number of researchers who claim that environmental needs should be included in human rights, as do Woods (2010), Padhy (2008), or Picolotti (2010). However, with this book, Bos and Düwell explore a new aspect within the discussion of human rights and sustainability by directing their focus towards future generations and the duties our generation (presumably) has when it comes to ensuring their rights. For reasons of space, we limit our discussion here to a selection of articles.

The first of four parts begins with "Greening the human rights laws" by Elina Pirjatanniemi. In this article, the author addresses questions of environmental problems from a legal point of view by analysing whether long-term ecological responsibility could be integrated within the European Convention on Human Rights (ECHR). She detects obstacles to tackling environmental problems like global warming within this framework on the grounds that human rights violations, as such, are addressed directly to an individual or a group, but not to people who, as yet, do not exist (11f.). The author goes on to describe the trilemma of sustainably balancing economic, social and environmental aspects of development. To provide a better understanding of the possibilities and limitations of human rights, Pirjatanniemi draws on Barr's "sustainability continuum"[1], a scale ranging from weak to strong. And while human rights and the ECHR currently only enhance the weaker forms of sustainability and face multiple obstacles when it comes to applying these rights to a stronger form and to future generations, Pirjatanniemi calls for stretching our understanding of human rights towards stronger forms of sustainability. Even though the author does so quite convincingly, the reader is left asking in which manner stronger forms of sustainability might be implemented, for example, in court decisions.



In a subsequent chapter, "International human rights and duties to future generations", Stephen Riley advocates the idea of an international constitution on the grounds that constitutions are meant to transcend time and generational limits. According to his argument, such a concept is vital to frame the debate towards sustainability duties and to fulfil our own intergenerational duties concerning sustainability. What is more, the author sees human rights as a synthesis of moral *and* legal rights. He goes on to argue that human rights, at least in part, may be the answer to problems of sustainability today and in the future. Nevertheless, he holds that a constitutionalist notion of human rights tasked with coordinating national constitutions as well as combining moral and legal understandings of human rights has significant advantages over other concepts. Riley also outlines the implications of a constitutionalist approach. Unfortunately, after proposing such an ambitious concept, he closes somewhat anticlimactically by pointing out that such a project would face enormous challenges and would greatly depend upon the degree of commitment it could attain (65). Taking the globally arising nationalist tendencies and the seeming return to preserving national self-interests into account, his proposed concept seems all the more improbable and utopian. This is even more so the case when he states that a precondition for an international constitution is an international society "committed to international human rights and not just to the self-preservation of states" (59).

In view of the book's topic, or upon asking one's own conscience, one might be under the impression that future generation's rights ought to be protected no matter what. Jos Philips' contribution "Human Rights and Threats Concerning Future People: A Sufficientarian Proposal", however, marks a counterpart to this notion.

The author asks how the interests of future people can be incorporated into human rights given that they will be affected by various risks and uncertainties. With this he contradicts Riley, who stated that "human rights are not dependent upon the calculation of risk" (55). Philips, however, presents a cost-effectiveness consideration, deriving his idea from works by Gardiner and Shue: Before acting upon a threat, one must consider aspects such as the urgency, severity and the probability of the occurrence of the threat as well as the amount of affected people and the effectiveness of possible measures (84). Following this consideration, reducing global warming should not come at the expense of other interests; and threats concerning future people – such as climate change – should therefore not always take priority over concerns of the present – or so he argues. He concludes that, while human rights may well be able to include future people and while climate change (and related threats to humankind) should still take priority within human rights, the costs for realizing these rights should not be "excessively costly for a society" (87). This article is well argued and structured, making it easy to follow in a compilation of otherwise quite demanding works. Nevertheless, the author's sufficientarian approach leaves idealists with a sour taste.

Referring to a Dutch court which ruled that the government has a legal obligation to protect its citizens from climate change, Adina Preda's "Human Rights, Climate Change and Sustainability" asks whether future generations, the environment, or distant others have any rights against us when it comes to climate change. She answers this question with a clear "no" – dismissing the issue of environmental justice entirely. Additionally, she bases her argument on a notion of human rights as a moral right rather than as judicial obligations arising from legal documents. Using Choice and Interest theory as well as the non-identity effect and problem, Preda argues not only that future people do not have rights against us, but that we are also currently *not* violating any duties owed to them (100f.). Concerning climate change as an issue of global justice, the author demonstrates how environmental rights can only be of a positive nature. She goes on to argue that the justification of a positive right requires the identification of a duty bearer. However, the environment has been altered and harmed by an unorganised collective, namely all of humankind, and according to Preda, an unorganised collective can hardly be considered as one agent.

