

Intergenerational Justice Review

Issue topic:
**Constitutions as Intergenerational
Contracts: Flexible or fixed? (Part II)**



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The peer-reviewed journal Intergenerational Justice Review (IGJR) (ISSN 2190-6335) publishes 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.

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

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

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

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

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

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

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

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

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

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

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

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Constitutions as Intergenerational Contracts: Flexible or fixed?

by Jörg Tremmel

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

Introduction¹

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

A “constitution” is usually² defined as a system of fundamental principles according to which a state is to be governed. Constitutions build a framework for a state's public policy. They enjoy normative priority over ordinary statutes and regulate the manner in which ordinary laws are made. Constitutions also enshrine the fundamental values of a people, often in their preambles or in their first part. They can (but need not) contain a catalogue of basic human rights and liberties. Constitutions are distinguished from ordinary legislation by their rigidity. Written constitutions usually require legislative supermajorities, concurrent majorities of different houses of the legislature, and/or popular referenda in order to be changed.³ By their very nature, constitutions are intergenerational documents because they are intended to place certain questions beyond the reach of simple majorities. With few exceptions, they are meant to endure for many generations.

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

A thought experiment⁴

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

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

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

All those who are subject to the rule of a constitution should be able to exert influence over the basic laws that regulate their lives.

“Sovereignty” means the ability of a people, of each generation⁵ of citizens, to live under rules of their own choosing. After all, whose is a constitution? If the answer is “the citizens of country X”, this means nothing else than it is the constitution of the citizens *currently alive*. This is the appropriate state of affairs since dead people can neither be benefited by possessing something, nor harmed by losing a property, including the capacity to rule after their death. But if a constitution is too difficult to change, the dead citizens of country X wield power over the living,⁶ and the past rules over the present. It might well not make a difference if those succeeding generations share the values and views of their ancestors, but what if they happen not to? What if succeeding generations see some provisions of the constitution as a threat to their long-term well-being, or even as morally wrong? This problem is exacerbated when a stable majority of the citizenry would like to reform the constitution but falls short of the required supermajority of 66% or even 75%. Can we call it “the rule of the people” or “popular sovereignty” if stable majorities (let's say from 50% + 1 vote up to a three-fifths supermajority) of the present *demos* cannot change certain constitutional clauses for the simple reason that their forefathers put the bar for changing the constitution extremely high? “Generational sovereignty”⁷ is closely linked to the concept of “legitimacy” for two reasons, namely that

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

Terminology

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

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

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

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

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

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

The beginning of the debate about perpetual constitutions

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

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

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

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

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

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

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

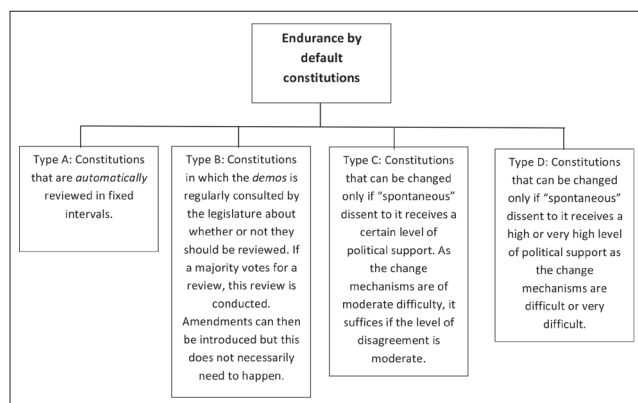


Figure 1: Different forms of endurance by default constitutions

Irrevocable provisions protected by eternity clauses

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

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

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

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

Most of the world's eternity clauses are not irrevocable provisions.²⁹ In theory, this would allow a two-step process by which, firstly, the eternity clause could be abolished, and then, secondly, the previously entrenched content can be altered by normal constitutional change procedure. But some eternity clauses are declared irrevocable themselves³⁰ – in this case of "second-order unamendability", no legal recourse can be taken by successor generations to change the content that was entrenched by their predecessors.

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

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

The proposal: recurrent constitutional reform commissions

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

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

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

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

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

It is very likely that the implication of such a window of opportunity is not that the constitution be rewritten from scratch, quite the contrary. Zachary Elkins, Tom Ginsburg and James Melton have analysed each and every constitution written since 1789.³⁶ One of their key findings is that flexibility (defined as the constitution’s ability to adjust to changing circumstances captured in the empirical analysis by the ease of formal and informal amendment, either informally via constitutional construction by the courts or via formal amendment procedures by the legislature) is positively correlated with the endurance of a constitution.³⁷ Likewise, the inclusiveness of a constitution (defined as the degree to which the constitution includes relevant social and political actors taking into account that time will change which societal groups will have a stake in the endurance of the constitution) is positively correlated with its stability over time. The life expectancy of the least inclusive constitution is a full 55 years less than the most inclusive constitution (14 years vs. 69 years).

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

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

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

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

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

The (forgone) welfare concern

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

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

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

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

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

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

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

The case of Iran deserves a closer look. Starting in 2009, Iran was repeatedly the site of vigorous youth revolts. Millions of young people took to the streets when waging the so-called Green Revolution against the rigged election of Ahmadinejad and soon against the whole illiberal theocratic political system that is protected by the present constitution. They sought basic liberties. When “their” constitution was enacted 38 years ago (in 1979), the majority of the people living in this country today were not even born. The subsequent youth revolutions were repressed with sheer brutality, and failed to change the political system. The irrevocableness of some key provisions⁴⁴ makes it very difficult for the succeeding generations in Iran to adapt their constitution to their values as the framers have sought to leave an immovable imprint. Now the youth has the choice between the devil and the deep blue sea. A revolution would give them the opportunity to replace the Iranian constitution, but during a revolution many (more) Iranians would be imprisoned, tortured and killed.

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

Harm and forgone welfare are two distinct concepts. While some provisions of the Iranian constitution are harmful, other constitutions, even in Western Europe and North America, can be held responsible for forgone welfare. Who would aver that all constitutional clauses in established Western democracies foster the welfare of the citizens living under the jurisdiction of these constitutions? Take the US constitution. The Second Amendment⁴⁵ to the United States Constitution protects the right of the people

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

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

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

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

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

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

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

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

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

The endurance of a constitution must not be equated with the endurance of ordinary laws. Even though laws have a more modest claim than constitutions, their longevity (at least in some areas) is often greater. France, for instance, has seen no less than 15 constitutions come and go, yet the French Code Civil of 1805 has endured unaltered “[w]hether the French government has been imperial, republican, or fascist.”⁵³ The same is true, by analogy, of the *Bürgerliches Gesetzbuch* in Germany, which came into effect on 1 January 1900.⁵⁴

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

The core argument of paternalistic thinking – that the framers of a constitution are in a position to identify and represent the general interest – does not hold. Scepticism is justified on a number of grounds. Firstly, it is extremely unlikely that the interests and preferences of a group of adults⁵⁵ can be better identified by a third-party than by the affected group itself. The paternalistic conception that men understand women’s needs better than women themselves was successfully rejected by women during their long battle for the right to vote. By the same token, we reject the idea that the interests of Afro-Americans could have been adequately represented by their white masters during the era of the Declaration of Independence, which was neither demanded by – nor beneficial for – the represented. That citizens themselves best understand their own interests is a generally accepted principle in contemporary political theory for sound reasons.

That citizens themselves best understand their own interests is a generally accepted principle in contemporary political theory for sound reasons.

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

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

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

sentism. The resounding assertion that later generations will pander to their “passions” and short-term interests can be countered by pointing at an interesting development in constitution-amending worldwide. The growing acceptance of our responsibility for posterity has resulted in the fact that constitutions, especially the ones which were adopted in the last few decades, refer verbatim to long-term thinking and speak of the obligations of today’s citizenry towards future generations.⁵⁷ These newly inserted clauses may be termed “posterity protection provisions” (PPPs).⁵⁸ Thematically, most of these clauses fall into one of the following three categories: general PPPs, ecological PPPs and financial PPPs.⁵⁹ An example for the ecological PPPs is Art. 24 of South Africa’s Constitution of 1994.⁶⁰ Examples for financial PPPs are the “debt brakes” recently adopted by several European countries. The Constitution of Poland, for instance, limits the level of national public debt to three-fifths of GDP.⁶¹

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

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

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

The sovereignty concern

Definitions of sovereignty

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

1) A people lives under the jurisdiction of a “very difficult to change” constitution⁶⁷ that was established long ago. All of the constitution’s provisions in fact foster their welfare/guarantee their liberties but the citizens are under the false impression that they do not. The citizens thus want to change/repeal/add one or several provisions. But the rigidity of the constitution does not allow for them to do so.

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

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

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

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

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

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

These four cases can be depicted in the following matrix:

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

Figure 2: Trade-offs between quality and sovereignty

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

Tacit consent

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

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

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

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

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

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

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

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

Different levels of consent/dissent in different age groups

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

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

Conclusion and outlook

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

that recurrent reform commissions strike a good balance between the necessary rigidity and flexibility of constitutions. If all this is granted, the route for further research lies ahead. Given the great variety of legal and political traditions in constitutionalised states around the world, democracies and non-democracies, it seems appropriate to conceive differently of such a reform commission for each country. There cannot be a “one-size-fits-all” approach.⁸² It would be presumptuous to propose the same design for recurrent constitutional reform commissions for countries as different as, say, Iran and Germany. Further research should look at the national level and try to answer the following questions for each country: *In which time spans should the constitutional reform commission be convened?*⁸³ As mentioned, there can be a mathematical calculation for this, using the demographic structure of a country. But if this is deemed too complicated, a people could just agree on an accommodating number, for instance 25 years.⁸⁴ *How long should the commission be in session, once it has been convened?* Arguably, it should not sit for more than two or three years. *By which mode should the members of the commission be selected or elected?* *How many members should the commission have altogether?*⁸⁵ Here, due to very different national traditions, the opinions might vary the most. Path dependencies might limit the range of feasible solutions. One option might be an intensive deliberation process, bringing members of civil society to the forefront of the process.⁸⁶ In fact, there were some intriguing examples for that approach in Iceland and in British Columbia.⁸⁷ But expert commissions could also have their merits. After German Reunification, the Joint Constitutional Commission that was composed solely by members of parliament completed the amendment process successfully.⁸⁸ *Provided the commission makes a proposal for a more or less extensive revision of the constitution, how should it be ratified? Should the usual amendment procedure suffice?*⁸⁹ Providing answers to these kinds of questions⁹⁰ is very much a national project – it could even be “the constitutional project” of the current generation of citizens in each country in which the institution of a constitutional reform commission has yet to be established. It is, after all, “their” constitution.

Notes

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

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

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

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

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

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

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

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

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

9 Muñoz-Fraticelli 2009, 377.

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

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

12 Jefferson 1789.

13 Jefferson 1789.

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

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

16 Madison 1790.

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

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

19 Roznai 2015: 3.

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

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

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

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

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

24 Roznai 2015: 11.

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

26 Article 79 (3)

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

27 Article 20

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

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

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

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

28 Article 1

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

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

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

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

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

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

31 Elkins/Ginsburg/Melton 2009: 3.

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

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

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

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

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

37 Elkins/Ginsburg/Melton 2009: 76.

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

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

40 Rasch/Congleton 2006: 340.

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

42 Ginsburg/Simpser 2014. See also Svobik 2012.

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

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

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

46 I owe this point to Bruce Auerbach.

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

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

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

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

50 Roznai 2015: 22.

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

52 Muñoz-Fraticelli 2009: 388.

53 Elkins/Ginsburg/Melton 2009: 76.

54 I owe this point to Markus Rutsche.

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

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

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

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

59 Tremmel 2009: 57; Tremmel 2006: 190.

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

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

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

62 González-Ricoy 2016a: 42.

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

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

65 Gosseries 2016: 101.

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

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

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

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

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

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

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

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

73 Cf. Muñoz-Fraticelli 2009, fn. 14.

74 Otsuka 2003: 95-105.

75 Rasch/Congleton 2006.

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

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

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

79 https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm.

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

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

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

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

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

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

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

87 Landemore 2015; Warren/Pearse 2008.

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

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

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

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Constitutional Handcuffs

by Richard Albert

Abstract: This article makes three contributions to the literature on constitutional change. First, it reinforces the theoretical foundations of constitutional entrenchment by defining the spectrum of constitutional permanence. Second, it offers an original taxonomy of entrenchment clauses, including preservative, transformational and reconciliatory entrenchment. Third, in concluding that absolute entrenchment undermines the participatory values that give constitutionalism its meaning, it proposes an alternative to entrenchment: the entrenchment simulator. Whereas entrenchment clauses prohibit constitutional amendment, the entrenchment simulator provides a promising alternative that both embraces the expressive function of entrenchment and remains consistent with the promise of constitutionalism.

Introduction¹

The advent of the written constitution has given rise to an enduring tension in constitutional statecraft, pitting constitutionalism against democracy.² Constitutionalism strikes a decidedly antagonistic posture toward democracy, restraining democracy by fastening handcuffs on its exercise and imposing limits on its expression. Whereas democracy celebrates the limitless horizons of collective action, constitutionalism takes a more skeptical view of popular movements, moderating its enthusiasm for active citizenship with careful vigilance for the dangers of majoritarianism. That is the very function of countermajoritarian constitutional concepts like bills of rights, judicial review and the separation of powers.

Democracy, in contrast, rejects this tyranny of the countermajoritarian minority and aspires to break free from the chains that constitutions shackle around it. For democracy, legitimacy flows neither from natural law nor moral truth but only from the freely given consent of the governed. The highest ambition of democracy is therefore to reflect civic preferences through majoritarian participatory politics.

Constitutional architects have constructed innovative constitutional devices to palliate the tension between constitutionalism and democracy. Their function is to insulate majoritarian popular will from judicial invalidation. Some of these devices confer upon legislatures the power to limit the scope of judicial review.³ Others narrow the range of judicial authority.⁴ Still others have emerged organically in the course of the judicial process.⁵ What unites all of them is their purpose: to signal to citizens that it is citizens themselves – and not the institutions of the state – who possess the sovereignty to chart the constitutional course of the state.

Perhaps no constitutional mechanism more mightily captures this power of sovereignty than the constitutional amendment procedures enshrined in a constitutional text.⁶ Indeed, the authority to amend the constitution is the best democratic answer to the enduring tension in constitutional statecraft between constitutionalism and democracy because the rules governing constitutional amendment unmistakably resolve this tension in favour of democracy – by giving citizens the key to unlock their constitutional handcuffs.

But some modern constitutions have instead resolved this tension in favour of constitutionalism. Constitutional designers have, in both the civil and common law traditions, expressly designated certain constitutional provisions *unamendable*.⁷ Unamendable constitutional provisions are impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities. They are intended to last forever and to serve as an eternal constraint on the state and its citizens. Paradigmatic examples of unamendable constitutional provisions read, for example, that republicanism “shall not be a matter for constitutional amendment,”⁸ amendments to federalism “shall be inadmissible,”⁹ or that the secularism of the state “shall not be amended, nor shall [its] amendment be proposed.”¹⁰ Let us call these provisions *entrenchment clauses*.¹¹

The highest ambition of democracy is therefore to reflect civic preferences through majoritarian participatory politics.

Entrenchment, as I see it, serves three purposes. First, entrenchment clauses are deployed to preserve certain structural features of the state. For instance, an entrenchment clause may preserve federalism, republicanism, secularism or some other constitutional structure. I call this *preservative entrenchment*.

Second, in addition to preserving an important element of the state, entrenchment may be used to transform the state by helping to paint a portrait of the state not as it is, but as it could be. This type of entrenchment clause guarantees a broad spectrum of rights and liberties that once were foreign to the state but now are new additions to its constitutional vocabulary. I call this *transformational entrenchment*. And third, an entrenchment clause may advance the cause of reconciliation between two or more previously warring factions which have joined together in peace to form a new or reconstructed state. This final type of entrenchment – which I call *reconciliatory entrenchment* – absolves members of these factions of prior wrongdoing and renounces all future claims to criminal or other penalties.

Although constitutional states avail themselves of entrenchment in the service of purposes that some may deem laudable,¹² entrenchment clauses nonetheless violate the fundamental promise of constitutionalism. They undermine the legitimacy of constitutionalism by throwing away the key to unlock the handcuffs that constitutions attach to the wrists of citizens. There is something therefore quite unsettling about entrenchment clauses. They deny citizens the democratic right to amend their own constitution and in so doing divest them of the basic sovereign rights of popular choice and continuing self-definition, all of which makes entrenchment clauses deeply troubling for democratic theory, and doubly troubling for democratic practice.

A constitution is a window into the soul of the citizenry, a mirror in which citizens should see themselves and their aspirations

reflected, precisely because it is citizens themselves who should give continuing shape and content to their constitutional text. Entrenchment, in contrast, short-circuits this fundamental premise of the larger promise of constitutionalism. Constitutionalism – and its attendant constitutional amendment rules and other innovations designed to palliate the tension between constitutionalism and democracy – should preserve for citizens the powers of self-definition and redefinition that give democracy its meaning. Loughlin puts it well when he declares that a constitution is “not a segment of being but a process of becoming.”¹³ Yet entrenchment presupposes the contrary: that the essence of a constitution must be frozen into permanence.

A constitution is a window into the soul of the citizenry, a mirror in which citizens should see themselves and their aspirations reflected, precisely because it is citizens themselves who should give continuing shape and content to their constitutional text.

In the following section, I will explain and illustrate the idea of constitutional entrenchment. I will then propose an alternative to entrenchment clauses that I call *the entrenchment simulator*. In contrast to entrenchment clauses that render their amendment a constitutional impossibility, the entrenchment simulator provides a promising alternative that both embraces the expressive function of entrenchment clauses and remains consistent with the promise of constitutionalism. I will close with a few concluding thoughts about the enduring tension between constitutionalism and democracy.

Constitutional Entrenchment

Ordinarily, the text of a constitution is subject to evolving interpretations. This should come as no surprise insofar as a constitution is often drafted in expansive language whose terms, standing alone, can neither prescribe nor proscribe a particular course of action. Accordingly, the text undergoes a continual evolution in constitutional meaning manifesting itself as formal or informal interventions in the organic development of the constitution. These interventions, which either arrest or quicken the pace of constitutional change, take the form of constitutional amendments inscribed into the text of the constitution.¹⁴

Amending the constitution usually demands an extraordinary confluence and sequence of events launched by political institutions, traditionally either legislatures,¹⁵ heads of state,¹⁶ social forces like popular movements¹⁷ or less obvious – though no less influential – coils of constitutional change like courts.¹⁸ In the normal course of affairs, therefore, a constitution is susceptible to episodic revision consistent with the rules of constitutional amendment located in the constitutional text.

But not all constitutions are created equal. Some constitutional states enshrine constitutional provisions that are not subject to either regular or periodic amendment. They are unamendable. By unamendable, I do not mean that constitutional provisions are practically or virtually unamendable as a result of particularly onerous amendment formulae.¹⁹ I mean to identify these entrenched provisions quite literally as fully resistant to the constitutional amendment procedures outlined in the text of the constitution insofar as they may not ever be lawfully amended – even if citizens and legislators achieve the requisite majorities commanded by the constitution. To entrench a constitutional provision is therefore

expressly to remove what that provision enshrines – for instance a legal principle, social or moral value, governmental structure or political rule – from the parameters of the customary constitutional field of play.

