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# Legitimate Intergenerational Constitutionalism

by *Iñigo González-Ricoy*

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

## Introduction<sup>1</sup>

From an intergenerational standpoint, constitutions raise serious procedural legitimacy concerns. For one thing, once adopted, constitutions are almost by definition rigid, as they typically impose amendment requirements, such as parliamentary supermajorities or approval by referendum, that are more cumbersome than ordinary law-making procedures. By making their content resilient to change, they may not be able to adjust to an evolving society, and may end up not reflecting future individuals' interests and circumstances. For another, given that future generations will have a hard time amending the constitution's content should they wish to do so, constitutions can end up imposing the will of the founding generation on subsequent generations, hence undermining future generations' sovereignty – i.e., their ability to live under rules of their own choosing. These two concerns are particularly worrisome when perpetuity clauses are included in the constitution, as these make (part of) the constitution's content impossible to amend. However, constitutions can also produce intergenerational legitimacy benefits. By entrenching democratic rules and fundamental rights against change, for example,

they make it more likely for future generations to live under those rules and enjoy these rights. Further, when constitutions include provisions of environmental justice, fiscal fairness, or pension system sustainability – as many existing constitutions do – they can advance the interests of future generations in more specific ways.<sup>2</sup> For example, given that constitutions enjoy normative priority over ordinary statutes and are typically enforced by independent bodies, they can force elected officials – who often prioritise the short-term for electoral reasons – to better take into account future individuals' interests. They can also help public and private actors to overcome coordination problems in intergenerationally sensitive policy domains, such as climate change mitigation or investment in blue-sky research, in which such actors may be tempted to free ride on others' efforts. Finally, they can credibly signal the importance of intergenerational hazards to the general public, hence increasing citizens' willingness to take into account the interests of future individuals and to support far-sighted policies.

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

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

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

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

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

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

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

### **Intergenerational constitutional provisions**

Constitutions are intergenerational legal instruments almost by definition, given that they are typically hard to amend and thus

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

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

Let us briefly explore how these features can, when intergenerational provisions are included in the constitution, advance future individuals' interests. Consider the Chilean Constitution mentioned above. In 1988, in *Pedro Flores v. Corporación del*

*Cobre, Codelco, División del Salvador*, the Supreme Court upheld the constitutional environmental right to "live in an environment free from contamination" in a lawsuit aimed at stopping the deposition of copper mill tailings onto the beaches of Chile in order to safeguard marine life. Similarly, in *Comunidad de Chañaral v. Codeco División el Saldor*, the Supreme Court upheld a farmer's constitutional right to life by prohibiting the drainage of Lake Chungará.<sup>7</sup>

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

These two cases, however, were just a precedent to an extraordinary decision made in 1997, when the Supreme Court struck down the government's previous approval of the Rio Condor Project, a logging project in Tierra de Fuego, after finding that it threatened the constitutional right "to live in an environment free from contamination".<sup>8</sup> There are a number of reasons why the decision is relevant for the issue at hand. To begin with, the Court upheld the constitutional environmental right just mentioned against a decision made by the Chilean government to let a US-based corporation log 270,000 hectares of pristine forest – a project that was worth \$350 million. In so doing, it put in practice some of the features mentioned above, namely the priority of the constitution's content, including the environmental rights included in it, and the ability of the Court to revise and eventually turn down the government's decisions when these are considered to threaten such content. In addition to this, the court interpreted the constitutional environmental right as protecting "not only present generations but also future ones", thus acknowledging future individuals' interests as protected by the constitution as well as intergenerational standing, i.e. the right of present individuals to sue on behalf of future generations.<sup>9</sup> Of course, intergenerational provisions are not always equally adopted, formulated, and enforced or have the same constitutional status. For example, while intergenerational provisions are sometimes enshrined as fundamental rights, thus granting their holders a subjective, personal guarantee and heavily constraining governmental action as a result, they are often enshrined as statements