The author concludes that climate change should not be framed in terms of rights. Nevertheless, she thinks, we still have a duty to combat climate change. Even though this contribution presents a sound line of argument and contains multiple examples, it still leaves these reviewers with the wish for more explanation and a fundamental question: If we don't owe it to future generations, the environment, or other inhabitants of this planet to take actions against climate change, then to whom, in fact, do we owe it? Perhaps to ourselves? Furthermore, even though Preda is one of the few authors in this volume who actually provides her own definition of human rights, she concludes that "it may actually be more beneficial to admit that the language of rights is inappropriate here and [to] insist on the perhaps weaker but convincing claim that contributing to climate change is 'merely' wrong." (104) After disarming the notions of 'justice' and 'right', with what does that leave us?

In the following chapter, Gerhard Bos is also concerned with the question of whether long-term environmental responsibilities should be accounted for as duties corresponding to future people's human rights. And he, too, answers this question in the negative. He goes on to argue that questions of global and intergenerational justice should not be addressed as a matter between groups, e.g., in generational terms. This also means that long-term responsibilities are not to be seen as duties owed to future people. Instead, they should be viewed as long-distance and long-term responsibilities and duties between *individual* contemporaries *regarding* future people.

Michael Reder and Lukas Köhler open the third part of the collection with a more political point of view, linking human rights to political decision-making. Their aim is to demonstrate that human rights can, in fact, constitute a moral and normative basis for political decisions on climate policies. Criticising various approaches as too abstract, they strive to utilise a more pragmatic approach in exploring the normative foundations of human rights. By invoking a Hegel-oriented approach, they explore the normative and social practices essential to acting in accordance with Hegel's notion of Sittlichkeit. They discover a potential in human rights to be guidelines for political action on a global scale. These normative guidelines to sustainability are to be found in human rights' moral principles such as freedom, equality, solidarity and participation. As a result, and taking moral and political implications into account, human rights can indeed provide a foundation for sustainability policies. In addition, the authors illustrate how negligence of policy to combat climate change will endanger future people's human rights, and especially those of the most endangered groups. The authors close with addressing what this would mean in practice: Solving the conflict between developing and industrialised countries and the dilemma of mitigation vs. development by using, e.g., the principle of equality. However, the global distribution of power and the nations' reluctance to sacrifice their own interests for the sake of cooperating by all means put a damper on the presented concept.

Bos and Düwell conclude the book by offering an overview of questions about the role of human rights and ecological challenges which they think need to be considered in future debates. First, they encourage us to consider what effect being aware of the role of future people will have for the current human rights regime and how a rising tension among different human rights might be resolved. Second, if future people were to be considered human rights-holders, how could they be represented in the political and legal order? And what would this mean for our understanding of democracy? Third, the authors point out that human rights were traditionally understood as rights held against the individual state. However, appropriate responses to global ecological challenges call for a higher degree of international coordination. Therefore, the question arises whether tackling issues such as climate change requires a new level of international coordination or even supranational institutions. These questions are both interesting and – especially concerning the latter point – of pressing relevance. Nevertheless, the book itself does not quite begin to answer them. Instead, it finishes with questioning the "role of human rights as the central reference point of our normative-political order." (218) Hence, according to the authors, investigating the role of human rights regarding long-term (environmental) responsibilities, as done in this publication, is of utter importance.

The book provides a broad overview of the concept of sustainability as well as of

our moral and legal obligations to future generations. It is very comprehensive and clearly structured, and reading the introductory chapter alone will give the reader a very good idea of the research questions and issues at hand. All contributors to this volume agree that the topic of climate change needs to be taken seriously and that the existing generation's actions, our actions, will have an impact on future people. However, the authors disagree in their answers to the central question of this book. While some argue that human rights can be the carrier of long-term ecological responsibility towards future people, a considerable part of this book qualifies this or even takes an opposite point of view. Readers hoping to find a unanimous passionate plea for recognizing our long-term ecological responsibility within the human rights framework may find themselves disenchanted after reading. Be that as it may, the book challenges us to think more thoroughly about our behaviour and its impact on the future. The complexity of the issues surrounding human rights, sustainability and future generations is very well demonstrated here, and the reader is taken on many excursions to gain a broader understanding of their philosophical roots. Moreover, the book benefits greatly from the interdisciplinary makeup of its contributors in that the reader is introduced to a great variety of approaches and views, making it possible to reflect on the topic from different angles and facilitating a profounder understanding of the issue at hand. However, the numerous references to complex concepts and philosophical theories also make this a rather sophisticated and demanding book which it is not always easy to follow. Consequently, this publication is mainly addressed to readers with some previous knowledge of the topics discussed, such as legal scholars, philosophers, political scientists, and other members of the scientific community. The fact that some authors do not define their – sometimes quite differing – understandings of the generously used concepts of "human rights", "sustainability" or especially "intergenerational justice" also further complicates the reading experience. As a result, the reader is often left to keep up with a constant switch from, for example, human rights in a legal sense (Pirjatanniemi) to a moral sense (Preda) to a notion which combines both their legal and moral aspects (Riley) – or, alternatively, she is simply left without any definition. Finally, some presented concepts leave open questions due to the fact that most contributions focus on the description but stop before addressing the policy implications, application or feasibility of their concepts.