Degrees of Permanence

Entrenchment is a matter of both degree and kind.²⁰ There are different stages of entrenchment ranging in increasing rigidity from provisional to permanent entrenchment. Just as a constitutional provision may be entrenched, so too may a law. Conventional laws are subject to legislative revision or repeal in the regular legislative process by the default rule of simple majority. But a legislature may entrench a law by requiring special legislative majorities or other unconventional decision rules to amend or repeal it. By imposing a higher threshold for amending that entrenched law, the legislature sets it apart from conventional laws. Likewise, a similar distinction applies to constitutional provisions. Entrenching a constitutional provision is to require special procedures to amend or revise the content of that entrenched constitutional provision. Whereas a constitution may, as a default rule, require a special legislative or popular majority, or both, to amend one of its provisions, amending an entrenched constitutional provision would entail something qualitatively or quantitatively more than the default rule demands.

[Entrenchment clauses] undermine the legitimacy of constitutionalism by throwing away the key to unlock the handcuffs that constitutions attach to the wrists of citizens.

We may conceptualise entrenchment on a sliding scale of the type of legislative and/or popular majorities required to consummate a revision to an entrenched provision, be it a legislative or constitutional provision. At its core, then, entrenchment is a measure of permanence. Perhaps an illustration of the stages of entrenchment will help sharpen precisely what it means to say that there exist different degrees of entrenchment.

Let us therefore posit an ascending scale of entrenchment permanence consisting of five separate stations: (1) legislative non-entrenchment; (2) legislative entrenchment; (3) conventional constitutional entrenchment; (4) heightened constitutional entrenchment; and (5) indefinite constitutional entrenchment. Let us also stipulate that we find ourselves in a presidential system where the national bicameral legislature must pass laws by a majority vote of both houses and in which the constitution may be amended by a supermajority of each house of the national legislature, as well as a majority of the subnational legislatures.²¹

Beginning at the lowest end of the scale, we find a conventional law on a conventional subject passed by the bicameral legislature. To revise or even to repeal this law would require nothing out of the ordinary: a conventional law passed by a majority of the bicameral legislature will suffice. We may refer to this lowest level as simply *legislative non-entrenchment*.

Next, the second station of least permanence is occupied by an unconventional law passed by a conventional legislature. The law is unconventional because the legislature deems its subject matter sufficiently important as to insist that any effort to revise the law must muster more than a simple majority of the bicameral legislature. Perhaps the law concerns something of peculiar historical

significance to the nation. Given its importance, the law would be subject to higher threshold for amendment: a supermajority of the bicameral legislature. I refer to this second station as *legislative entrenchment*.

The third level of entrenchment in our sample sliding scale of permanence is a constitution. Let us posit that the drafters of this constitution, having had the foresight to prepare for the contingency that their constitution may require some modifications over the course of its duration, enshrined an amendment formula in the text of the document. The constitution stipulates that amending the constitution, perhaps to respond to changing social and political conditions, requires two conditions: the approval of a supermajority of the bicameral national legislature and the consent of a majority of the subnational legislatures. In my taxonomy, this third station is called *conventional constitutional entrenchment*. What follows this third level of entrenchment is what we might consider a superconstitutional provision requiring even more exacting conditions for amendment. The drafters may have deemed certain constitutional provisions particularly noteworthy or vital to the design of the state, in which case they may have set those provisions apart from the other constitutional provisions. Perhaps the drafters of the constitution believed that the rules of executive selection were so deeply constitutive of the state as to warrant special solicitude in the text of the constitution. Imagine, therefore, that the founding drafters established a special rule to amend this particular constitutional provision. Instead of requiring a supermajority of the bicameral national legislature and a majority of the subnational legislatures, any amendment to this superconstitutional provision would demand the approval of a supermajority of both the national legislature and the subnational legislatures. This fourth station of entrenchment is conspicuously more rigorous than the third, and of course far more exigent than the two other foregoing stations. I call it *heightened constitutional entrenchment*.

Perhaps the founding generation regarded certain constitutional structures, values or principles as so fundamental to the existence and identity of the state that they charted the unusual course of carving out a special class of unamendable constitutional provisions.

This brings us to the fifth station in our ascending scale of entrenchment. As we intensify the degree of entrenchment from the first station through the fourth, the fifth and final station is permanence. Assume here that the founding drafters of the constitutional text were so convinced of the importance of a given constitutional provision that they chose to shield that provision from any future effort either to amend it or to remove it entirely from the constitution. Just as we can conceive that certain constitutional provisions that may be deemed of greater consequence than others, we may certainly conceive of constitutional provisions that are thought to be of such great consequence to the state as to warrant making them wholly immune to the amendment procedures enshrined in the constitutional text. These would include provisions that, in the view of the founding drafters, are special provisions which far surpass the solemnity of the superconstitutional provisions warranting heightened constitutional entrenchment. Perhaps the founding generation regarded certain constitutional struc-

tures, values or principles as so fundamental to the existence and identity of the state that they charted the unusual course of carving out a special class of unamendable constitutional provisions. What makes them special is that no measure of legislative or popular approval – not even unanimity among all institutions of the state in concert with the freely expressed wishes of the citizenry – would be sufficient ever to change these unamendable provisions. On our ascending scale of entrenchment, we might call this fifth and most uncompromising type of entrenchment *indefinite constitutional entrenchment*.

Entrenching Permanence

My focus in these pages is just that: indefinite constitutional entrenchment, which I shall henceforth refer to simply as entrenchment. The notion of entrenchment raises fascinating questions about the purpose of constitutionalism – and also about its promise – and challenges us to think critically about the relationship between constitutionalism and democracy. What is it about constitutions, for example, that gives them their force of reason? Does a constitution derive its legitimacy from liberal democratic principles, the consent of the governed, or should we revere a constitutional text because it displaces the seat of sovereignty from citizens to another more legitimate site? I suspect that the most compelling answer draws from each of these, and still other themes.²²

Constitutionalism is an institution that at once celebrates and undermines democracy. On the one hand, constitutionalism is firmly rooted in popular will insofar as it aggregates and subsequently crystallises the disparate needs, demands, and aspirations of citizens. But, on the other hand, insofar as it takes possession of the sovereignty of citizens, constitutionalism is an affront to the most basic principle of democracy: the power to define and re-define oneself and to shape and reshape the contours of the state. Entrenchment, more than any other constitutional device, illustrates how constitutions undermine democracy. This of course raises the question: what is democracy? I am sympathetic to Samuel Issacharoff's definition: democracy refers to a system of self-government in which legitimate authority derives from the freely expressed will of citizens expressing their views either directly or indirectly.²³ I therefore adopt procedural democracy, in contrast to substantive democracy, as my baseline understanding of the concept. Procedural democracy concerns itself with the process by which citizens make decisions about their collective future as members of the state.²⁴ Substantive democracy concerns itself with the values that underpin the actual decisions that citizens make.²⁵ In this respect, the former orients itself toward the decisional input and the latter, the decisional output.²⁶ This was the very basis of John Hart Ely's process-based theory of democracy,²⁷ which, in my view, captures the essence of democratic legitimacy. Democracy and its attendant institutions demand that citizens be given every opportunity to participate in the procedures for settling on, and ultimately setting, the trajectory of the state.²⁸

Constitutionalism is an institution that at once celebrates and undermines democracy.

What underlies my view of constitutionalism is therefore that popular choice is a value worth defending. Popular choice may admittedly depart from the commonly cited substantive values of

liberal democracy. But just as fairness, equality, and due process are first order values that are integral to modern civil society, popular choice should likewise occupy a privileged position because it is the very act of deliberation, reflection and ultimately choosing that gives democracy its meaning. Without choice and the right to exercise it, we detract from the purpose of joining together in the shared venture that is a community, be it a village, territory, nation or state.

Yet, procedural democracy on its own has proven to be an insufficiently strong basis upon which to stand up a new constitutional state.²⁹ Procedural democracy, to paraphrase Daniel Markovits, has had to bow to the mercy of the substantive values of democracy³⁰ and to accept that it is ill-equipped to address the needs of modernity. And perhaps with reason because the dangers of privileging process over substance are familiar to us all, and they serve as a frightening reminder that choice does not always produce righteous outcomes. We need only look to history, some of it alarmingly recent, for proof that citizens should not always be entrusted with the power of free choice because there is little assurance that they will act in the larger interests of justice and virtue. Nazism in Germany,³¹ apartheid in South Africa³² and Jim Crow laws in the United States³³ are but three vicious manifestations of majoritarianism.

Without choice and the right to exercise it, we detract from the purpose of joining together in the shared venture that is a community, be it a village, territory, nation or state.

That is precisely why constitutional drafters opt so wisely to restrict popular choice. By erecting barricades to guard against the menace of majoritarianism, constitutions and their attendant counter-majoritarian institutions aim to neutralise the dangers of majoritarianism, namely the popular predisposition to actualising short-term preferences over long-term investments, the inclination toward concrete benefits over abstract ideals, and the subjugation of minority rights to majority will.³⁴ It is, therefore, one thing to hold in high esteem the value of democratic popular choice, but quite another to set it as the definitive standard against which other values are measured. This common practice – the subordination of process to substance – is now standard procedure in the task of constitutional design.³⁵ Citizens have become accustomed to – and if they have not, they should resign themselves to – restrictions on their capacity to choose their own course, both as individuals and as members of a community, because it is the only way to neutralise the self-interest that informs, and perhaps more accurately constrains, our choices. And so it makes eminent sense to limit the scope of popular choice.

But to fully deny citizens any form of popular choice in designing and redesigning their very own constitution is another matter altogether. And it is similarly qualitatively different from – and significantly more objectionable than – denying citizens the right to speak through their elected representatives on matters of everyday legislative affairs. In my taxonomy of degrees of entrenchment, this latter example would correspond to the second level of entrenchment, pursuant to which a legislature passes a law that can be amended or repealed only with a special majority of legislators. Legislative entrenchment, as it is called, as opposed to constitutional entrenchment, has given rise to an engaging exchange

among constitutional scholars, some arguing that one legislature may bind a subsequent legislature and others arguing the contrary.³⁶ The contemporary debate derives from the foundational work of the great English constitutional theorist, Albert Venn Dicey, which has since been refined by his modern counterpart, H.L.A. Hart. Both Dicey and Hart help illuminate competing notions of legislative sovereignty: the first incarnation of sovereignty granting a later Parliament the continuing sovereignty from which it may claim the right to overrule an earlier one; and the second placing Parliaments across the ages on an equal footing such that no one body may bind another.³⁷

A constitution is a constitution only if it retains for citizens the right to define and redefine themselves and their state as they deem best.

Whether an earlier legislature may bind a future legislature invokes significantly lower stakes than whether a prior body of citizens may irreversibly bind a subsequent body of citizens against its will. Citizens acting as constitutional amenders may undo legislative entrenchment, but legislative entrenchment should not trump constitutional amendment. Legislative entrenchment admittedly compromises sovereignty. But it is a secondary, and indeed lesser, form of sovereignty that we may call *mediated sovereignty*, which refers to the people themselves acting through their duly elected legislative delegates. In contrast, constitutional entrenchment goes much further. First, constitutional entrenchment does not compromise mediated sovereignty; it instead constrains direct sovereignty, which refers to the people themselves acting of their own volition in their own name, unfettered by the bureaucratic and political hurdles that representative democracy presents. It is therefore the purest form of sovereignty imaginable, the very apex of constitutional legitimacy and legitimate authority. Second, constitutional entrenchment does not stop at simply *compromising* that sovereignty, as one might characterise the consequence of legislative entrenchment. Constitutional entrenchment does something far more grave and much more severe than legislative entrenchment: it extinguishes sovereignty.

Constitutional entrenchment also runs contrary to the promise that constitutionalism augurs for citizens. Constitutionalism is an institution that should reflect how citizens see themselves and their state – precisely because it is citizens themselves who should breathe ongoing life and meaning into their constitution. A constitution is a constitution only if it retains for citizens the right to define and redefine themselves and their state as they deem best. If the constitution sequesters this fundamental right of self-definition from citizens, then a constitution cannot be what it is intended to be – a continuing autobiography, a project of discernment and an evolving self-portrait.

If the constitution sequesters this fundamental right of self-definition from citizens, then a constitution cannot be what it is intended to be – a continuing autobiography, a project of discernment and an evolving self-portrait.

Some states strip their constitutional text of the very essence of constitutionalism. They entrench constitutional provisions

against amendment, in so doing handcuffing the wrists of their citizens and leaving them unable to escape their constitutional shackles. For that is precisely the effect of entrenchment on citizens: it transforms them from citizens into subjects, reminiscent of days long past when democracy was but a dream envisaged by heroic revolutionaries preparing to stand up against their imperial overlords. Mobilising in pursuit of a new social charter to govern how to relate to the state, and how to engage with themselves, citizens birthed the radical notion of a text that would enshrine their rights and liberties against infringement by the state. But the text itself was not cast in iron. It was instead left open and receptive to social and political change – discrete or grand changes that would occur as a result of either organic evolution or deliberate revision – on the implicit if not explicit understanding that it was not, nor could ever be, the text itself that was sacred. What was understood to demand reverence as sacrosanct was instead the source of the text’s legitimacy. And back then, as today, there is but one singular basis of legitimacy and of legitimate authority: popular choice.³⁸ That is the core of constitutionalism. And entrenchment undermines that critical core of constitutionalism. As the emblematic embodiment of the repudiation of popular choice, entrenchment fails not because it freezes for some period of time a particular feature or features of the state³⁹ – that is, after all, a legitimate function of a constitution – but rather because entrenchment freezes a constitutional provision indefinitely.⁴⁰ Entrenchment suppresses popular choice to the detriment of citizenship and narrows the range of possibilities that citizens envision for themselves and their state. Entrenchment, as it exists in constitutional states around the world, from the Americas to Africa, from Europe to Asia, works a devastating harm on the constitutional soul of citizens. For by shielding constitutional provisions against amendment, entrenchment takes possession of the fundamental civic right of self-definition that is an avenue into the meaning and virtue of democracy.

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The Entrenchment Simulator

No right is more constitutive of citizenship than the power to amend the constitution, for a constitutional amendment derives from the highest of all democratic values: popular choice. The process of amending the constitution strikes at the heart of what it means to be a people whose disparate members have joined together in a common venture to define themselves as a collective and to build and sustain the apparatus of their state.

To withhold from citizens the power of constitutional amendment is to withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights. Nothing is more democratically objectionable than dispossessing citizens of the power to rewrite the charter governing the boundary separating the citizen from the state, and citizens from themselves. Sequestering this democratic right commandeers the sovereignty that gives democracy its meaning and throws away the key to unlock the handcuffs that constitutions fasten to the wrists of citizens.

The Expressive Function of Entrenchment

There is good reason, though, to design constitutions so as to handcuff the wrists of citizens. Citizens are, after all, self-interested individuals whose first instinct is more often inward-looking and self-regarding than oriented toward the larger, and more public, interests of the community. At their best, constitutions mould disparate persons into members of a joint undertaking who ultimately join together to become, and to see themselves as, citizens of the state.

Constitutions achieve this high ambition by facilitating the development of social conscience, and of a social consciousness, among the citizens of the state in three ways. First, by setting down markers distinguishing proper from improper conduct both by the state toward citizens, and by citizens toward themselves. Second, by clearly demarcating the respective spheres of jurisdiction for the institutions of the state. And, third, by constructing the archetype of a just or ideal society to which citizens and the institutions of the state alike should aspire.

To withhold from citizens the power of constitutional amendment is to withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights.

Entrenchment aims – though falls wide of the mark in its attempt – to fulfil the function of creating a model society. It fails in its mission because it lacks legitimacy insofar as its dictates derive not from the freely given consent of the people but from the often unwelcome and self-imposed will of the past. It is this disconnect – between the aspiration to shape shared values and the coercion to adopt those values – that dooms entrenchment to failure. Nevertheless, entrenchment expresses an important message not only to those bound by the terms of the written constitution but likewise to those outside observers curious to discern the bases and principles upon which stand that particular constitutional state. In addition to setting apart a legal principle, social or moral value, governmental structure or political rule from other constitutional provisions, entrenchment also conveys the symbolic value of that principle, value, structure or rule⁴¹ – the symbolic value that the constitutional entrenchers attributed to it precisely by entrenching it.

This purely expressive function of entrenchment doubles as the core of its merit: deploying symbolic statements – as opposed to using force or other forms of compulsion – to set or correct social norms.⁴² That purposeful symbolism is the subtle, yet paradoxically the most powerful, virtue of entrenchment. For by identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colours in its self-portrait.

The expressive function of entrenchment is not unlike the expressive function of constitutionalism or constitutional law. As Ashutosh Bhagwat writes, when judges interpret the constitution, they proclaim the values that constitute the constitutional culture of the state even as they shape those values.⁴³ Thus when courts engage in constitutional judicial review, they give “concrete expression to the unarticulated values of a diverse nation.”⁴⁴ Yet entrenchment does more than merely express a symbolic statement of unarticulated values. It makes an unvarnished definitive

statement about the values that do and should bind citizens to the state, and citizens to themselves. There is nothing unarticulated about entrenchment. Quite the contrary, the very fact of entrenchment removes any spectre of doubt as to what should be the values of the state.

An important distinction emerges in constitutional scholarship on this point. Scholars distinguish between the expressive and communicative functions of a constitutional text.⁴⁵ The former – expression – refers to an act or omission that unintentionally conveys meaning while the latter – communication – refers to an actual intent to convey meaning. Expression may as a consequence of this distinction occur and exist on its own without communication. For instance, a person may act or fail to act in such a way as to express an affinity for someone or something but that person may not have intended to communicate that affinity. Therefore expression, which is subject to evolving interpretations from third party observers, is a gesture dissociated from intent. In contrast, communication is a gesture whose purpose is indeed to convey an intent and whose meaning is usually settled by the communicator herself. Insofar as the very nature of entrenchment entails a similarly constraining intent to communicate the importance of a principle, value, structure or rule, entrenchment goes beyond simply performing an expressive function. Entrenchment openly marries expression with communication by, first, clearly identifying a constitutional provision as unamendable and, second, just as clearly manifesting the intent to convey the meaning behind the decision to have made that provision unamendable.

That constitutional entrenchment merges expression with communication raises two concerns, each of which, on its own, divests entrenchment of the legitimacy that is the lifeblood of constitutionalism. First, the effect of blending expression and communication is to weaken the potent persuasive subtlety of the expressive force of entrenchment. Standing alone, expressive entrenchment seeps inconspicuously into the consciousness of citizens, slowly but assuredly taking root in the collective spirit of the citizenry. But when this intention is communicated outright, our intuition raises red flags about the motives behind the wish to instil the values entrenched in the constitution. Much better to use the constitutional text to make expressive statements about rights and values, and therefore to allow citizens to reach their own conclusions about the worth of particular values and which ones they wish to adopt as their own, than to impose them from the top downward.

By identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colours in its self-portrait.

Second, the risk inherent in authorising the state or founding drafters to reveal their intent to impose values on a class of citizen subjects – as is the case when expression and communication are combined – is that the chosen values may not find a welcome home in the individual hearts and the shared mores of those citizens. The costs incurred in entrenchment exceed its benefits when what we seek to entrench stands in conflict, and if not in conflict then in some tension, with existing or future beliefs or convictions. This echoes the stakes in the tug of war pitting constitutional structure versus political culture, the former mistakenly as-

suming that it can actually dictate the content of the latter. There is a grave danger in presuming that a constitutional structure, for instance entrenchment, can shape political culture, specifically social values. Indeed, the continuing dialogue about this very matter – a dialogue that is unlikely to achieve resolution any time soon⁴⁶ – demonstrates only one point beyond doubt: that constitutional structure and political culture enjoy a bi-directional relationship in which the form and fate of one is linked to the fate and form of the other.

Therefore, the critical institutional design challenge to breathing legitimacy into constitutional entrenchment is to find a way to isolate its redeeming expressive function from its unproductive communicative function. And that is just what I hope to do. With the entrenchment simulator that I shall unveil in the pages to follow, I will endeavour to achieve twin goals. First, I will aim to capture the salutary expressive essence of entrenchment within the entrenchment simulator. And second, I will seek to disengage entrenchment from its problematic consequence of constraining popular choice and pre-empting self-definition. The immediate purpose of the entrenchment simulator is to signal important social pre-commitments. But its larger purpose is to create sufficient space within which those pre-commitments may evolve over time, as of necessity they must.

Constitutional structure and political culture enjoy a bi-directional relationship in which the form and fate of one is linked to the fate and form of the other.

The Challenge of Constitutional Democracy

But before I proceed to introduce the entrenchment simulator, we must first return to the question that began this inquiry: what is the proper balance between constitutionalism and democracy? This is of course harder said than done. Despite the richness and diversity of constitutional texts around the world, it is difficult to identify a constitutional state whose constitutional text has successfully managed to solve the enduring tension between constitutionalism and democracy. Granted, it may be too much to expect of constitutional designers to do anything but modestly lessen that tension. After all, scholars have long recognised its inevitable persistence,⁴⁷ some even arguing that there is merit to the tension itself and that we should not resolve it.⁴⁸

If successful efforts to assuage the tension are few and far between, quite the contrary is true of constitutional texts that veer too sharply toward either constitutionalism or democracy. Begin first with the former. Above, I have chronicled and illustrated how constitutional states privilege constitutionalism at the expense of democracy by entrenching discrete constitutional provisions. But there exists something far worse than that: constitutional states which entrench the entire constitutional text – each and every constitutional provision – instead of a mere single provision or a few provisions.

To find what is perhaps the most egregious example of a constitutional text that elevates constitutionalism so high above democracy as to render democracy virtually meaningless, we must look to Mexico. True, Mexico permits amendments to its constitution provided that the amendment is approved by a two-thirds supermajority of the national legislature and a majority of the subnational legislatures.⁴⁹ But that is the extent of the revisions or additions permitted by the constitution. Anything more than

discrete amendments to the text is expressly forbidden insofar as the constitution does not contemplate, and indeed rejects, the possibility of a new constitution ever being created to replace the existing one – even if a popular revolution ensues.⁵⁰ The Mexican Constitution consequently makes revolution illegitimate and deprives it of any force of reason before one is ever launched.

That the Mexican Constitution tilts so militantly in favour of constitutionalism as to outlaw revolution – which is the very apex of democratic mobilisation and popular will – should concern anyone infused with the democratic spirit and otherwise committed to the core democratic principles of popular choice and self-definition. The importance of this point cannot on any conceivable grounds be overestimated because its implications are just that colossal. For the Mexican Constitution takes a radical position that effectively holds time and space forever constant, never permitting the kind of political change that has made possible the great democratic transformations in human history, namely the constitutional birth of the United States in 1787,⁵¹ the founding of the first French Republic in 1789,⁵² or the social renewal of South Africa in 1996.⁵³ These possibilities are foreclosed to Mexicans, even if conditions in their state deteriorate so intolerably as to require broad popular mobilisations to reclaim the nation from a despot or illegitimate rulers. There may, therefore, be no better example than the Mexican Constitution to demonstrate how the reverence for written constitutionalism has in some constitutional states suppressed democracy and prevented citizens from exercising their legitimate authority to change or chart the constitutional course of their state.

But let us also recognise that constitutional states can just as well commit the contrary though equally objectionable offence, that is to say, privileging democracy at the expense of constitutionalism.⁵⁴ Switzerland is the paradigmatic model of a state where procedural democracy is the highest value. Long regarded as the modern cradle of direct democracy,⁵⁵ Switzerland has accordingly conferred upon itself a constitution that grants unreviewable power to its citizens, placing no matter of law, rights or policy beyond their reach. Citizens may vote in referenda to overrule legislation, revise and reverse matters of social policy, reconfigure the organs of the state, and engage in wholesale constitutional change.⁵⁶ And Swiss citizens may do all of this with a bare majority.⁵⁷

That Swiss citizens have the final say in constitutional matters is not out of the ordinary. American citizens, for example, retain determinative control over their constitution, provided they can muster the requisite supermajorities to successfully navigate the amendment process.⁵⁸ However, what makes the Swiss model so exceptional in its inclination toward majoritarian democracy and in its disinclination toward constitutionalism is that, quite unlike the United States and other leading liberal democracies, Switzerland does not allow judicial review of federal legislation.⁵⁹

This unbridled Swiss majoritarianism is just as alarming as the Mexican constitutional entrenchment is restrictive. Both do equal parts injustice and harm to popular choice [...].

This is consistent with the theme that runs through the entire Swiss public constitutional apparatus: majoritarian public choice. Whereas courts typically function as the supervisory force against the threat of majoritarianism in liberal democracies, courts in

Switzerland have no such role. No check, therefore, constrains the majoritarian wishes – or more accurately, the impulses – of Swiss citizens.

This unbridled Swiss majoritarianism is just as alarming as the Mexican constitutional entrenchment is restrictive. Both do equal parts injustice and harm to popular choice, the former because it fails to test the strength and sustainability over time of that choice, and the latter because it gives insufficient respect to it. And that is the harm in subscribing indiscriminately to either constitutionalism or democracy without recognising that each has strengths that compensate for the weakness of the other.

Our challenge, then, is to make peace between constitutionalism and democracy. Resolving the tension between them will require, first, building on their respective strengths and compensating for their respective weaknesses and, second, fashioning a constitutional structure that will make real the promise that both hold for humanity. This, in my view, is no small feat insofar as it demands the design of a constitutional device exhibiting three components: (1) entrenchment; (2) expression; and (3) an escape hatch.

Before I outline each of these three items, let me say a short word on each. First, the text need not necessarily entrench a legal principle, social or moral value, governmental structure or political rule. But if it does, it should not resort to indefinite constitutional entrenchment. The text should instead entrench that principle, value, structure or rule in a way that corresponds to the fourth station of entrenchment – which I call *heightened constitutional entrenchment*⁶⁰ – pursuant to which the constitutional text demands special procedures (which depart from the default constitutional amendment procedures) to amend that entrenched item. Second, it is preferable to enshrine some degree of entrenchment beyond the third station of entrenchment – which I call *conventional constitutional entrenchment*⁶¹ – because of the expressive and symbolic value that only a special form of entrenchment can convey. And since the fifth and final station – *indefinite constitutional entrenchment* – is much too constraining, only the fourth station remains as a possibility.⁶²

We cannot resolve the tension between constitutionalism and democracy merely by tilting the scales less so in favour of constitutionalism. We must instead make a very real effort to actualise the underlying premise of procedural democracy while, nonetheless, guarding against the menace of majoritarianism.

Finally, we cannot resolve the tension between constitutionalism and democracy merely by tilting the scales less so in favour of constitutionalism. We must instead make a very real effort to actualise the underlying premise of procedural democracy while, nonetheless, guarding against the menace of majoritarianism. We can achieve this balance if, alongside the use of some degree of constitutional entrenchment, we grant citizens an escape hatch to pull if they wish to extricate themselves from the handcuffs that entrenchment wraps around their wrists. That escape hatch is provided by the fourth station of entrenchment – *heightened constitutional entrenchment* – precisely because it does not consign citizens to life under indefinite constitutional entrenchment but rather allows them to exercise their popular choice. It is true, however, that citizens exercise their popular choice under constrained conditions, but this restriction on democracy is both politically useful and socially vital in a liberal democracy.

The entrenchment simulator achieves each of these three objectives. It is a constitutional structure whose aim is to reconcile constitutionalists with democrats by pooling the virtues of constitutionalism and democracy, and by mitigating their respective limitations. The entrenchment simulator creates a new constitutional arrangement whose function is to govern both the content and timing of constitutional amendments. Were constitutional states to adopt this entrenchment simulator, they would achieve the expressive benefits of constitutional entrenchment while not compromising the popular choice and self-definition underlying procedural democracy.

Three elements form the basic apparatus of the entrenchment simulator: (1) interim induction; (2) constitutional rank; and (3) sequential approval. The first, interim induction, seeks to respond to the challenge that confronts constitutional designers when they endeavour to introduce, and in so doing to entrench, new values into the national consciousness. Constitutional designers may often face resistance from citizens, who may for various reasons be unreceptive to new values; for instance, a new founding commitment to preserving federalism or unitarism; presidentialism or parliamentarism; republicanism or monarchism; religion or secularism; or a commitment to transforming the state through civil and political rights or through electoral procedures, or even a new founding commitment to reconciliation. In order to allow sufficient opportunity for the new values to take root in the citizenry, the entrenchment simulator mandates a period of induction – measured from the date the entrenchment comes into force – during which those newly entrenched values enjoy absolute immunity from constitutional amendment. Not even unanimity may overturn the entrenched provision.

Induction serves an important function. Insofar as there are long odds facing any attempt to deploy constitutional structure to shape political culture, induction helps facilitate the process of infusing new values into the lives and being of citizens. Induction – by which I mean a period of acculturation during which new constitutional values introduced by entrenchment are assimilated – gives those new values a chance to take root and, once rooted, to remain in the consciousness of citizens. Consider it a mandatory trial run whose animating hope is that, by the end of the designated induction stage, what may have been viewed initially as controversial or foreign values imposed by elites ultimately become ingrained in the quilt of state and the fabric of citizenship – so deeply that they become constitutive of nationhood, just as the constitutional framers had hoped.

Without this period of courtship between the text and the citizen, a constitutional state may never be fully capable of making a clean break from the past and charting a new direction. With the possibility looming of a constitutional amendment returning the state to days past or changing constitutional clothes yet again, there is no assurance that the vision of the framers will ever be given a real opportunity to take hold. But induction creates and cultivates that opportunity.

Just how long this period of induction should last before citizens may once again reclaim their right to amend the constitution is a difficult matter. On the one hand, limiting the induction period to a few years may be too short a time span because it would be insufficiently long to inculcate citizens with new values. On the other, extending induction to much more than an entire genera-

tion, say over twenty years or so, may be too long because it would approximate too closely the perilous conditions of constitutional entrenchment we have canvassed above.

Induction serves an important function. Insofar as there are long odds facing any attempt to deploy constitutional structure to shape political culture, induction helps facilitate the process of infusing new values into the lives and being of citizens.

Looking to those constitutional states currently imposing a comparable though not quite similar temporal restriction against amending new constitutional provisions, we may conclude that they generally ban amendments anywhere from five to ten years from the date of enactment.⁶³ Afterwards, the constitutionally protected provision reverts to normal status and may be freely amended according to the conventional rules of constitutional amendment. Five or even ten years seems like much too little time to allow new values to permeate the state and its citizens. However, one generation or more seems right, although each constitutional state availing itself of the entrenchment simulator could of course tailor this time period to its own indigenous needs and conditions. Still the principle remains clear: induction – which entrenches a constitutional provision for only an abbreviated period of time – serves the purpose of breathing new values into citizens, fully consistent with what constitutional entrenchers hope will transpire when a people confers a new constitution upon itself. But induction on its own is insufficient to help right the balance between constitutionalism and democracy. Without more added to our design, an entrenched constitutional provision will revert to being a conventional constitutional provision after the designated time has elapsed following the interim induction period. The entrenchment simulator addresses this problem with its second component: constitutional rank. To understand the notion of constitutional rank, we must return to the fourth station of constitutional entrenchment: heightened constitutional entrenchment. What motivates constitutional designers who adopt indefinite constitutional entrenchment is the conviction that certain features of the state are more important, and if not more important then more constitutive, of the state and its citizens. For that is the effect, either real or perceived or both, of entrenching a legal principle, social or moral value, governmental structure or political rule. Constitutional designers resort to indefinite constitutional entrenchment to establish a hierarchy of constitutional provisions, which represents an implicit rank ordering of constitutional values. Indefinitely entrenched provisions are regarded by the framers as not only qualitatively different but more valuable than the conventionally entrenched provisions – and those framers hope that these entrenched values will ultimately come to be seen as such both by citizens and third-party observers. This is the inevitable consequence of indefinite constitutional entrenchment. By entrenching a particular feature of the constitution, constitutional designers envelop that feature in a certain measure of legitimacy – founding legitimacy, as opposed to continuing popular legitimacy (though the two are not mutually exclusive) – which results in elevating that feature above all other conventionally entrenched constitutional provisions. The upshot of indefinite constitutional entrenchment is that it creates tiers of significance among constitutional provisions. That is what I mean by constitutional rank.

Using the concept of constitutional rank, the entrenchment simulator establishes tiers of escalating significance among constitutional provisions. But it does so in a way that retains the amendability of those constitutional provisions designated as most important in the constitutional order. Recalling that the entrenchment simulator rejects indefinite constitutional entrenchment as illegitimate and imprudent, the alternative that presents itself is heightened constitutional entrenchment. Two positive benefits flow from inviting constitutional states to rely on heightened constitutional entrenchment in their constitutional design. First, heightened constitutional entrenchment exercises the same expressive function as indefinite constitutional entrenchment, signalling both to citizens and to third party observers what is thought to be most important about the state: its design and its citizens. Second, it goes beyond simply distinguishing between the two tiers of entrenchment – indefinite constitutional entrenchment and conventional constitutional entrenchment – that we discern in constitutional states deploying indefinite constitutional entrenchment. Rather, heightened constitutional entrenchment folds within itself an infinite possibility of tiers of entrenchment that constitutional designers can use to distinguish among several tiers of constitutional provisions. Those possibilities range from conventional constitutional entrenchment to multiple incarnations of heightened constitutional entrenchment, but they exclude indefinite constitutional entrenchment.

Heightened constitutional entrenchment folds within itself an infinite possibility of tiers of entrenchment that constitutional designers can use to distinguish among several tiers of constitutional provisions.

We might imagine, for example, a hypothetical presidential state designating four tiers of constitutional provisions.⁶⁴ The fourth, and lowest, tier could include the basic structural provisions of the constitution, namely providing that the chambers of the bicameral national legislature consist of 300 representatives in the lower house and 100 senators in the upper house. This bottom tier would be subject to the default rules of constitutional amendment mandated in the constitutional text. Let us posit, in this instance, that the default rule for amending the constitution requires two-thirds concurrence of each chamber as well as two-thirds concurrence of the subnational legislatures.

Moving upward along our constitutional hierarchy, the third tier of constitutional provisions would require a more exacting threshold for amending the constitution – say, three-quarters concurrence of each chamber and two-thirds of the subnational legislatures – and consist of constitutional provisions thought by the framers to be more important than the simple distribution of seats in the bicameral legislature, for instance term limits on presidential service. In the second tier, which could include, just as an example, a constitutional provision requiring the president and the bicameral national legislature to pass a balanced budget each year, the rule for amending the constitution would be tougher even still: three-quarters approval of each legislative chamber and three-quarters of the subnational legislatures.

Finally, the first and highest tier of constitutional rank in our hypothetical could conceivably include a rule that is so deeply interconnected with the founding moments of the state – consider perhaps the secular nature of the state – that it requires an

even more exigent quantum of popular and legislative approval: three-quarters approval from both the bicameral national legislature and the several subnational legislatures as well as three-quarters approval of the citizenry in a referendum.

Constitutional rank, then, is the incarnation of heightened constitutional entrenchment. For when one invokes the latter, one is by implication declaring that there exists an echelon of merit according to which each constitutional provision may be classified. If a principle, value, structure or rule is regarded as minimally more important than a conventional constitutional provision but less important than the most important constitutional feature of the state, then it should be categorised according to the lowest level of heightened constitutional entrenchment – the lowest constitutional rank within that degree of entrenchment. Conversely, if it is viewed as markedly more important than a conventional constitutional provision and minimally less important than the most important constitutional feature of the state, then it should be categorised according to the highest level of heightened constitutional entrenchment – otherwise understood as the highest constitutional rank within that degree of entrenchment.

If a principle, value, structure or rule is regarded as minimally more important than a conventional constitutional provision but less important than the most important constitutional feature of the state, then it should be categorised according to the lowest level of heightened constitutional entrenchment.

Constitutional designers may accordingly enjoy the sweet without suffering through the sour if they adopt this strategy, because it bestows upon the constitution and the state the expressive benefits of entrenchment while not weakening the democratic core of the citizenry. By highlighting the richness of entrenchment possibilities that lie between conventional constitutional entrenchment and indefinite constitutional entrenchment, heightened constitutional entrenchment and its incarnation in the notion of constitutional rank demonstrates the merit of this second feature of the entrenchment simulator.

Now, having reached the third element of the entrenchment simulator, the entire mechanism begins to take final shape. If induction serves the purpose of creating a safe harbour within which constitutional framers may endeavour to shape the contours of and instil new values into citizens, and if ranking allows framers to express both implicitly and explicitly what they deem most constitutive of statehood and citizenship, then the third element – sequential approval – is the mechanism through which citizens may manifest their intention to free themselves from the handcuffs that the constitutional entrenchers have wrapped around their wrists. It is, in short, the escape hatch that citizens can pull to liberate themselves from the past and to propel themselves into their own self-defined collective future.

Sequential approval requires that citizens express their freely-given views on whether to amend a particular constitutional provision falling within a class of heightened constitutional entrenchment. But sequential approval requires that citizens express their consent to such an amendment more than once, in at least one initial and one subsequent confirmatory vote, and according to a clearly delimited majority defined in the constitutional text. Although the actual majority threshold would presumably vary from one constitutional text to another – as would the number of times

that citizens would be required to reach that particular majority in different votes separated by a constitutionally defined period of time – the principle remains the same despite any wrinkles that may exist among constitutional states adopting the entrenchment simulator.

Let us deconstruct the following hypothetical constitutional rule mandating sequential approval: “In order to be approved, an amendment to [provision x] shall require a supermajority of eligible citizens to vote in favour of the amendment on two separate occasions separated by five full years as of the day of the first vote.” We should note three things about this hypothetical rule. First, the threshold for amendment is high: a supermajority of citizens. Second, the confirmatory vote occurs only in the event of a successful supermajority vote in favour of the amendment at the initial vote. Third, the confirmatory vote is separated from the initial vote by five full years, which would mean in most constitutional democracies that there had been intervening legislative or executive elections, or both.

This is significant for three reasons: namely that the supermajority threshold tests the strength and intensity of popular will for an amendment; that the five-year waiting period would verify the sustainability over time of the popular choice to amend the constitution; and that the intervening elections would have afforded electoral candidates the opportunity to voice their opinion on the amendment at a time when citizens would have been most likely to engage attentively to the ongoing political discourse. Of course, this hypothetical constitutional rule is just that – hypothetical.⁶⁵ Nevertheless, it lays bare the usefulness of sequential approval.

Sequential approval [...] is the mechanism through which citizens may manifest their intention to free themselves from the handcuffs that the constitutional entrenchers have wrapped around their wrists.

Recall our baseline premise: we must mitigate the menace of majoritarianism, which typically manifests itself in mob mentality that prefers to act on emotion in the immediacy of the moment rather than to take the necessary time to deliberate carefully and critically about the proper course of action. Requiring sequential approval helps ensure that the popular will accurately reflects the considered and thoughtful judgment of the citizenry instead of its most primal predispositions, which is precisely the source of our discomfort about majoritarianism. Quite apart from the temporal element of sequential approval, combining time and threshold makes it even harder to amend a provision that has been entrenched pursuant to heightened constitutional entrenchment because it requires a special majority to do so. That citizens in favour of reversing the entrenched provision must meet the designated special majority threshold more than once is yet another way to mitigate majoritarianism. For were citizens to form the requisite majorities successfully twice over the designated period of time, it would rebut the presumption of the transient and fickle nature of citizens – the very vices that raise concerns about majoritarianism.