Nevertheless, this is a highly valuable contribution which lays the groundwork for theorising about environmental concerns from a normative perspective and will be of great benefit to students and scholars from various backgrounds.

Notes

1 Barr, Stewart (2008): Environment and Society: Sustainability, Policy and the Citizen. Hampshire: Ashgate.

Bos, Gerhard / Düwell, Marcus (eds.) (2016): Human Rights and Sustainability: Moral Responsibilities for the Future. Oxford / New York, NY: Routledge. 218 pages. ISBN: 978-1-138-95710-7. Price £85.

Call for Papers: Demography Prize for Young Researchers 2016/2017

The Stuttgart-based Foundation for the Rights of Future Generations (FRFG) and the London-based Intergenerational Foundation (IF) jointly award the biennial Demography Prize, endowed with EUR 10,000 (ten thousand euros) in total prize-money, to essay-writers who address political and demographic issues pertaining to the field of intergenerational justice. The prize was initiated and is funded by the Stiftung Apfelbaum.

Through the prize, the FRFG and IF seek to promote discussion about intergenerational justice in society, and, by providing a scholarly basis to the debate, establish new perspectives for decision-makers. The invitation to enter the competition is extended especially to young academics from all disciplines. Collaborative submissions are also welcome.

For the 2016/2017 prize, the FRFG and IF call for papers on the following topic:

"Measuring Intergenerational Justice"

Submission Requirements

Submissions will be accepted until 1 July 2017. Entries should be 5,000 to 8,000 words in length (excluding figures, tables and bibliography). All documents required for a submission, including the full call for papers and formal entry requirements, are available upon request by email to Antony Mason at antony(at)if.org.uk. For future reference, and because we may be organising a symposium around the Prize, we kindly ask you to also send us a short biography (one paragraph) when requesting formal entry requirements. Submissions for the essay competition will also be considered for publication in the *Intergenerational Justice Review* (www.igjr.org).

Topic Abstract

In recent years, there has been a rising interest in measuring and comparing intergenerational justice and the well-being of young people, both across different countries (spatially) as well as over time (temporally). The presumption of this new field of research is that the present demos tends to imposing increasing burdens on younger and future generations. Evidence for this thesis could be seen in the high sovereign debts, youth unemployment and poverty, and a more and more severe global ecological crisis.

In a 2013 study published by the Bertelsmann Foundation, and led by Pieter Vanhuysse of the UN's European Centre for Social Welfare Policy and Research, a total of 29 OECD states were compared on the basis of four indicators: public debt per child; the ecological footprint created by all generations currently alive; the ratio of child- to elderly-poverty; and the distribution of social spending among generations ("elderly-bias indicator of social spending", EBiSS). These measures

were then aggregated into the "Intergenerational Justice Index" – the first of its kind. A similar attempt to capture the wellbeing of young people is the "Youthonomics Global Index". Published in 2015 by a France-based think tank of the same name, it analyses the situation of young people in 64 Western and non-Western countries by means of no less than 59 different social, economic and political indicators.

The most recent in line is the "European Index of Intergenerational Fairness", launched in early 2016 by the Intergenerational Foundation (IF). Designed as a quantitative measurement of how the position of young people has changed across the EU, its 13 indicators include housing costs, government debt, spending on pensions and education, participation in democracy, and access to tertiary education. The index's findings indicate that the prospects of young people across the EU have deteriorated to a ten-year low.

Entries to the competition could approach the topic through a broad range of questions, including:

• What are the methodological pitfalls of measuring intergenerational justice, and how can they be avoided? Are the existing models internally valid, and to what extent do they allow for generalisation? What are the potential sources of selection bias and measurement error?

• Are the respective indicators by which they measure intergenerational justice sufficient and appropriate, or should they be supplemented? If so, how exactly? Are they conceptually sound and well operationalised? Do they allow for replication?

• In a cross-sectional or time-series comparison, how well do "ageing societies" such as Germany, Sweden or Finland respond to the challenges of intergenerational justice? In particular, how – if at all – do they succeed in balancing the welfare spending between the young and the old, and what measures ought they be taking in this regard?

• With regard to the country rankings, is intergenerational justice, as measured by the different indices, a function of some other set of variables – i.e., how do they correlate with alternative rankings, socio-economic or other, and what might this teach us?

• What promising policy options are there for reducing existing injustices between the young and the old? How might they be implemented?

• What measures of institutional design could be taken in order to prevent the marginalisation of young people and future generations in political decision-making? For example, should suffrage be extended or even universalised to include the currently disenfranchised, and what would be the prospective effects of such a move?

Note that these are non-binding suggestions: participants are strongly encouraged to come up with their own essay questions or research puzzles, as long as they pertain to the overall topic of this call for papers in a sufficiently clear way. Submissions are welcome from all fields of social science, including (but not limited to) political science, sociology, economics, and legal studies. Philosophers and/or ethicists are invited to contribute applied normative research.

References

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