That is the entrenchment simulator. It consists of three distinguishable elements: first, an interim induction period, during which new values or principles are given time to integrate into the constitutional culture of the state and its citizens; second, a constitutional ranking arrangement, pursuant to which constitu-

tional designers may designate, with the use of heightened constitutional entrenchment, different tiers of constitutional provisions on the basis of their respective significance to the state; and third, a requirement of sequential approval, which imposes both temporal and voting threshold obstacles to amending those entrenched constitutional provisions. Each of these three elements, taken together, helps us address the enduring tension between constitutionalism and democracy.

To recap the ground we have covered, let us reflect on the concern that prompted our inquiry: many constitutional states have, to their liking and with several different devices, resolved the tension between constitutionalism and democracy in favour of constitutionalism, most notably by indefinitely entrenching constitutional provisions beyond the reach of the citizenry. The consequence of prohibiting citizens from exercising their right to amend their own constitution is to divest citizens of their right to self-definition and popular choice, in essence forever tying their hands with no recourse ever to free themselves from their predicament. We should of course expect that constitutions would handcuff citizens, in so doing preventing them from taking actions that the state, the founding drafters, as well as intervening generations of constitutional amenders deem improper in that particular society at that particular time. But indefinite constitutional entrenchment does not simply handcuff citizens – something that all constitutions do, as they should. Indefinite constitutional entrenchment throws away the keys to those handcuffs, consigning citizens into the permanent custody of the entrenching generation.

Constructing a mechanism to return those keys to citizens is no easy task. But the entrenchment simulator may hold promise for meeting that challenge. In confronting the tension between constitutionalism and democracy, the entrenchment simulator strikes a compromise between, on the one hand, the unforgiving rigidity that is characteristic of indefinite constitutional entrenchment and, on the other, the public autonomy that democratic liberty entails. Three points are useful by way of summary.

First, the entrenchment simulator recognises the importance of entrenchment. But it privileges heightened constitutional entrenchment over indefinite constitutional entrenchment because the former keeps the keys to self-definition within the reach of citizens, however complicated the labyrinthine rules to amend a provision subject to heightened constitutional entrenchment may be. Second, the reason why the entrenchment simulator looks so favourably upon some measure of entrenchment is precisely because of the expressive value that entrenchment entails. Fixing common civic objectives and anchoring the state in shared social and political values is exceedingly important to creating and cultivating a community of citizens. The entrenchment simulator latches onto expressiveness as the vital means to that critical end.

But indefinite constitutional entrenchment does not simply handcuff citizens – something that all constitutions do, as they should. Indefinite constitutional entrenchment throws away the keys to those handcuffs, consigning citizens into the permanent custody of the entrenching generation.

Finally, the entrenchment simulator acknowledges that it is an event of high moment to undertake the process of unentrenching a constitutional provision whose drafters thought it was so foundational as to merit entrenchment in the first place. That is why

the entrenchment simulator adds a temporal element to the task of amending an entrenched constitutional provision. To guard against the perils of majoritarianism, the entrenchment simulator calls for special majorities to express their collective wish to unentrench an entrenched provision – not only on one occasion, for instance a single referendum conducted on a single day, but rather on multiple occasions over different periods of time. This last wrinkle strives to ensure both that, in the interest of constitutionalism, a sustained special majority has sufficient time to deliberate on the enormity of amending an entrenched constitutional provision and that, in the interest of democracy, citizens retain determinative decision-making authority to shape their state.

Conclusion

Perhaps the tension between constitutionalism and democracy will never quite fade. Constitutionalism and democracy are, after all, each anchored in opposing visions of statehood and citizenship. The former orients itself toward substantive principles that can often be achieved only by pinching down on the procedural values that give meaning to the latter. And the latter privileges civic participation in the very democratic processes that the former constrains with rules about who may participate, when and how they may do so, and toward what ends. It therefore seems unavoidable that constitutionalism and democracy would sometimes clash, and that the former would prevail in some contexts just as the latter would reign in other contexts.

What is not inescapable, however, is that one would so dominate the other as to reduce it to a mere shell of itself. Yet that is precisely what results from entrenchment. When constitutional drafters entrench constitutional provisions against amendment by even the most compelling popular or legislative majorities, the consequence is to cast constitutionalism in the leading role and to relegate democracy to the background. Entrenchment invites constitutionalism to breathe in all of the available oxygen, and in so doing it chokes democracy into submission. For by divesting citizens of the fundamental civic right to popular choice and self-definition, entrenchment undermines the promise of citizenship and the possibilities of constitutionalism.

Entrenchment invites constitutionalism to breathe in all of the available oxygen, and in so doing it chokes democracy into submission.

The entrenchment simulator begins the critical work of reversing the tide of constitutionalism in constitutional states. The purpose of the entrenchment simulator is not necessarily to elevate democracy over constitutionalism. It is more modestly to right the balance that has undeniably shifted away from democracy since the advent of the written constitution. Indeed, if anything may be said about the preferences betrayed by the entrenchment simulator, it is that it cedes to constitutionalism much of the terrain once governed by democracy. But with good reason, given the inherent dangers of majoritarianism that modernity has demonstrated with sharp and disconcerting clarity.

There, nevertheless, remains much work left to do to strike the proper balance between constitutionalism and democracy. The road ahead is admittedly long. But the entrenchment simulator holds promise for resolving this enduring tension – a tension that continues to define the stakes in constitutional law and theory

to this very day. Only by holding firm to foundational principles of statehood and citizenship – namely the freedom of popular choice, the right to self-definition, and the legitimacy of public authority – may we ultimately achieve a comfortable consensus on how rigidly constitutionalism may constrain democracy and what democracy must surrender to constitutionalism.

Notes

1 Editorial note: This is an abbreviated version of a longer article originally published in volume 42 (3/2010) of the *Arizona State Law Journal*, pages 663-715.

2 The tension sets liberal constitutionalism in opposition to procedural democracy. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. CHI. L. REV.* 689, 701–02 (1995); James E. Fleming, *The Missing Selves in Constitutional Self-Government*, 71 *FORDHAM L. REV.* 1789, 1793 (2003); James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 219 n.35 (1993); José Julián Álvarez González, *Another Look at the Discretionary Constitution*, 71 *REV. JUR. U.P.R.* 1, 22 (2002); Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1861 (2004); Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 *CARDOZO L. REV.* 1055, 1061 (2006); Frank I. Michelman, *Brennan and Democracy*, 86 *CAL. L. REV.* 399, 400 (1998); Irwin P. Stotzky, *The Role of a Free Press and Freedom of Expression in Developing Democracies*, 56 *U. MIAMI L. REV.* 255, 256 n.2 (2002); Cass R. Sunstein, *Constitutionalism and Secession*, 58 *U. CHI. L. REV.* 633, 636 (1991). But see JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 163 (2001) (advancing a theory of constitutionalism as democracy); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 197 (Jon Elster & Rune Slagstad eds., 1988) (arguing that constitutionalism and democracy are mutually reinforcing).

3 See, e.g., *CONSTITUIÇÃO FEDERAL [C.F.] [Constitution]* tit. IV, ch. 1, sec. IV, art. 52(x) (Braz.) (authorising the Senate to limit the scope of a judicial decision); Part I of the *Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 § 33(1)* (U.K.) (authorising Parliament or provincial legislatures to suspend the application of a judicial decision).

4 See, e.g., *New Zealand Bill of Rights Act 1990*, 1990 No. 109, Part 1 §§ 4(b), 6 (compelling the judiciary to interpret a parliamentary law in a manner that avoids invalidating it); *United Kingdom Human Rights Act of 1998*, § 4 (authorising the judiciary to issue declarations of incompatibility but not to invalidate legislation).

5 See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004) (tracing the development of proportionality analysis).

6 See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *AM. POL. SCI. REV.* 355, 355–57 (1994).

7 Scholars have used various terms for these unamendable provisions. For instance, some have called them eternity clauses. See, e.g., Robert J. Delahunty, *The Battle of Mars and Venus: Why do American and European Attitudes Toward International Law Differ?*, 4 *LOY. U. CHI. INT'L L. REV.* 11, 29–30 (2006); James J. Killian, *Der große Lauschangriff: Germany Brings Home the War on Organized Crime*, 23 *HASTINGS INT'L & COMP. L. REV.* 173, 186–87 (2000); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 *EMORY L.J.* 837, 846 (1991); Manfred Zuleeg, *What*

Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union, 45 *AM. J. COMP. L.* 505, 510 (1997); Peter L. Linseth, Book Review, 25 *L. & HIST. REV.* 229, 229–30 (2007) (reviewing MICHAEL STOLLEIS, *A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945* (Thomas Dunlop trans. 2004)). Others have called them perpetuity clauses. See, e.g., Gunnar Beck, The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness, 25 *PENN ST. INT'L L. REV.* 615, 615 n.2 (2007); Colin B. Picker, International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, 41 *VAND. J. TRANSNAT'L L.* 1083, 1093 n.46 (2008); Richard Stith, Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court, 11 *AM. U. J. INT'L L. & POL'Y* 47, 48 n.5 (1996). Still others call them nonamendable clauses. See, e.g., William E. Forbath, The Politics of Constitutional Design: Obduracy and Amendability – A Comment on Ferejohn and Sager, 81 *TEX. L. REV.* 1965, 1982 n.65 (2003); Burt Neuborne, Constitutional Court Profile: The Supreme Court of India, 1 *INT'L J. CONST. L.* 475, 495 n.84 (2003); Vijayashri Sripathi, Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000), 14 *AM. U. INT'L L. REV.* 413, 440 n.155 (1998). 8 *COSTITUZIONE [COST.] [Constitution]* art. 139 (Italy). 9 *GG art. 79(3)* (F.R.G.). 10 *TÜRKIYE CUMHURİYETİ ANAYASASI [Constitution]* part I, art. 4 (Turk.). 11 This term is not new. See, e.g., Alexander Hanebeck, Democracy Within Federalism: An Attempt to Reestablish Middle Ground, 37 *SAN DIEGO L. REV.* 347, 363 (2000); John R. Vile, Truism, Tautology or Vital Principle? The Tenth Amendment Since *United States v. Darby*, 27 *CUMB. L. REV.* 445, 496 (1996); Scott J. Bowman, Comment, Wild Political Dreaming: Constitutional Reformation of the United States Senate, 72 *FORDHAM L. REV.* 1017, 1028 (2004); see also David Fontana, Comment, A Case for the Twenty-First Century Constitutional Canon: *Schneiderman v. United States*, 35 *CONN. L. REV.* 35, 44 n.41 (2002) (discussing the theory of entrenchment). There exists, however, some ambiguity in the literature between an entrenchment clause and an entrenched clause. In my view, the best reading of these terms suggests that the former is the mechanism that entrenches the latter. But not all scholars agree. Compare Charles A. Kelbley, Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality, 72 *FORDHAM L. REV.* 1487, 1529 (2004) (referring to entrenched clauses as entrenchment clauses), and Sydney Kentridge, Civil Rights in Southern Africa: The Prospect for the Future, 47 *MD. L. REV.* 271, 277–78 (1987) (same), and Yoram Rabin & Arnon Gutfeld, *Marbury v. Madison* and its Impact on Israeli Constitutional Law, 15 *U. MIAMI INT'L & COMP. L. REV.* 303, 313 n.30, 313 n.34 (2007) (same), with Anthony D'Amato, Legal Uncertainty, 71 *CAL. L. REV.* 1, 28 n.59 (1983) (correctly, yet implicitly, distinguishing between entrenched and entrenchment clauses); Ernst Wilhelm, Review of Australian Public Law Developments, 30 *MELB. U. L. REV.* 269, 270–71 (2004) (same). In these pages, I will refer to entrenched clauses as entrenchment clauses in the interest of consistency. For a helpful discussion of the distinction between entrenched clauses and entrenchment clauses, see Jason Mazzone, Unamendments, 90 *IOWA L. REV.* 1747, 1818 (2005); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 *U. CHI. L. REV.* 1043, 1044 n.1 (1988); Frank I. Michelman, Book Review, Courts and Constitutions: Thirteen Easy

Pieces, 93 *MICH. L. REV.* 1297, 1303 & n.27 (1995) (reviewing *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995)); see also Matthew S.R. Palmer, Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution, 54 *AM. J. COMP. L.* 587, 609–10 (2006) (correctly distinguishing between the two types of clauses but using the term entrenching instead of entrenchment).

12 See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 320–21 (1991); JOHN RAWLS, *POLITICAL LIBERALISM* 238–40 (2d ed. 2005); Cass R. Sunstein, American Advice and New Constitutions, 1 *CHI. J. INT'L L.* 173, 185 § 7 (2000); Stephen Townley, Perspectives on Nation-Building, 30 *YALE J. INT'L L.* 357, 365 (2005). But see Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 *HARV. L. REV.* 1693, 1727 n.118 (2008) (suggesting, though not asserting, concerns with entrenchment).

13 MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 113 (2003).

14 On the notion of unwritten constitutional amendments, see ACKERMAN, *supra* note 11; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Sanford Levinson, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 25–32 (Sanford Levinson ed., 1995); David A. Strauss, Common Law Constitutional Interpretation, 63 *U. CHI. L. REV.* 877, 884 (1996).

15 See, e.g., *CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [Constitution]* ch. XV, art. 137 (Cuba); *REPÚBLICA DOMINICANA [Constitution]* tit. XIII, art. 116 (Dom. Rep.); *CONST. OF THE KINGDOM OF NORWAY*, pt. E, art. 112 (1814).

16 See, e.g., *CONSTITUTION DE LA RÉPUBLIQUE GABONAISE [Constitution]* tit. XII, art. 116 (Gabon); *LA CONSTITUTION DE LA RÉPUBLIQUE DE MADAGASCAR [Constitution]* tit. VIII, art. 140 (Madag.); *LA CONSTITUTION DE LA RÉPUBLIQUE TUNISIENNE [Constitution]* ch. X, art. 76 (Tunis.).

17 See Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 *SUFFOLK U. L. REV.* 27, 27–28 (2005); William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 *MICH. L. REV.* 2062, 2064–65 (2002); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 *U. PA. L. REV.* 297, 351 (2001).

18 See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 142 (2d ed. 2005).

19 See, e.g., Michael J. Klarman, What's So Great About Constitutionalism?, 93 *Nw. U. L. REV.* 145, 184 (1998) (suggesting that the rules to amend the United States Constitution are so arduous that the Constitution is, for all intents and purposes, entrenched); Wendy Turnoff Atrokhov, Note, The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in The Russian Federation Amidst the Chechen Crisis, 32 *CORNELL INT'L L.J.* 367, 381 (1999) (referring to the difficulty of amending the Russian Constitution).

20 Although constitutional scholars do not discuss entrenchment in these terms, the notion of degrees of entrenchment is implicit in their work. See, e.g., Lourens W. H. Ackermann, The Legal Nature of the South African Constitutional Revolution, 2004 *N.Z. L. REV.* 633, 645 (2004); Robert Kwame Ameh, Doing Justice After Con-

- flict: The Case for Ghana's National Reconciliation Commission, 21 *CAN. J.L. & SOC'Y* 85, 101 (2006); Carlos E. Gonzalez, Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?, 80 *WASH. U. L.Q.* 127, 229 (2002); A. Leon Higginbotham, Jr. et al., De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990 *U. ILL. L. REV.* 763, 783 n.77; Tayyab Mahmud, Jurisprudence of Successful Treason: Coup d'Etat & Common Law, 27 *CORNELL INT'L L.J.* 49, 60 (1994); Ariel Porat & Omri Yadlin, Promoting Consensus in Society Through Deferred-Implementation Agreements, 56 *U. TORONTO L.J.* 151, 176 (2006).
- 21 The number of stations in our sliding scale would of course vary from one jurisdiction to the next, depending on the structure of the legal order (namely whether it is presidential, parliamentary, semi-presidential or otherwise), on the rules of constitutional modification enshrined in the text of the constitution, and on the profile of its constitutional hierarchy (specifically where sovereignty rests within each of these models, for instance in the legislature, judiciary, executive, elsewhere or some form of shared sovereignty).
- 22 Walter Dellinger makes a good case that constitutional legitimacy flows from the consent of the governed. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *HARV. L. REV.* 386, 387 (1983).
- 23 Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1861–62 (2004).
- 24 See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 *HARV. INT'L L.J.* 1, 14–15 (1995).
- 25 *Id.* at 16.
- 26 Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 *VAND. L. REV.* 327, 329–31 (1997).
- 27 See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).
- 28 *Id.* at 87.
- 29 Jiri Priban, *Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making*, 38 *LAW & SOC'Y REV.* 407, 415 (2004).
- 30 Daniel Markovits, *Democratic Disobedience*, 114 *YALE L.J.* 1897, 1906 (2005).
- 31 See, e.g., WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* (1991). Indeed, the German Basic Law is the product of a distinctly substantive, rather than procedural, conception of democracy. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2066–67 (1997); Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 *U. CHI. L. SCH. ROUNDTABLE* 301, 302 (1998). For a concise chronicle of the motivations behind the substantive focus of the German Basic Law, see Brendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 *U.C. DAVIS J. INT'L L. & POL'Y* 267, 281–86 (1996).
- 32 See, e.g., P. ERIC LOUW, *THE RISE, FALL, AND LEGACY OF APARTHEID* (2004). In South Africa, the oppressive regime was in the minority and the oppressed peoples formed the majority. But the minority created political institutions, most notably the Tricameral Parliament, designed with special procedures to permit the minority to govern as the de facto majority over the de jure majority. See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 9 (2000).
- 33 See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).
- 34 Erwin Chemerinsky, *The Supreme Court 1988 Term-Foreword: The Vanishing Constitution*, 103 *HARV. L. REV.* 43, 83–84 (1989).
- 35 *Id.* at 64–74.
- 36 Compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665 (2002) (arguing that an earlier legislature may bind a future legislature), with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 *VA. L. REV.* 385 (2003) (critiquing the theory of legislative entrenchment advanced by Posner and Vermeule), and John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *CAL. L. REV.* 1773 (2003) (same).
- 37 A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 18–25 (Liberty Fund 8th ed. 1982); H.L.A. HART, *THE CONCEPT OF LAW* 148–52 (2d ed. 1994).
- 38 See Sanford Levinson, *The Political Implications of Amending Clauses*, 13 *CONST. COMMENT.* 107, 116–17 (1996).
- 39 Samuel Issacharoff, *Fragile Democracies*, 120 *HARV. L. REV.* 1405, 1429 (2007).
- 40 Ernst Benda, *The Protection of Human Dignity*, 53 *SMU L. REV.* 443, 445 (2000) (elaborating this point in the context of German constitutionalism).
- 41 Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 *U. CHI. L. REV.* 447, 471 (1991).
- 42 See Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2024–25 (1996).
- 43 Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 *CONN. L. REV.* 961, 1002 (1998).
- 44 PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 211 (1982).
- 45 See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. PA. L. REV.* 1503, 1508 (2000).
- 46 See, e.g., Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 *ANNALS AM. ACAD. POL. & SOC. SCI.* 173, 178 (2001); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 *TEX. L. REV.* 1763, 1775–76 (2004); Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, 14 *CARDOZO ARTS & ENT. L.J.* 297, 336–37 (1996); Roger B. Myerson, *Economic Analysis of Constitutions: The Strategic Constitution*, 67 *U. CHI. L. REV.* 925, 928–29 (2000); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1, 3 (2003).
- 47 See, e.g., Kim Lane Scheppele, *Parliamentary Supplements (Or Why Democracies Need More than Parliaments)*, 89 *B.U. L. REV.* 795, 807 (2009); Mark Tushnet, *The Hartman Hotz Lecture: Dialogic Judicial Review*, 61 *ARK. L. REV.* 205, 206 (2009).
- 48 See, e.g., JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 165–67 (1984); Matthew C. Stephenson, *“When the Devil Turns...”: The Political Foundations of Independent Judicial Review*, 32 *J. LEGAL STUD.* 59, 85–86 (2003); George Thomas, *The Tensions of Constitutional Democracy*, 24

CONST. COMMENT. 793, 797 (2007) (reviewing WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007)).

49 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, tit. VIII, art. 135, 5 de Febrero de 1917 (Mex.).

50 Id. tit. IX, art. 136, 5 de Febrero de 1917 (Mex.).

51 See DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION (2008).

52 See HORACE MANN CONAWAY, THE FIRST FRENCH REPUBLIC (1902).

53 See HEATHER DEEGAN, SOUTH AFRICA REBORN: BUILDING A NEW DEMOCRACY (1999).

54 One particularly fascinating example that appears to privilege democracy at the expense of constitutionalism, yet actually does the reverse, is the El Salvadorian Constitution, which obliges citizens to mount an insurrection in the event that an entrenched rule is violated. See CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR [Constitution], tit. III, art. 88 (1983) (El. Salv.). While this would appear to celebrate the democratic mobilisation without which insurrection would be impossible, the implicit purpose of that mobilisation actually undermines the popular choice and self-definition that mobilisation presupposes – precisely because the constitutional text commands eternal obedience to an unchangeable constitutional rule.

55 See, e.g., KRIS W. KOBACH, THE REFERENDUM: DIRECT DEMOCRACY IN SWITZERLAND (1993); Peter Sager, Swiss Federalism: A Model for Russia?, 1995 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 163, 164 (1995).

56 CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE, April 18, 1999, SR 101, RO 101, art. 138–41 (Switz.).

57 Id. art. 142.

58 U.S. CONST. art. V.

59 See Nicholas Aroney, Formation, Representation and Amendment in Federal Constitutions, 54 AM. J. COMP. L. 277, 286 (2006).

60 See discussion *supra* *Degrees of Permanence*.

61 See discussion *supra* *Degrees of Permanence*.

62 See discussion *supra* *Degrees of Permanence*.

63 See, e.g., THE CONSTITUTION OF THE STATE OF KUWAIT pt. V, art. 174 (disallowing amendments within five years of the coming into force of the constitution); PERMANENT CONSTITUTION OF THE STATE OF QATAR pt. V, art. 148 (disallowing amendments within ten years of the coming into force of the constitution); see also CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] pt. IV, tit. II, art. 284(1) (Portuguese Republic) (requiring a wait of five years between each constitutional amendment, in the absence of the agreement of 80% of the national legislature); 1975 SYNTAGMA [SYN] [Constitution] 4, § 2, art. 110(6) (Greece) (imposing a five-year wait between constitutional amendments); UNDANG-UNDANG DASAR REPUBLIK DEMOKRATIS TIMOR LESTE [Constitution] pt. VI, tit. II, art. 154(2)–(4) (E. Timor) (forbidding amendments fewer than six years apart, unless 80% of the national legislature agrees otherwise).

64 I use four tiers only as an example to accentuate the possibilities for innumerable tiers of constitutional provisions. Some countries use fewer, or more, tiers to categorise their constitutional provisions, in the process signalling to citizens and to observers just what is more or less important than others. It is plainly a rank-ordering

of constitutional principles and values. See, e.g., Commonwealth of Australia Constitution Act, 1900, ch. VIII, art. 128 (creating two tiers of constitutional provisions, each requiring adherence to different rules of amendment); Part V of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11, §§ 41–47 (U.K.) (establishing roughly half a dozen tiers of constitutional provisions, each with its own corresponding amendment threshold); CONSTITUTION OF THE REPUBLIC OF GHANA ch. 25, § 290–91 (establishing two tiers of constitutional provisions and two different rules for amending provisions in each tier); CONSTITUTION OF THE REPUBLIC OF RWANDA tit. XI, art. 193 (creating two tiers of constitutional provisions, each with its own corresponding threshold for amendment); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA No. 108 OF 1996 ch. 4, § 74 (distinguishing among nearly half a dozen tiers of constitutional provisions, each with its own amendment threshold); CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT ch. XVII, § 245–47 (distinguishing among four tiers of constitutional provisions and four different rules for amending the provisions in each tier).

65 Some constitutional states currently use a comparable technique for amendments to the constitution. See, e.g., KONSTITUSIYA AZERBAJCAN RESPUBLIKASININ [Constitution] § V, ch. XII, art. 156 (Azer.) (requiring two sustained majority votes, each separated by a period of six months); CONSTITUTION OF ERITREA ch. VII, art. 58 (1997) (providing that a constitutional amendment must be approved by two separate votes one year apart). Haiti does something quite interesting with respect to the timing of the coming into force of amendments: an amendment that is passed by the national legislature does not become valid until after the installation of the next duly-elected president. CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI tit. XIII, art. 284–2. This appears to be an effort to avert political self-dealing.

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Constitutions as Chains?

On the Intergenerational Challenges of Constitution-Making

by Konstantin Chatziathanasiou

Abstract: In this essay, I explore the ambiguity of the competition's title "Constitutions as Chains", and distinguish between two intergenerational challenges in constitution-making: the challenge of intergenerationally just constitutional provisions, and the challenge of creating a stable institution which is accepted by successive generations. I prioritise the latter. After contrasting classic ideas of Burke and Paine, I discuss different ways of addressing the challenge, such as the amendability of a constitution, eternity clauses or recurring constitutional assemblies. A flexible approach towards existing constitutional provisions, which is open to future developments, gets the nod. However, a need for empirical research remains.

Introduction¹

"Constitutions as chains" is an ambiguous metaphor.² It allows for at least two interpretations to characterise constitution-making.

The first interpretation carries a negative connotation: it is the interpretation of constitutions as fetters.³ Ideally, society commits itself in a "sober" state to certain rules. The aim is to prevent itself from carrying out actions in a "drunken" state that it will regret when "sober" again. Odysseus is seen as the archetype of such practice. He has his companions tie him to the ship's mast. Thus, he can listen to the sirens without falling for their call.⁴ A problem arises if fetters are not self-imposed. This is a classic puzzle in constitutional theory: one generation claims a freedom for itself which it simultaneously denies a successive generation. We can call this the paradox of constitution-making.⁵ If we now think of generations as different actors, autonomy can turn into heteronomy.⁶

The second interpretation carries a positive connotation, and can be understood as a response to the aforementioned paradox: recurring constitutional assemblies could renew a constitution's legitimacy, or decide on a new constitution. Constitutions would form a chain, connected through assemblies. This is not exactly the idea that underlies the legal concept of a "legitimation chain" (Legitimationskette) in representative democracy;⁷ still, this interpretation points to the necessity of a constant renewal of a constitution's democratic foundation.

The metaphor of "constitutions as fetters" has rhetorical force, and the idea of "legitimation chains" offers an interesting response. In order to assess the fit of problem and proposed solution, we need to elaborate on both. I begin by distinguishing two intergenerational challenges in constitution-making. Building on classic texts by Burke and Paine, I turn to what characterises a constitution as a legal institution and how it exerts its influence. Against this background, I go on to discuss different possible reactions to the intergenerational challenge. I see the best possible reaction in a rational, not overly restrictive, approach to constitutional boundaries and change mechanisms. Still, which approach to constitution-making is most likely to be successful, remains an empirical question.

For legal examples, I rely on the German Constitution, the Basic Law (Grundgesetz), as this is the legal material I am most familiar with. However, I do believe – albeit cautiously – that the arguments put forth in this essay apply more generally. But there are at least two caveats. First, institutions arise and function under conditions specific to a certain society. There is no one-size-fits-all approach. Second, constitutions in authoritarian regimes do not bind power in the same way, and they pose challenges that I do not address in this essay.⁸

The metaphor of "constitutions as fetters" has rhetorical force, and the idea of "legitimation chains" offers an interesting response.

Two intergenerational challenges

The intergenerational challenge of constitution-making consists of at least two specific sub-challenges. Their common denominator is uncertainty on the part of the current, acting generation: knowledge about our successors is necessarily incomplete.

Intergenerational justice

The first intergenerational challenge concerns the question of intergenerational justice directly. If we assume an ethical obligation to preserve the action space of the following generations, how should we account for this obligation in material constitutional provisions? This question relates to the preservation (or augmentation) of resources, which can be natural resources, but also material wealth. Indeed, for Thomas Jefferson the rights of successive generations were closely related to the question of national debt.⁹ And today, provisions requiring a balanced budget are discussed and employed as instruments of intergenerational justice.¹⁰ In the German case, apart from budget provisions, article 20a Basic Law refers directly to successive generations. According to this provision, "the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."¹¹ A provision that addresses intergenerational justice generally and apart from matters of environmental protection does not exist, but has been discussed.¹² While there already are traces of intergenerational justice provisions, prominently Peter Häberle still sees a great – and global – potential in this regard.¹³

Stability

The other challenge concerns the stability of the constitution as an institution, meaning its enduring recognition and acceptance. From the perspective of generational ethics, institutions – including constitutions – are "cultural capital", but it is unclear whether such capital is a positive heritage or a negative burden.¹⁴

The success of a constitution, i.e. whether it creates a stable environment for civil¹⁵ society, will ultimately depend on successive generations. From such an angle, the second challenge has priority over the first. Insofar as acceptance of a constitution depends on its contents, an interrelation exists. One could also argue that the obligation to endow them as far as possible with functioning institutions is also among the obligations towards successive generations, and that the functioning of an institution includes the option to adapt it to current circumstances.

If we assume an ethical obligation to preserve the action space of the following generations, how should we account for this obligation in material constitutional provisions?

Constitutional designers are well aware of these challenges. They want to take precautionary measures to make a constitution's endurance more likely. To this end, they need a workable descriptive conception of how a constitution functions.

What characterises a constitution?

A constitution functions in multiple ways. Emphasising one almost necessarily means neglecting another. Still, in the following I will focus on some of the aspects I deem essential.

Creating identity

A prominent function of a constitution can be to create a collective identity. A group might constitute itself as such through a constitution. The constitution offers a common point of reference. Such a legal constituting process might be preceded by a prelegal conception. Examples are ethnicities or nations.¹⁶ However, such a prelegal conception is not a necessary condition. The sober idea of "constitutional patriotism" (Verfassungspatriotismus)¹⁷ does not presuppose a narrow conception of a nation.

If the identity of a group is created, or reinforced, by a constitution, the relationship to the constitution is a peculiar one. A problem might arise when reverence turns into sacralisation.¹⁸ This obscures the view on the possible need for reform. Horst Dreier gives an impressive account of this danger, and names examples where normative "petrification" may occur. In the German context, this is the role of the states on the federal level, certain aspects of the rule of law, and the reluctance to make use of direct-democratic instruments.¹⁹ Risks of petrification give cause for concern.

Generational imprint

Constitutions have a practical everyday function: they create boundaries for government and shield matters from politics. They state what can be determined politically and what cannot. Thus, minorities are protected from majorities, and "fragile democracies" protect themselves against the reopening of particularly sensitive chapters of political bargaining.²⁰ Traumatic experiences can play a strong role in drawing these boundaries. In this sense, the description of a constitution as an intergenerational document must be qualified. A constitution might matter for several generations; however, it bears a decisive imprint from the generation that enacted it. The constitutional moment thus might not be a sober one.²¹ Such a moment is often connected to an intensive experience. Prudent and far-sighted constitution-making in such a situation is nothing less than "audacious practice".²²

Experimental character

Every democratic constitution is a big experiment. Pratap Bhanu Mehta discusses the biggest experiment of this kind: the democratic constitution of India.²³ He describes the manifold challenges involved as "manifestations of one single challenge: how to create citizens bound by a sense of reciprocity".²⁴ In the moment of constitution-making, it is unclear whether a sense of common civility will arise. Constitution-makers can only hope so and try their best to create institutions that make this possible. This implies potential fallacies and mistakes. Necessarily, the knowledge with which constitution-makers operate is incomplete.²⁵ A "sacralisation" is not compatible with this perspective. The possibility of being wrong about a choice of constitutional design rather leads to a respectful, but rational approach to constitutional documents.

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Further, if we account for the experimental character of constitution-making, it does not come as a surprise that most constitutions do not endure. Although created for "eternity", only half of them last more than 19 years.²⁶ Areas of law with a much more modest claim to longevity seem to endure much longer. In the German context, this is captured in the classic statement by the leading figure of German administrative law, Otto Mayer. The new edition of his German textbook came out just after a world war, a revolution and the enactment of a new constitution. Still, the preface stated that there was not much new to report: "Constitutional law passes, administrative law remains"; this has already been observed elsewhere.²⁷ In the following, I contrast (mainly) two classic positions on constitution-making.

Edmund Burke's eternal society

Edmund Burke understood the constitution as an intergenerational contract.²⁸ In itself this conception is not helpful. A contract has at least two parties. In case of a breach, a party can sue. This means that one party can turn to a third party that will facilitate enforcement. However, generations do not come together as parties; there is no reciprocal relationship.²⁹ And more importantly, a constitution lacks an external authority that guarantees enforcement.³⁰ One might think of a constitutional court, but a constitutional court also depends on the acceptance and recognition of its judgements and has — apart from its slowly built legitimacy³¹ — no mechanism to enforce its decisions. Burke's conception turns comprehensible if a higher — or natural — order beyond positive law is invoked. In his pamphlet³² against the French Revolution, Burke elaborates on his position:

Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure — but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, [...] and to be dissolved by the fancy of the parties. [...] because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science;

a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy.³³

In this longer quote, Burke speaks of the state as an all-encompassing “partnership” in an “eternal society”, in which “visible and invisible world” are connected. These principles are violated by revolution. As a politician Burke even argued for a military intervention in France.³⁴ One might disagree about whether Burke is a natural law theorist, a reactionary or a conservative.³⁵ In any case, his actual conception is in many aspects not compatible with our contemporary idea of a rational constitutionalised state. It can hardly be deemed liberal. The possibility of thinking and acting freely has not much space in a “partnership in all virtue”. Burke describes the state as divine order. Such a state is not ours. The liberal constitutionalised state guarantees its citizens the freedom to act and think; it has to function without divine legitimation.³⁶ In short, Burke’s conception does not share the presumptions of modern constitution-making.³⁷

This does not mean that Burke’s conception cannot spark an interesting debate. A normative reinterpretation of Burke could lead to an as-if-benchmark useful for evaluating how well a constitution fares in the first intergenerational challenge: could the constitution – if thought of as an intergenerational contract – be the result of negotiations, in which successive generations took part? The particular difficulty of this thought experiment lies in anticipating the preferences of successive generations. A meaningful – and need-based³⁸ – minimal consensus could be thought of, e.g., regarding “natural foundations of life”.³⁹ Beyond such minimal consensus, we can only speculate which values matter to successive generations. We do not know. The accusation of a pretence of knowledge is easily raised.⁴⁰

The liberal constitutionalised state guarantees its citizens the freedom to act and think; it has to function without divine legitimation.

We still do not need to give up the contract metaphor completely. The idea of an offer has merit: The constitution-making generation offers a constitution to its successors. This constitution has to prove itself constantly and has to be recognised in practice. This bears a resemblance to Ernst-Wolfgang Böckenförde’s description of the

deep problem of the constitutionalised state: it depends on conditions that it cannot guarantee.⁴¹ Still constitutional designers can ask themselves the meaningful question: which design⁴² will make it more likely for successive generations to accept the offer?

Thomas Paine’s objection

A far more liberal (and, for our question, more constructive) perspective is taken by Thomas Paine, who fiercely contradicts Burke in a direct reply:

There never did, there never will, and there never can exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling posterity to the “end of time,” or of commanding for ever how the world shall be governed, or who shall govern it; and therefore, all such clauses, acts or declarations, by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void.—Every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. The parliament or the people of 1688, or of any other period, had no more right to dispose of the people of the present day, or to bind or to controul them in any shape whatever, than the parliament or the people of the present day have to dispose of, bind or controul those who are to live a hundred or a thousand years hence. Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organized, or how administered.⁴³

Paine emphasises the role of the living and denies the legitimacy of eternal legislation. In a letter to James Madison, Thomas Jefferson makes a similar statement: “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”⁴⁴

The statements by Paine and Jefferson have a strong normative, but also a descriptive content. On the normative side, they propose that each generation has certain rights, in particular regarding political self-determination.⁴⁵ According to Paine, “every age and generation must be as free to act for itself.” On the descriptive side, they acknowledge that the influence of each generation is limited, as Paine speaks of the “right or the power [my emphasis] of binding and controuling [sic] posterity to the ‘end of time.’” This is where the interpretation of “constitutions as fetters” is not consistent:⁴⁶ One cannot loosen one’s fetters. Odysseus needed his companions to do it. But to be effective a constitution depends on the recognition by its addressees, the People. From a factual viewpoint, the People can always exercise their constituent power and give themselves a new constitution,⁴⁷ or just ignore the present one. A liberal constitution is not eternal.⁴⁸ Whether it will prove itself is an open question.

Countermeasures

The measures taken on the level of constitutional design to

enhance the likelihood of a constitution's acceptance need to strike a balance between substantive and procedural elements.

Substantive elements

First, there is a substantive side to meeting the intergenerational challenge. The offer made to successive generations must have suitable legal substance.⁴⁹ A constitution that is grossly unjust programmes social conflict and is not a suitable intergenerational offer. What rather is needed is a material legal solution that protects fundamental rights and creates the basis for functioning statehood. Formulating a minimal content is a difficult task, but not unthinkable. Arguably, the basic characteristics of a minimal constitution consist in a limitation of state power, protection of the citizen's rights, and practicable rules for democratic institutions. One might also think of safeguarding democracy and the rule of law.⁵⁰ Many designs are possible in the case of democratic institutions and government.⁵¹

From a factual viewpoint, the People can always exercise their constituent power and give themselves a new constitution, or just ignore the present one. A liberal constitution is not eternal.

But as uncertainty persists regarding future challenges and future generations' preferences, this material side needs to be complemented with procedural elements. These imply that the constitution-makers themselves do not know which substantive solutions will be realised by such means.⁵²

Procedural elements

Notwithstanding a recently identified trend towards more specificity in constitutional documents,⁵³ we can assume that constitutions are rather general documents, with provisions that need to be interpreted. Thus, the "open texture of law"⁵⁴ provides successive generations with some flexibility. This way, situations that were not foreseeable at the time of constitution-making can be covered. The need for interpretation creates a new problem: Which interpretation shall be decisive? Commonly, this dilemma is solved by entrusting a constitutional court with the task of interpreting the law in light of current developments.⁵⁵

Going one step further, one can allow for a constitution to be amendable.⁵⁶ If mere interpretation does not suffice to keep the constitution up-to-date, the text can be adjusted to changed circumstance. The German Basic Law regulates its amendment procedure in Article 79. Amendment is tied to high thresholds: the two-thirds majority required by Article 79 (2) Basic Law in both parliament (Bundestag) and the representation of the federal states (Bundesrat) is not easily achieved. But there is more. In Article 79 (3) the Basic Law shields certain contents from being amended: "the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20".⁵⁷ This is the so-called eternity clause which has particular importance from an intergenerational perspective.

Eternity clause and constitutional assemblies

On the textual level, such an eternity clause conserves a specific constitutional content and shields it from amendment. The clause creates the seemingly paradoxical category of unconstitutional constitutional law. The clause aims at marking hidden breaches

of the constitution. If the constitution is undermined, this can be made visible and described as such. The power to distinguish makes eternity clauses attractive. They are used more and more in constitutions around the globe.⁵⁸ More often than not, they are shaped by painful experiences that have marked a societal transition.⁵⁹ The later practical use of an eternity clause does not necessarily fall within the scope of what the constitution-maker had foreseen. The experience that led to Article 79 (3) Basic Law was the undermining of the Weimar constitution by Nazism. Today, Article 79 (3) Basic Law is used by the Federal Constitutional Court to mark the limits of European integration by way of so-called "identity control".⁶⁰ One may argue about the persuasiveness of this – potentially self-serving and political⁶¹ – jurisprudence.⁶² In any case, European integration was not the object of the founders' concerns when drafting the Basic Law. This illustrates a possible functional change of constitutional guarantees.

From the perspective of generational ethics, the use of eternity clauses seems like an appropriation: with which right does one generation deprive another from an option to act? From such a perspective, the solution of a "permanent constitutional assembly" seems appropriate.⁶³ Recurring conventions would counterweigh the eternity clause and renew the constitution's legitimacy. This is the idea of the connected "constitutional chains" mentioned at the beginning. This idea has the merit that it recognises the need for a democratic foundation of a constitution. However, it overestimates the force of eternity clauses and at the same time underestimates the risks of an institution rivalling the written constitution.

The [eternity] clause aims at marking hidden breaches of the constitution. If the constitution is undermined, this can be made visible and described as such.

Eternity clauses express the idea that certain values were of paramount importance to the founders. But the word "eternity" should not fool us. With good cause the Federal Constitutional Court of Germany speaks of the "so-called eternity guarantee".⁶⁴ The normative force of such an eternity clause cannot exceed the normative force that a constitution generally has due to the recognition by its addressees. This does not mean that a constitutional amendment contrary to Article 79 (3) Basic Law would be simple to realise. It means that the actual opposition to such an endeavour depends on how the eternity clause is perceived and valued in practice. In fact, at least in Germany, the clause is valued highly. For the idea of an eternal constitutional core this is essential. As already mentioned, Dreier recognises a concerning trend of "petrifications". Dreier speaks of a "sacralisation" and emphasises the need for a rational approach to the constitution that limits power, but does not contain eternal truth.⁶⁵ A constitutional assembly that expresses that a constitution is not set in stone could be a remedy to such tendencies.

A constitutional assembly can be organised in many different ways.⁶⁶ If it is planned and designed from scratch, however, it will always lack the special historic moment that has helped most constitutions achieve legitimacy. One might consider whether a constitutional assembly was necessary after German reunification. The Basic Law was designed as a provisional solution. In this sense, it was designed to trigger a debate about its very self

in the moment of reunification. For reasons of feasibility, mixed with political prejudice, unified Germany did not enact a new constitution. Still, the historic moment was there. Without such a moment, constitution-making can be difficult.⁶⁷

There is a stronger argument against permanent, or regularly recurring, constitutional assemblies. It builds on the aforementioned description of how a constitution functions, and where its limitations lie. As an institution, a constitution depends on its broad acceptance by its addressees. Enforcement is decentralised. Society must – at least with a critical majority – enforce the constitution collectively against a transgressor. Which rules and values should be upheld, though? If society wants stability, it has to agree on a body of such rules and values. The constitution in the form of a respected document gives the necessary reference point.⁶⁸ Legitimacy and dignity of the institution “Constitution” underline it.⁶⁹ To say it with Thomas Schelling: They add salience.⁷⁰ This is where the force of a constitution lies. It provides a strong reference point for what the values of a society are. From the perspective of positive political theory, it solves a coordination problem.⁷¹ This function becomes paramount in moments of crisis. In such unforeseeable situations, the force of the constitution should not be weakened. A constituent assembly that is active in parallel, and potentially strongly legitimised, might create a competing institution that may undermine this force. On the other hand, in times of (relative) political calm, a constituent assembly might again bring about the societal divisions that the constitution tried to overcome.⁷²

A constitution is so important that it seems ill-advised to weaken its force just as a matter of principle by creating a competing

The normative force of [...] an eternity clause cannot exceed the normative force that a constitution generally has due to the recognition by its addressees.

institution. In a constituent assembly, the constituent power is activated. This raises the question how a formally valid constitution will be perceived, if a parallel constituent assembly is in process. It cannot be safely assumed that politics would continue to respect the formally valid document. If the assembly discusses a change of competences between government bodies, this would cast a shadow on how these competences are exercised under the valid constitution. And political forces could use the opportunity of a majority in a constitutional assembly to entrench their interests. Constitutional assemblies typically mark transitions. Taking the aforementioned risks into account, the wiser choice suggests avoiding permanent constitutional assemblies.

Against the background of the dangers that are associated with such a concept, we can think about less severe means to check whether a constitution is in need of reform. Commissions that check for this need without employing constituent power are one example. Such commissions, and a scientific discourse on the shape of the constitution, are well underway.⁷³

Open and flexible interpretation

This does not mean that legitimacy and its renewal should not concern us. A means less severe than permanent constitutional assemblies can be found in an open, flexible and, most importantly, rational approach to existing constitutional provisions. It seems that constitutions are well aware of their limitations. The

(extended) Call for Papers for the 8th Intergenerational Justice Prize points to a historic example, the French Constitution of 24 June 1793, which never entered into force.⁷⁴ There, the “right to revolution” was explicitly acknowledged. Article 28 read: “Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut pas assujettir à ses lois les générations futures.”

The statement that a generation always has the right to “revise, reform, and change” its constitution seems paradoxical in a constitution that aims at endurance. But this is not a singular historic oddity. We find similar clauses even today in constitutions. The last provision of the German Basic Law, Article 146, reads:

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.⁷⁵

The relevance of Article 146 Basic Law is a fiercely debated issue in German constitutional scholarship.⁷⁶ The history of the preceding provision,⁷⁷ which naturally lacked the reference to reunification, was influenced by the division of Germany and Allied occupation. It was supposed to open the door to a constitution-making process free of such constraints. As reunification was realised by the new federal states of former Eastern Germany acceding to Western Germany,⁷⁸ a significant part of German constitutional scholars treats it as obsolete, if not dangerous.⁷⁹ This view is not uncontested. Dreier recognises the potential of Article 146 Basic Law. He speaks of the “normative bridge” that Article 146 Basic Law can provide and of how Article 146 Basic Law dispenses with the need for revolution.⁸⁰ Accordingly, Article 146 Basic Law allows for a transition to a constitution that is designed differently than the eternity clause would allow.⁸¹ This is particularly relevant for a constitutional development that may want to continue the tradition of the Basic Law, while at the same time doing specific things differently. Such a development need not take place in the near future. But the possibility of such development should not be excluded.

A means less severe than permanent constitutional assemblies can be found in an open, flexible and, most importantly, rational approach to existing constitutional provisions.

In regard to our question of intergenerational constitutional stability, Article 146 Basic Law bears an intriguing potential. The constitution leaves the possibility open to be developed further, thus leaving more choices to successive generations. This could indeed mitigate “reactance”.⁸² In accordance to the old Article 146 Basic Law, the Basic Law put its own abolishment on the table in the process of German reunification. The possibility of abolishment could have benefited its endurance, as after an intense debate the result was in fact the affirmation of the existing Basic Law.⁸³ However, a challenge to this reasoning can be found in the United Kingdom’s “Brexit” vote, where the vulnerability of the Union – expressed in the option to leave it in accordance with Article 50 of the Treaty of the European Union – worked to its detriment. This case cannot be covered here,⁸⁴ but it should motivate us to taken an even closer look at the conditions of institutional stability.⁸⁵

Conclusion and outlook

I have argued that a flexible and rational approach to a constitution's limitations can benefit a constitution's success. This is an argument for treating such a provision as Article 146 Basic Law as a counterweight to the eternity clause. The possibility of adapting the constitution to new challenges remains open to successive generations that want to continue, and build on, a constitutional tradition. This might already have a stabilising effect today. However, there are limits to this argument. Indeed, the question of how a flexible approach that is open to future development affects the acceptance and thus the stability of a constitution cannot be answered with legal methodology alone.⁸⁶

Empirical research can put our intuitions to the test. Quantitative studies suggest that inclusiveness as well as a certain level of flexibility predict a constitution's endurance.⁸⁷ This literature is already rich and still growing. But causal inference is particularly difficult in the constitutional setting.⁸⁸ This calls for complementary perspectives. Typically, such a perspective can come from case studies. A more daring approach that is worth exploring can be found in laboratory decision experiments, that are designed to tackle the identification problem.⁸⁹ The behavioural mechanisms identified in experimental studies could be contrasted with the insights from field data studies.⁹⁰ New experiments could be designed to model the problems faced by constitution-makers. This exercise could further inspire the noblest task of constitutional designers: creating institutions that help bring about a civic sense of solidarity.⁹¹

Notes

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2 The theme for the Intergenerational Justice Prize 2015/16 was expressed in German as "Verfassungen als Ketten" ("Constitutions as Chains"). For the English version this was rendered as "Constitutions as Millstones".

3 Albert 2010 explores a similar metaphor: "constitutional handcuffs".

4 Homer, *Odyssey*, 12th Book, 192 et seq. (translated by A. T. Murray): "So they spoke, sending forth their beautiful voice, and my heart was fain to listen, and I bade my comrades loose me, nodding to them with my brows; but they fell to their oars and rowed on."

5 More generally, Elster 1984: 93: "paradox of democracy".

6 See Dreier 2009b: 29, who refers to the passage of time ("Der Zeitfaktor macht aus Selbstbindung Fremdbindung, aus Autonomie Heteronomie.").

7 See the settled case law of Germany's Federal Constitutional Court (Bundesverfassungsgericht), demanding a "legitimation chain" between the People and public authority; e.g., BVerfGE 77, 1 = NJW 1988, 890, 891.

8 See also Tsebelis/Nardi 2016, who include only OECD countries in their sample. For a treatment of constitutions in authoritarian regimes, see the edited volume by Ginsburg/Simpser 2012: 15, who map the functions of such constitutions as "operating manuals, billboards, blueprints, and window dressing".

9 See Thomas Jefferson, letter to James Madison, Paris Sep. 6, 1789.

10 See, e.g., Article 109 (3) Basic Law; critical but balanced appraisal of this mechanism by Burret 2013: 62.

11 Translation by Christian Tomuschat and David P. Currie (http://www.gesetze-im-internet.de/englisch_gg; last retrieved October 19, 2016).

12 On intergenerational justice provisions in national constitutions, see Tremmel 2009: 57-59.

13 See Häberle 2006: 226.

14 On these classifications, see Tremmel 2009: 68-69.

15 Note that if a society is governed by an authoritarian regime, the pure longevity of a constitution cannot be seen as an indicator of success.

16 Classic analysis by Anderson 2006: 6, who sees a nation as "an imagined political community – and imagined as both inherently limited and sovereign" and deems the invention of the printing press as critical for the emergence of nationalism (*ibid.*, Chapter 3).

17 As represented in Germany by Sternberger 1990.

18 Warning by Dreier 2009a.

19 Dreier 2009b: 69-71.

20 In his work on "fragile democracies", Issacharoff 2015: 10 emphasises the role of constitutional courts as "primary means of managing conflict in the difficult national settings of so many of the world's democracies [...] in the service of state building"; in regard to prior traumatic experiences, Albert 2010: 693 makes a more narrow categorisation of "reconciliatory entrenchment" clauses, referring to amnesty provisions for previous enemies.

21 On "interest, reason and passion" in constitution-making, see Elster 2012; further, Issacharoff 2015: 217.

22 Ginsburg 2012: 1.

23 Mehta 2003.

24 Mehta 2003: 35.

25 See on this problem also Engel 2001; Gärditz 2016.

26 Elkins/Ginsburg/Melton 2009: 129.

27 Mayer 1924.

28 See the (extended) Call for Papers for the 8th Intergenerational Justice Prize 2015/16.

29 On the "problem of reciprocity", see Tremmel 2009: 183, who hints at the key function of indirect reciprocity in intergenerational justice.

30 See, e.g., Elkins/Ginsburg/Melton 2009: 7.

31 More by Petersen 2015: 144.

32 See the characterisation by Paine 1998: 89: "There is scarcely an epithet of abuse to be sound in the English language, with which Mr. Burke has not loaded the French Nation and the National Assembly. Every thing which rancour, prejudice, ignorance, or knowledge could suggest, are poured forth in the copious fury of near four hundred pages."

33 Burke 1909-14: 165.

34 Jörke/Selk 2016: 153.

35 Jörke/Selk 2016 take the latter view.

36 For a classic description of this problem, see Böckenförde 2006: 92-114 and later Böckenförde 2015; also Dreier 2010.

37 Similar conclusion by Jörke/Selk 2016: 155.

38 On need-based approaches, see Tremmel 2009: 98-100.

39 See Article 20a Basic Law.

40 See also the critique by Gärditz 2016.

- 41 Böckenförde 2006: 112.
- 42 Ginsburg 2012: 1-2 pleads for a cautious use of the term.
- 43 Paine 1998: 91-92.
- 44 See Thomas Jefferson, Letter to James Madison, Paris, Sep. 6, 1789, proposing a life span of 19 years for constitutions and laws. Interestingly, this is exactly the median life span of all constitutions coded by Elkins/Ginsburg/Melton 2009.
- 45 Tremmel 2009: 84 categorises the debate on a right to political self-determination as a question of the inheritance of cultural capital.
- 46 At least from the perspective of the People.
- 47 This process, of course, can be costly.
- 48 Dreier 2010: 17, pointing to the possibility that the constitution is overcome by revolution or further developed through evolution.
- 49 See also Isensee 1995: 85.
- 50 Issacharoff 2007.
- 51 McAdams 2015: 71: “Those creating a constitution are likely to disagree about which constitutional version is best, even though they may agree that quite a few versions are better than the failure to create a constitution.”
- 52 See also Engel 2001; Gärditz 2016.
- 53 Versteeg/Zackin 2016: 4: “constitutional micromanagement”.
- 54 Hart 2012: 124.
- 55 Voßkuhle 2010 draws an analogy to programming and speaks of maintaining the constitution’s “source code”; Strauss 2010 argues that the – notoriously difficult to amend – U.S. constitution evolves as a “common law system”, in which judges rely less on text, but more on precedent and common sense.
- 56 Note that a constitutional change might also take place without an explicit change of text or jurisprudence; see Ackerman 2014.
- 57 As translated by Christian Tomuschat and David P. Currie (http://www.gesetze-im-internet.de/englisch_gg; last retrieved October 19, 2016).
- 58 Roznai 2015: 3, examining clauses in 735 - partly historic, partly current - constitutional documents: “in recent decades unamendable provisions have expanded in terms of their detail, currently covering a wide range of topics.”
- 59 Issacharoff 2015: 47-52.
- 60 Polzin 2016 gives an account of the development of constitutional identity and identity control in Germany.
- 61 On the political dimension, see Lepsius 2015.
- 62 Critique by Halberstam/Möllers 2009.
- 63 See the (extended) Call for Papers for the 8th Intergenerational Justice Prize 2015/16.
- 64 BVerfGE 123, 267 (343) (“sogenannte Ewigkeitsgarantie”).
- 65 Dreier 2009a.
- 66 More on this by Elster 2012.
- 67 The Swiss case should not be overlooked. In Switzerland, “total revision” is a separate category of constitutional change. Interestingly, it is undertaken without a strong external reason. Altogether, the Swiss case appears as rather special, but with immense innovative potential for the interpretation of German norms; see the commentary of Article 146 Basic Law by Michael 2013, who heavily draws from comparative materials and especially the Swiss model.
- 68 On “self-enforcing” democracy, see Weingast 1997; Mittal/Weingast 2010.
- 69 We need to differentiate here; see McAdams 2015: 49: “Legitimacy might strengthen the focal point effect, but is separate from it.”
- 70 For the role of “focal points” in (political) coordination problems, see the seminal work by Schelling 1960.
- 71 Building on Schelling 1980 and in regard to constitutions: Hardin 1989; Strauss 1996; Weingast 1997; Hadfield/Weingast 2013; McAdams 2015.
- 72 On the fragility of many democracies, see again Issacharoff 2015.
- 73 See, e.g., the work of Germany’s Commission on Federalism (“Föderalismuskommission”). The Joint Constitutional Commission (“Gemeinsame Verfassungskommission”) after the German Reunification is a different case however: it is not marked by ongoing practical concerns, but by a special historic moment, in which constituent power might have been activated; on this possibility, critically, Isensee 1993.
- 74 On its fate, see Kley 2013: 172-173.
- 75 As translated by Christian Tomuschat and David P. Currie (http://www.gesetze-im-internet.de/englisch_gg; last retrieved October 19, 2016).
- 76 This debate cannot be covered in this essay.
- 77 So-called “Artikel 146 GG alte Fassung” (old version).
- 78 The Beitrittslösung according to Article 23 GG in its old version.
- 79 Leading voice is Isensee 1992b: Rn. 61; see also Isensee 1992a; Herdegen 2013; critique by Dreier 2009b: 82.
- 80 Dreier 2009b: 93.
- 81 Same view taken by Blasche 2006 and Cramer 2014.
- 82 On the psychological concept, see Brehm 1966; for a political context, see Elster 2000: 95-96: “By lowering the drawbridge and offering them the opportunity to leave, the ruler might reduce their desire to use it.”; Elster points to de Tocqueville 1995: 181, who in the context of his recollections of his participation in the constitutional commission of 1848 writes: “I have long thought that, instead of trying to make our forms of government eternal, we should pay attention to making methodical change an easy matter. All things considered, I find that less dangerous than the opposite alternative. I thought one should treat the French people like those lunatics whom one is careful not to bind lest they become infuriated by the constraint.”; for the original French version, see de Tocqueville 1893: 282.
- 83 The discussion is documented in Guggenberger/Stein 1991.
- 84 For a broad coverage, see the “Brexit Supplement” to vol. 17 of the German Law Journal.
- 85 See, e.g., the challenge of the “cosmopolitan/nationalist cleavage” as described by Dawson 2016.
- 86 See also, albeit with different consequences, Isensee 1995: 14.
- 87 Elkins/Ginsburg/Melton 2009: 139: “constitutions that are subject to public ratification are eight percent more likely to survive than those that are not”.
- 88 Law 2010 argues for methodological pluralism in the empirical study of constitutional law; Elkins/Ginsburg/Melton 2009: 33, 89, especially in reference to the problem of endogeneity in the data.
- 89 Arguing for such an approach in the social sciences generally, Falk/Heckman 2009; from a legal perspective, Engel 2013; from a political science perspective, e.g., Kubbe 2016.
- 90 See, e.g., the experimental literatures on status quo bias in human decision-making (Kahneman/Knetsch/Thaler 1991; Arlen/Tontrup 2015), positive effects of democratic choice

(Tyran/Feld 2006; Dal Bó/Foster/Putterman 2010; Sutter/Haigner/Kocher 2010), intergenerational common resources (Hauser/Rand/Peysakhovich/Nowak 2014; Putterman 2014), or trust creating mechanisms (Kopányi-Peuker/Offerman/Sloof 2015).

91 See again Mehta 2003: 35; on “indirect reciprocity”, see Nowak/Sigmund 2005: 1291: “likely to be connected with the origins of moral norms”.

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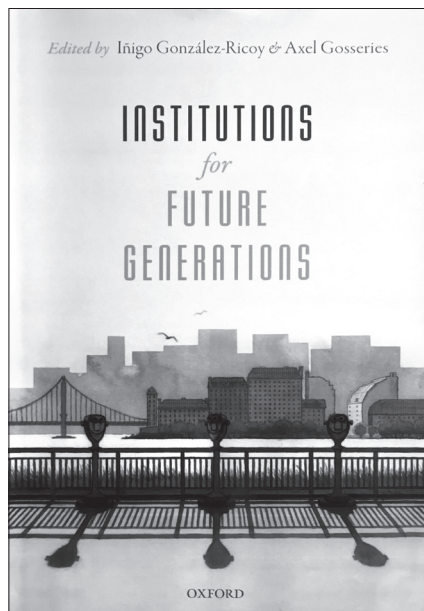
Iñigo González-Ricoy and Axel Gosseries (eds.): Institutions for Future Generations

Reviewed by Markus Rutsche

Doing justice to a collection of 24 articles within the confines of a short book review is a nigh-on impossible task, but I hope that by presenting a brief survey of its content I can at least draw some attention to it. Iñigo González-Ricoy and Axel Gosseries, the editors, deserve much praise from the outset for their laudable service of putting together what is (to my knowledge) the latest and to date perhaps most comprehensive volume on institutional responses to the widespread problem of “short-termism”. They describe their project as an attempt to “advance and assess a variety of innovative institutional proposals to render policymaking [...] more sensitive to the interests of future generations” (3); and it is in this broad spirit of applied political philosophy that the book combines empirically informed evaluations of existing approaches with largely normative considerations of yet-to-be-realised possibilities for institutionalising intergenerational justice.

Apart from its two separate introductions, which make for a very helpful and succinct overview of the issues at hand, the volume is organised around three different blocks: the first addresses theoretical and conceptual issues of intergenerational justice; the second discusses institutional proposals which aim specifically at promoting long-term policies; and the third explores ways of increasing the long-termism of already existing institutions whose primary ends and purposes lie elsewhere.

Before raising a few concerns that do remain after a close reading of this book, a brief summary of its content might be in order. Following an excellent introduction by the editors and another one by Michael K. MacKenzie on the various sources and manifestations of short-termism, Part II hits off with a “primer” on intergenerational justice by Nicholas Vrousalis, who offers some “tentative responses” (49) to the question of how, according to the standard theories, the benefits and burdens of progress ought to be measured (by preference satisfaction, resources, or capabilities?) and intergenerationally distributed (according to the demands of equality, sufficiency, or maximum utility?). Next, Stéphane Zuber provides a more detailed look at how to measure intergenerational justice both at the design stage and at the operational stage of any given institution, and he does so by addressing the comparison of costs and benefits across generations as well as the more specific issue of just savings, figuring most prominently in Rawls’s *Theory of Justice* (§44). Whether it is at all possible for us, in any meaningful sense of the term, to actually “represent”



future generations is a question asked, and eventually answered in the affirmative, in the following chapter by Anja Karnein. She argues that a modification of what she calls “surrogate representation” (90) is the most convincing way of approximating such an ideal without running into the several difficulties that may arise from other approaches to representing future generations. With the goal of further conceptual clarification in mind, Axel Gosseries then embarks on an attempt to “clarify the link between generational sovereignty and specific institutional proposals” (98). He maintains that the numerous proposals contained in the collection at hand “only [...] to a limited extent [restrict] the jurisdictional sovereignty of the generations that they affect” (109), not least because only few of them, as we shall see in passing, require any constitutional entrenchment at all.

Part III opens with a proposal which, as Ludvig Beckman and Fredrik Ugglå freely admit, is “not exactly new” (117): the idea of an ombudsperson for future generations. To the regular readers of this journal, this idea will be indeed rather familiar; however, the way in which the authors argue for its feasibility, democratic legitimacy, and possible effectiveness is still original and generally convincing, despite the obvious need for this proposal to be part of a bigger “package”. A more comprehensive view along those lines is offered in the subsequent chapter by Simon Caney, who discusses a package of five distinct reforms or policies that are designed to “enhance the accountability of the decision-making process in ways that take into account the interests of persons in the future” (135). Based in part on a system currently in place in Finland, he advocates, in turn, for a mandatory Governmental Manifesto on how to protect the interests of future generations, a Parliamentary Committee to report on and scrutinise that manifesto, an annual “Visions for the Future” Day, an independent Council for the Future, and the employment of performance indicators to evaluate the attainment of long-term goals. A more economic perspective is then added by John Broom and Duncan K. Foley, who propose a World Climate Bank tasked with the issuance of “World Climate Bonds” in order to finance the long-overdue shift towards renewable energy. They suggest that eliminating the inefficiency caused by greenhouse-gas emissions requires nothing less than a transformation of the global economy; and their argument that an international financial institution is needed to underwrite and to finance this transformation will surely resonate with many. Moving on, Iñigo González-Ricoy provides an overview of consti-

tutional provisions for securing the interests of future generations. (The article is not identical with a piece by the same author that appeared in issue 2/2016 of this journal.) He argues that constitutional entrenchment can curb short-termism in three different ways: first, constitutionalising intergenerational provisions can raise the costs of deviating from such policies; second, it can reduce uncertainty with regard to the outcome of said policies; and third, it can go a long way in signalling the importance of these matters to each and every citizen by “coordinating [them] around new focal points as well as shaping their values and beliefs” (171). A somewhat different approach is taken by Dennis F. Thompson, who suggests that we should “establish an independent body whose members [...] act as trustees charged with the responsibility of the political system.” (184) Echoing a metaphor from Hobbes’s *Leviathan*, he holds that democratic trusteeship prescribes “the institutional equivalent of bifocals” by allowing that citizens and their representatives “see clearly not only their own democratic interests but also those of future citizens.” (195)

Marcel Szabó proposes the idea of a “Common Heritage Fund”, financed by a 1% tax on all international trade and tasked with the goal of “conserving the natural resources of the world for the next generations.” (197) While there are several antecedents to such an idea, most notably in the form of the UNESCO World Heritage Fund established in 1972, the author argues that adopting his proposal would move the international community “towards a more balanced world order where the participating states pay due consideration to the differences existing between them [...], without losing sight of the enforcement of the interests of future generations.” (212) Another model for the representation of future generations is proposed and discussed by Kristian Skagen Ege, who contrasts his own “sub-majority rule model” with Dobson’s “restricted franchise model”. While both aim at promoting future-oriented deliberations in representative democracies by raising public awareness about issues that will have a lasting impact on the living conditions of future generations, Ege’s model is distinct in demanding that “at least one-third of the legislators [...] be granted two procedural rights in order to protect future interests” (214), namely, the power to delay legislation and the right to require referendums. In the concluding chapter of Part III, Chiara Cordelli and Rob Reich consider ways in which philanthropic institutions may play a role in serving intergenerational justice. They argue that, given their unusual accountability structures and their largely private nature, such institutions are uniquely well-equipped for counteracting the phenomenon of democratic “presentism” as well as for supplementing and complementing political institutions seeking to do the same.

As mentioned above, Part IV of the volume consists of a number of papers discussing how institutions that “we” already have and that exist for their own distinct purpose (rather than those designed precisely with the aim of furthering long-termist policies) can be made more sensitive and responsive to the demands of intergenerational justice. It opens with an enquiry by Simon Niemeyer and Julia Jennstål into the question of how the institutionalisation of so-called “mini-publics”, consisting of “randomly selected citizens engaging in deliberation on decisions affecting intergenerational equity”, may further the effective inclusion of future generations and thereby overcome a perceived “value-action gap” by means of a “discursive representation of their interests” (247). In order for such an idea to be successful, the authors argue that a disposition

to “being open to all relevant arguments” (247) is required on behalf of its participants. They contend that achieving such a stance is, practically speaking, far from unrealistic, despite the obvious problems and challenges involved in this. Juliana Bidanure scrutinises another proposal that has been under intense consideration on the pages of earlier issues of the IGJR, and which can be said to have gained substantive momentum as of late: the introduction of “youth quotas” in parliaments as a means of “proxy representation” of future generations. (The article is not identical, neither in form nor in substance, with a piece published by the same author in issue 2/2015 of this journal.) She argues that, from a perspective of intergenerational justice in particular, the inclusion of more young people in parliaments is desirable on the grounds that they have a “higher stake” in the future and that they are “more concerned” by it than older people (the distinction between these two arguments remains a bit unclear). Such inclusion is also desirable because greater generational diversity is “likely to increase the competence of parliaments in solving complex problems” (268).

In his second contribution to the volume, Michael K. MacKenzie entertains the idea of an additional, randomly selected legislative chamber with a high degree of rotation among its membership (recruited from the entire citizenry) and mostly a general type of “soft power” at its disposal. He argues, rather persuasively, that a general-purpose institution of this kind would be “well-positioned to help counterbalance some of the short-term tendencies associated with elected chambers” (283). Claudio López-Guerra’s proposal in the following chapter is based on the intuition that “politicians ought to have a larger stake in the consequences of their own decisions.” (299) He suggests that a condition be imposed on the occupancy of public office according to which “politicians would agree to exclusively use certain public services, during and after their term in office.” (29) The rationale for this proposal is based on an analogy with airline pilots, who the author rightfully claims are “strongly motivated to fly [...] safely because their own lives are on the line.” (299) While the analogy might only go so far and looks likely to encounter severe issues of feasibility both in legal and political terms, the idea of “piloting” responsibility in such a way is surely an intriguing one and deserves further consideration. As many have pointed out before, the fact that an idea might seem far-fetched at first and even unlikely to ever garner sufficient support for its realisation does not necessarily make it any less interesting or worthy of discussion, and rightly so.

Karl Widerquist introduces the idea of a “people’s endowment” in order to establish “the precedent that the people as a whole own the environment and the resources within it.” (327) He suggests that half the revenue derived from such an endowment ought to be used for government spending and half for an unconditional basic income, and he maintains that doing so will “help create an institutional structure that more fairly shares the benefits of our economy with [...] all people, living today and in the future.” (327) Under the label of “democratic firms”, Virginie Pérotin reignites the idea of “firms owned and managed by their employees” (331), more commonly known as co-operatives, and argues that these would help mitigate many of the short-term biases typically associated with for-profit corporations. She holds that not only would there be direct benefits for future generations in that, *inter alia*, the accumulated capital of such firms could not be eaten up,

as it were, by its very own stakeholders (thereby effectively rendering those firms into “collective goods”), but that there would also be benefits of a rather indirect kind by establishing a longer time horizon for job stability as well as by ensuring a closer monitoring of management.

Next, Jonathan White turns to the issue of political parties and to the question of how to facilitate their taking on more long-termist views. His proposal amounts to outlining a new conception of the party constitution, which he argues (in terms that will ring familiar to the readers of this journal) ought to be conceived as “living” (353) – that is, as ever expanding and re-directing itself over time as new issues come and go. He adds to this the requirement that parties participate in efforts to archive and to publicise whatever prior policy commitments they might have engaged in historically, thereby enhancing their overall accountability. One cannot help but think, however, that this proposal must have grown out of the unusual configuration of recent British politics, for the practice of outsourcing and institutionalising the task of archiving a party’s history is indeed quite a common one in many countries including – but not limited to – Germany.

Turning to another arena, how may institutions of higher education do their share in encouraging long-termist decision-making? Danielle Zwarthoed suggests that the representation of both students and, especially, alumni be expanded significantly on universities’ governing bodies – a move she argues would go a long way in enhancing the long-termist orientation and accountability of not just higher education, but of other types of educational institutions as well. Joakim Sandberg offers a proposal according to which pension funds, thanks to their huge influence on commerce and society as a whole, ought to “take a stronger responsibility for the effects of corporate activities on future generations” (385). To this end, he suggests that instead of focusing on “fiduciary duty”, pension funds be given “independent social and environmental obligations” such that they be (legally) required to take into account their own impact on future generations and fragile stakeholders, and to do so “irrespective of whether this is in the beneficiaries’ interest” (394). Whether the interests of future generations must always outweigh those of present beneficiaries, or whether it might in fact be possible to consistently serve them both at once, is a question that is unfortunately not taken up by the author. In the final contribution to this volume, Thomas Baudin and Paula Gobbi discuss the strongly contested issue of family planning. They argue that since the individually desired degree of fertility is strongly driven by what they call “deep” determinants (such as a mother’s education, child mortality rates, and other factors), institutional efforts to reduce fertility in developing countries should focus more on shaping the economic and educational conditions to foster this outcome, rather than merely providing the means (i.e., birth control) for doing so.

As this all-too-brief summary shows, there is quite a lot happening in this book, and readers will doubtless find themselves deeply enriched and inspired by the multitude of approaches and ideas on how to institutionalise justice for future generations that are presented on its pages. What clearly emerges from the contributions to this volume is that there are indeed, as the saying goes, many rooms in the house of intergenerational justice, and that the responses to the problem are just as manifold and complex as the problem itself. The editors are to be commended for their efforts in bringing all of these together, and the collection will surely

serve as a starting point of debates on institutions for intergenerational justice for many years to come.

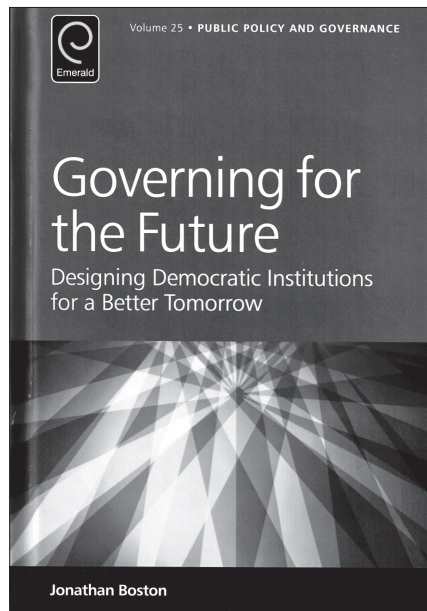
A minor quarrel, rather than a substantive point of contention, is that the volume provides few, if any insights on how to move from the level of creative imagination to actual implementation. Issues of feasibility and stability are very rarely discussed throughout the book, and while the institutional designs presented in it are certainly valuable in and of themselves, the general absence of such considerations does leave something to be desired (for the record, this is not true of all chapters). We also learn very little about institutions in the sense of “regimes”, that is, as sets of rather fixed and socially shared rules and norms that do not possess any agency in and of themselves (think of marriage, or friendship), and how these might figure in attempts to overcome the short-termism that has taken hold of so much of our society and our politics. And even though the authors implicitly seem to share a mostly commonsensical view of what institutions actually are, conceptually speaking, and how they may work to shape and to enforce attitudes, preferences, and eventually policies, there is little in the way of theoretical elaboration that would make any of this agreement explicit – let alone show what it is that holds the various proposals together, beyond their mere juxtaposition. But perhaps this is too much to ask. Those small misgivings aside, however, this volume does an excellent service to students and scholars of intergenerational justice alike, and one can only hope that it will find many vigilant and engaged readers.

González-Ricoy, Iñigo / Gosseries, Axel (eds.) (2016): Institutions for Future Generations. Oxford: Oxford University Press. 448 pages. ISBN: 978-0-19-874695-9. Price: £65.

Governing for the Future: Designing Democratic Institutions for a Better Tomorrow

Reviewed by Bruce E. Auerbach

Jonathan Boston's *Governing for the Future* is an impressive and ambitious work. It seeks to understand the reasons why public policy in democratic nations is focused on the short term at the expense of long-term interests, and to assess the extent of the short-term bias. Boston's work also seeks to examine how the effects of this "presentist" bias can be alleviated in democratic political systems. Boston assesses the advantages, disadvantages, limitations, and prospects for success, of a wide variety of approaches. *Governing for the Future* is 576 pages in length, including an extensive bibliography, and is well documented throughout. Boston's work is systematic in its approach. It begins by defining what Boston means by a "presentist bias", which he explains as "a tendency for policy makers to focus on the present or near-term at the expense of the future or, more specifically, at the expense of certain things in the future that are widely regarded as important and valuable." (20) Boston seeks to assess the severity of the problem presented by this short-term focus in public policy-making before examining the many causes of this bias. Boston's assessment of the strength of the presentist bias is that it is weak to moderate, rather than severe. As he notes, this conclusion is not based on a rigorous, systematic assessment of this bias. Although Boston proposes a number of approaches for measuring the severity of presentism, he concludes that these measures are either insufficiently feasible or insufficiently rigorous to be defensible. In the end, Boston estimates the extent of the presentist bias by contrasting what a severe presentist bias would look like, and the consequences it would have (including a rapidly decaying society unable to respond to long term problems), with the actual situation in most democratic nations. Boston concludes that because politics in liberal-democratic nations does not present with such a severe case, the presentist bias in these nations should be considered weak to moderate rather than debilitatingly severe. Boston traces the causes of the presentist bias to a number of factors, including "deeply ingrained features of the human condition, the pervasive impact of uncertainty on decision making" (95), the complexity of many public policy issues and salient asymmetries in power (95). The multitude of causes suggests that the presentist bias is difficult, if not impossible, to eliminate entirely, but also that it varies in strength over time and across issues and nations. More importantly, the variable intensity of the short-term bias makes it possible to improve our capacity to govern for the long term. Hence, the fundamental goal of Boston's book:



to "understand the nature, demands, and constraints of intertemporal governance", and to "offer realistic suggestions for innovative and effective democratic reform – in particular, initiatives that will encourage farsighted decision-making, protect future interests, and establish and cement the foundations of a good society over multiple generations." (xxii)

The majority of *Governing for the Future* is devoted to assessing a wide variety of options for ameliorating the presentist bias in democratic nations.

"In the absence of complete and effective 'solutions' to the presentist bias, advanced democracies have no choice but to 'muddle through' – countering such tendencies as best they can, drawing on the lessons of other jurisdictions, experimenting with new decision-making processes and policy approaches, and attempting, wherever possible, to make small but useful gains. Pragmatic adaption and learning by doing must be the primary tools." (472f)

To this end, Boston examines a wide range of both "demand-side" and "supply-side" strategies. Demand-side options focus on modifying the political incentives facing elected officials. These include seeking to improve citizens' knowledge and understanding of important "intertemporal" issues, influencing societal values and aspirations, and "framing policy issues and options in ways that are likely to galvanize public support for initiatives to enhance long-term outcomes." (473) Supply-side options include measures to constrain decisions by elected officials,

"build the capacity for forward thinking within the legislative and executive branches, and overcome deficiencies in policy coordination.... By such means, governments can be encouraged and/or enabled to give greater attention to long-term risks, take precautionary measures, and invest more prudently, thereby delivering greater economic, social, and environmental sustainability." (473)

Among the questions Boston addresses is one of particular relevance for this edition of the *Intergenerational Justice Review*, namely whether constitutional provisions can help alleviate the tendency to place the interests of future generations at risk by giving preference to short-term interests. A number of thinkers have argued that constitutions can be effective in providing some protection for the interests of future generations or for the protec-

tion of interests that will benefit both current and future generations (such as the guarantee of a healthful environment). Boston is generally skeptical that constitutional provisions are useful for accomplishing this goal (with the possible exception of the right to an ecologically healthy environment). He argues that defining the interests of future generations can pose difficulties, as can designing institutional mechanisms to protect those interests. Finally, constitutional engineering imposes costs as well as offering potential benefits, and in the absence of strong evidence that the benefits outweigh the costs, the enterprise strikes Boston as both difficult and inherently risky (235f). In the end, he concludes that “[r]elying on constitutional reforms to mitigate presentist tendencies ... is unlikely to be the most effective of the options available.” (236)

The other side of this argument is that many of the same questions can be raised about any changes to constitutional provisions, or, indeed, about adopting a constitution in the first place. They, too, are difficult to adopt, may impose costs as well as conferring benefits, and can be difficult to design well. Yet there is widespread agreement that the benefits of constitutions generally outweigh the costs, and that they are worth the effort. This is not to say that Boston’s assessment of the desirability of using constitutions to protect the interests of future generations is necessarily wrong. But it is also not clear that this assessment is right.

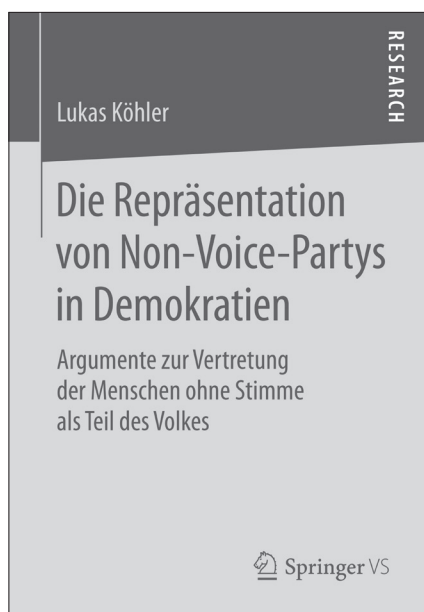
Governing for the Future is not a book one reads casually. Even for readers with some background, it can be a difficult read. This is largely a consequence of the systematic approach the author takes to examining the many aspects of the problem of governing for the future. The most obvious target audience for this work is as a text in an advanced public policy course. The book will also be of great interest to academics and policy-makers looking for a rigorous work on developing long-term public policy. It is a book one would read and then return to re-read chapters of special interest. On the other hand, readers without sufficient background in public policy are likely to find *Governing for the Future* frustrating. In a number of cases, the conclusion of a chapter is that the particular approach examined is not fruitful. It is hard to fault Boston for his conclusions, and even harder to fault him for the difficulty inherent in finding solutions to the problem of presentism he seeks to address – but while *Governing for the Future* is an important work, it is also a complex and, at times, a difficult work.

Boston, Jonathan (2017): Governing for the Future: Designing Democratic Institutions for a Better Tomorrow. Bingley, UK: Emerald Publishing. 576 pages. ISBN: 978-1-78635-056-5. Price: £98.

Representation of Non-Voice-Parties in Democracies: Arguments for the Representation of People without Voice as Part of the Citizenry

Reviewed by Elena Simon

In the Anthropocene, man is put back at the heart of the universe. In this era, where human technology may not only alter the immediate surroundings but the atmosphere of the planet, the questions of intergenerational justice have to be posed with new vigour. In light of radioactive waste, permafrost melting and rising sea levels, it is well known that the decisions that lead to a higher standard of living for many today, may leave future generations with a planet hostile to life. Future generations, though, have of course no possibility to participate in the decision-making process of the present. Yet there has been a debate on whether this might be changed and how. The most recent published volume is Gosseries and González-Ricoy’s



Institutions for Future Generations (2016), wherein Karnein (2016) and Skagen Ekeli (2016) address the challenges of political representation for future generations. Lawrence (2014) explores the possibilities of representing future generations in international law; Bailey, Farrell and Mattei (2013) discuss the possibilities of protecting the rights of future generations through commons; and Thompson (2010) argues that it is possible to anticipate future generations’ interests and therefore they should be represented. Is this justifiable under democratic rule? The monograph *Die Repräsentation von Non-Voice-Partys in Demokratien* by Lukas Köhler goes even further and argues that it is not only justifiable but necessary. He seeks to base the argument for the representation of future generations on a theo-

ry of state rather than on democratic rule. In the process, the book builds a bridge between the arguments of contractual theorists and current academics and provides the logical proof that the representation of future generations' interests is a necessary condition for democratic state legitimacy.

Köhler bases his discussion on the fact that there are a number of people affected by state actions who nonetheless do not have the right to vote, nor any opportunity to promote their interests in policy formulation. He frames this question as a matter of legitimacy. Legitimacy of state actions has been described as a "precarious resource" which is achieved and sustained under democratic rule through constant debate and public discourse. This confronts democratic rule with a series of awkward questions. If all power emanates from the people, how is it that some are not part of the people? And should or must democracy take into account and engage the interest of all those possibly affected by state actions to claim legitimacy?

The book seeks to answer those questions with arguments from political philosophy and law and by means of reconstruction. Köhler defines future generations as part of non-voice-parties, which are "groups of people that cannot vote, yet are (nonetheless) affected by state actions and that may be clearly defined by one specific characteristic" (28, own translation). He maps out the three main concepts that are put under pressure within this debate: the fundamental legitimation of a state, the definition and constitution of the "people", and the appropriate form of representation.

While first explaining his methodology of reconstruction and defining the term "non-voice-parties" (chapter 2), Köhler turns to the discussions on the purposes of states (chapter 3), state formation (chapter 4), the legitimacy of representation (chapter 5) and proposals for the actual implementation of the representation of non-voice-parties (chapter 6). Finally he engages with possible criticism (chapter 7), summarises his argument (chapter 8) and gives an outlook on the prospect for the representation of the interests of future generations (chapter 9).

Köhler's main concern is to find a modification of the All-Affected-Principle (AAP) that avoids its two major criticisms. The AAP is the solution to the democratic boundary problem and the problem of defining the legitimate sovereign. In its simplest form it states that anybody actually affected by state actions has to be represented in the decision-making process (32). The boundary problem arises because state actions could affect people living outside of a given polity and therefore the democratic decision-making-process might be compromised (32). The definition of the legitimate sovereign is a challenge to democratic theory, because if democratic legitimacy must be based on democratic legitimacy the argument could go on indefinitely, hence resulting in an infinite regress (33). Köhler engages with the two most prominent solutions to these problems given in the literature. The first, exemplified by the position held by Goodin, holds that the question of being actually affected is not a political or ethical one, but rather an epistemological one. According to this, state actions are interdependent and complex and thus there is no reasonable argument for excluding anybody in the decision-making-process. In consequence, this argument leads to the plea for a world state with a world citizenry (35). A second position, held by Sofia Nässtrom, states that only the ones subjected to a polity must be included. This reduces the relevant people to those who live under an

already existing legal framework. Yet, as she points out, this establishes "citizen" as a hierarchising category among humans and "state" is its enacting institution, therefore it is not possible to normatively justify either of them (39).

Köhler sees these problems arising because the theorists either view democracy as the principle on which they must base their arguments (as he says is the case with Arrhenius, Goodin and Dahl), or they do not find sufficient arguments to justify states (Nässtrom) (37). He leans towards a slightly modified version of the All-Subjected-Principle, yet to avoid Nässtrom's conclusions he needs to find arguments that justify the existence of a state (37). In order to achieve his goals he grounds his argument in the basic legitimation of state.

He proceeds in reconstructing the discourses of functional (chapter 3) and basic legitimacy (chapter 4) to prove that non-voice-parties need to be represented in democracies. Because he focuses on Western democracies, Köhler focuses on the classical debates on state formation from Hobbes, Rousseau, Locke, Kant and Mill, and the debates of criteria for legitimacy and its production from Max Weber and Jürgen Habermas. He demonstrates that basic legitimacy derives from natural laws, contractual theory and the idea of human in these theories.

In this reconstruction of discourses Köhler points out that the justification of state functions derive from the justification of state formation. The pragmatist notion of the rule of law does only justify state actions within an existing legal framework but does not apply when this legal framework comes under pressure and its legitimacy claims are contested. Therefore it excludes the central question of what makes "state" a legitimate power towards human (40ff.).

This is why Köhler turns to the natural law debate and argues that the state is the best institution to provide protection against anarchic violence. Köhler identifies the protection of pursuing *self-interests safely* and the protection of *human dignity* as the basic justifications for state formation, i.e. the establishment of a social contract. With Rousseau this contract establishes civic equality, in which all consent to subject themselves under a specific legal framework. Because of this equality, everybody born into the social contract, and thereby affected by it, needs to legitimise it and must be considered as contractual subjects (113). This is why future generations, too, need to be considered as contractual subjects, i.e. part of the people (114).

Yet the justification of state formation on the grounds of rational interests is insufficient because interests are contingent, contradictory and inconsistent (116). Pre-civic human dignity provides the second line of argument. The social contract that founds the state, and legitimises the state to act, derives its legitimacy from the promise to protect the right to human dignity. Thus, it is human nature that is at the heart of the relationship between state and human and ultimately legitimises any polity. This is why and how Köhler concludes that the right to be represented derives from being human and not from being a citizen. Therefore the representation of all affected people is a necessary condition (*sine qua non*) for legitimate democratic rule.

After he has established and proved theoretically that non-voice parties are part of the affected people, who need to be included into the social contract and thus need to be represented in democracies, Köhler turns to the question of how the representation of non-voice-parties might be implemented. After thorough consid-

eration of the arguments given in the literature on authority and accountability, he mainly follows Rehfeld in concluding that the legitimate way to represent the interests of non-voice parties is in the form of an anticipatory representation that aims for the best interest of the represented (153). Because non-voice-parties do not have the opportunity to ensure accountability through voting (136), Köhler argues for a deliberative system of accountability. He states that the criteria for legitimate representation are the comprehensible and transparent establishment of rules and their acceptance by an audience (157). Democracies, therefore, need to represent the interests of every group possibly affected by its actions to keep their basic legitimacy intact. This includes non-voice-parties and, as such, future generations. However, this does not mean that they need to be part of those who vote, because there are other ways how their interests might be represented. This way, Köhler avoids the argument for a world citizenry or the abolition of the state.

In the remaining chapters Köhler very briefly illustrates the Swedish concept of ombudsman for future generations as a realistic possibility for the implementation of future generations' representation in democracies (chapter 6). He distinguishes between non-voice-parties and structural minorities by introducing the case of the South Schleswig Voters' Association, a German party representing the Danish and Frisian minorities of the north German state Schleswig-Holstein who are foreigners, yet allowed to vote (173). The last three chapters defend his argument and highlight that his approach, which deduces basic state legitimacy from human dignity and self-interest, proves that henceforth the representation of non-voice-parties' interests is a question of state legitimacy. Since there is no need for "descriptive representation" but anticipatory representation suffices, there is no need for widening the citizenry beyond those who can vote. Through the establishment of an ombudsman, non-voice-parties' interests can be represented and the criticism aimed at the All-Affected-Principle does not apply to his approach (176-190).

As a dissertation in political philosophy the book follows the structure of a logical proof. Therefore the reconstruction of the classical democratic theory discourses, which leads to the proof that non-voice-parties need to be represented in democracies, takes up the most part of the book. As a result, the amount of chapters focusing on representation and the presentation of realistic implementation possibilities seems comparably small. Thus, while one can appreciate the author's overall aim to provide arguments for the representation of non-voice-parties in democracies, there are some questions in want of deeper discussion from the perspective of political science.

It is particularly the organisation and implementation of the representation of future generations' interests as non-voice-parties that pose challenges to democratic rule, and therefore it is a pity that some of the discussions have been cut short. An interesting point of discussion would have been the danger of moral hazard in justifying unpopular policies in the present with reference to future generations' interests, as Karnein (2016) has stressed. The main critique presented here will focus on matters of "descriptive representation", which play only a minor part in Köhler's argument, yet are at the core of the questions the reading raises for political implementation. Pitkin's contribution for the study of representation has been appreciated as teasing out "core elements of an interactive relation" between representatives and the rep-

resented. It thus seems that rather than singling out one specific form of representation, Pitkin aimed to show different facets of legitimate representation, which is first and foremost a social relation and therefore not free of power. This is where the argument for "descriptive representation" comes to the fore. This facet of representation focuses on representatives' shared social characteristics with their constituents. Yet, Köhler appears to dismiss the importance of "descriptive representation" rather quickly on the grounds of the representatives' capability to empathise, allowing them to anticipate the best interest of those represented (148).

However, as is seen in migration and refugee policies there is a real danger of paternalistic co-optation of interests and needs of the represented. Other examples are the women's and civil rights movement where the hope for empathy of white, male decision-makers had proven to be an insufficient basis for the protection of interests, rights, and dignity of affected groups. While shared social characteristics cannot guarantee that the representative will act as intended by the elector, without any representatives that share social characteristics "certain points of view will simply be ignored". The inclusion and discussion of the experiences of these (former) non-voice-parties and the "politics of presence" could have given the debate on representation a bit more substance.

It could have also softened some of the uncomfortable implications that arise from Köhler's inclusion of future generations in the category of non-voice-parties. Clearly, a representative with shared social characteristics is not possible in the case of future generations. However, it is and was important for the groups he identifies as non-voice-parties. In his understanding, the range of non-voice-parties includes children, whose interest may legitimately be represented by their parents (113); foreigners with limited electoral rights; and women who successfully fought for their political representation and as such are considered a former non-voice-party (148). The categorisation of these widely differing groups as non-voice-parties bears the danger of an equalisation of these groups in more than the intended comparative way. First, the problem arises with the "traditional" non-voice-parties. The defining characteristic of children in Köhler's reconstruction is that they are persons in need of parental care (111f), yet nonetheless, they are part of the same category as are women and foreigners. This activates a frame of "in need of care" that is the basis for the aforementioned paternalistic co-optation of interests and historically has been used just to this end.

Second, the main characteristic of Köhler's non-voice-parties is their lack of vote in contrast to citizens whose main characteristic is the opportunity to vote (136). He further states that he takes future generations as "representatives of non-voice-parties" (109). Yet, with this argument he appears to be revitalising the difference between groups without the *opportunity* to vote and groups without the *possibility* to vote. A language-sensitive perspective elucidates that language is not innocent and categorising is a way of producing social reality. To specify: future generations are not yet existent; their definition as being existent in some possible future prevents them from articulating their interests in the present. This is very different from the other-mentioned groups categorised and traditionally understood as non-voice-parties. Summarising them under the single category of non-voice-parties bears the danger of treating them as analytically equal. This is giving way to a possible naturalisation of their non-representation. It suggests that it is as unfeasible for children (and by extension women and foreigners)

to voice their interests as it is for people not yet existing. Most importantly, the equal treatment of future generations and disenfranchised groups bears the danger of applying the same lower criteria that are established for the representation of future generations to other groups classified as non-voice-parties. This may lead to arguments for their exclusion and further hierarchising society. Since it is the declared goal of the book to do the opposite – provide arguments for more representation – a broader and more nuanced discussion of “descriptive representation” would have been beneficial.

In conclusion, Köhler argues to take the revolutionary core of the Universal Declaration of Human Rights seriously and to implement it in democratic rule. In order to do so, he argues, the definition of the people needs to be widened (157). He shows how this argument is actually rooted in classical democracy and contractual theory that operate with a pessimistic idea of human beings. His contribution is thus to prove that the philosophical basis of Western democracy calls for the representation of the interests of all those possibly affected by state actions. He provides a line of argumentation for the representation of future generations and highlights the timeliness of contractual theorists in today’s democracies.

After the almost revolutionary call for a widening of the concept of the people, however, the suggested restrictions that may lead to the representation of non-voice-parties are based on considerations of Realpolitik and seem rather conservative. This leaves the reader a bit disillusioned and gives way to the question whether the analytical non-discrimination between people who *cannot* vote and people who are not *allowed* to vote really is desirable and legitimate.

Notes

- 1 Nullmeier 2010.
- 2 Kühne 2015: 463.
- 3 Weale 2007: 146.
- 4 Phillips 1995: 31.
- 5 Weale 2007: 211f.
- 6 Yanow 2002.

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Call for Papers:

IGJR issue 1/2018

The IGJR publishes articles from the disciplines from the social sciences/humanities, reflecting the current state of research on intergenerational justice. It is released bi-annually and employs a double-blind peer review process. Its editorial board consists of about 50 internationally renowned experts from ten different countries.

The topic of the 2/2017 and 1/2018 double issue will be:

“Measuring Intergenerational Justice for Public Policy”

We welcome submissions to the issue 1/2018 that address ways of measuring and empirically evaluating intergenerational justice, primarily in the field of public policy.

The double edition will have the additional help of Professor Pieter Vanhuyse, University of Southern Denmark, who will be serving as a guest editor.

Submission requirements

Submissions will be accepted until 1 February 2018. Entries should be up to 30,000 characters in length (including spaces but excluding bibliography, figures, photographs and tables.) Articles may be submitted electronically through the IGJR homepage (see “Submissions”).

For more information on the double issue and requirements for submissions, please visit www.igjr.org.

Topic abstract

In recent years, there has been a rising interest in measuring and comparing intergenerational justice in the expenditure schemes of welfare states. Here, the focus is on analysing the allocation of social expenditures for the elderly (i.e., citizens 65 years of age and older) relative to the share allocated for young people. A key indicator for the fairness of public policy is the amount of the attributable expenditures for the older generation (pension, care, disability, health) relative to the incidental costs of the younger generations (education, family support).

In a 2013 study published by Pieter Vanhuyse for the Bertelsmann Foundation a total of 29 OECD states were compared on the basis of a four-dimensional Intergenerational Justice Index (IJI). This index is composed of four indicators, notably among them the “elderly-bias indicator of social spending” (EBiSS): the ratio of social spending among different age groups after taking into account demographic composition. To evaluate the public policies of different nations with such an “intergenerational lens” is a new and promising field of research.

A related field are indices for the well-being of young people (as a specific part of the population), both across different countries (spatially) as well as over time (temporally). The “Youthonomics Global Index”, published in 2015 by a France-based think tank of the same name, 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.

Another study 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. The backdrop of these new calculations is demographic ageing that has led in many Western and Asian countries to a higher percentage of voters that are pensioners or close to the retirement age. Some authors argue that the year in which voters aged 50 and older exceed 50% of all voters (after adjusting for the notoriously higher turnout rates of elderly voters) entails the danger of creeping gerontocracy – the rising resource grab of elderly voters.

A report in the same vein is the “Unicef Study on Child Well-being in Rich Countries” by Peter Adamson. *Inter alia*, it examines changes in child well-being in advanced economies over the first decade of the 2000’s, looking at each country’s progress in educational achievement, teenage birth rates, childhood obesity levels, the prevalence of bullying, and the use of tobacco, alcohol and drugs.

Articles could approach the topic through a broad range of questions, including:

- What is a good definition of “elderly-biased policies”? What indices exist to measure intergenerational (in)justice in public policy? What indices exist to measure the (lack of) well-being of young people as a distinctive group?
- How do conclusions of pro-elderly bias change once we incorporate household transfers of resources (cash) and unpaid labour (time), in addition to public transfers, into the analysis (Gál et al. 2016)?
- How should concepts and measures of intergenerational justice differ when considering age groups versus cohort (temporal versus inter temporal generations)?
- Are the respective indicators conceptually sound and well operationalised? What are the methodological pitfalls of measuring intergenerational justice in public policy, and can they be avoided?
- Can the methodology of indices like the HDI, the HWI, the Happy Planet Index etc. be applied to the younger part of the population as a distinct group?
- Do ageing societies respond to the challenges of lopsided spending? What are the political and economic causes; what are promising policy responses? For instance, does high pro-elderly policy bias in both Southern and Central-and-Eastern Europe (Vanhuyse 2014) actually mask different generational or governance cultures? How do these cultures contrast with those of

elderly but more age group-balanced societies such as in Nordic Europe?

- Might opportunity-equalising human capital investments be positive-sum ways of improving the intergenerational fairness of public policies (Heckman 2013; Vanhuyse 2015)? If so, which investments, and what would be a good measure of their intergenerational fairness?
- What – if anything – should be done to balance the welfare spending between the young and the old from a normative point of view? How might intergenerationally (more) just policies and institutions be implemented in real-world politics, given the electoral clout of elderly voters?

We welcome submissions from all fields, including (but not limited to) political science, sociology, economics, and legal studies. Philosophers and/or ethicists are invited to contribute applied normative research.

Recommended literature:

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