of public policy, and hence merely guide, rather than limit, governmental action. Also, while intergenerational provisions are often formulated in abstract terms, as general principles rather than precise rules, they sometimes adopt very specific formulations – e.g. when they set a specific debt ceiling or declare specific areas as national parks. When the latter is the case, judicial discretion is heavily reduced – yet so is the ability of the enforcing body to adjust their understanding of intergenerational provisions as scientific and moral change occurs over time and across generations. Finally, while intergenerational provisions are often drafted by ad hoc conventions constituted by members of civil society and adopted by means that are inclusive of all citizens, such as when ratification referendums are employed, at some other times they are drafted and adopted by merely parliamentary means. A case in point is the balanced budget amendment and debt brake added to article 135 of the Spanish Constitution in 2011, which was drafted in August, when most citizens were on holiday, and adopted by parliament with little discussion and no submission to ratification by referendum. These and some further distinctions are crucial for the issue at hand. For, depending on how constitutional provisions, intergenerational and otherwise, are adopted, phrased, and amended, very different legitimacy concerns arise. Before turning to them, and to the legitimacy concerns they may generate, in the next section we briefly explore the potential benefits that constitutionalisation may bring about.

### The benefits of intergenerational constitutionalism

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

In order to properly assess the legitimacy of constitutionalising certain rules or principles, we therefore need to consider

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

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

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

First, properly taking into account the interests of future generations typically requires adopting policies, such as forestry preservation, investment in early education, or switching to low-carbon technologies, that impose short-term pain for long-term gain. When voters evaluate candidates on their aggregate performance, far-sighted policies like these are vulnerable to electoral cycles, for incumbents seeking re-election may be tempted to postpone their adoption. They may prioritise alternative policies with benefits arriving before the next election, thus passing the buck of not adopting such far-sighted policies to others in the future.

Constitutionalisation of intergenerational provisions can help overcome this problem by taking the final authority on the provisions' content away from elected officials, or at least by raising the costs the latter face if they deviate in policy-making from their content. Further, since far-sighted policies typically need to be sustained over extended periods of time (think, for example, of investment in blue-sky research), constitutionalisation increases the likelihood that future officials will not deviate from policies adopted by previous officials, as much as they would like to do it for electoral or ideological reasons.

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

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

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

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

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

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

### Legitimacy concerns – and how to address them

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

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

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

These worries are twofold.

First, given that constitutions are by definition rigid – i.e. they typically impose

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

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

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

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

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

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

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

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

An alternative means consists – also at the formulation stage, even though it has important effects on enforcement – in constitutionalising the relevant provisions abstractly, as general principles rather than specific rules. It should be noted that abstraction in formulation may make the intra-generational democratic worry mentioned above more acute, as abstraction gives courts more discretion to interpret the relevant provisions and makes them more

powerful as a result. It may also reduce the ability of intergenerational provisions to set specific goals that may clearly and predictably constrain public policy-making and that may enable coordination amongst private and public actors. However, abstraction no doubt brings intergenerational legitimacy benefits at the enforcement stage, for it makes it easier for courts to adjust their understanding to fit an evolving society, as circumstances and interests change over time. Abstractly defined provisions may thus minimise the dissonance between the interests of future individuals and the constitution's content.

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

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

A third alternative focuses on the adoption stage. If the relevant provisions are adopted under conditions that are normatively more demanding than ordinary law-making – if, for example, they are adopted as a result of a deliberative and inclusive process in which well-informed citizens robustly engage and reach an ample consensus – constitutional rigidity may appear less like a constraint on present and future citizens, and more like a constraint on elected officials, who may be tempted, for electoral or other reasons, to deviate from the provisions' content if

these are easily amendable or have no priority over ordinary statutes. Constitutional rigidity may then become a limit on elected officials' opportunism and short-sightedness, rather than on citizens' sovereignty, as Ackerman has famously argued.<sup>17</sup>

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

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

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

2. The constitution is drafted by a convention called for that purpose and constituted by members of civil society (rather than by members of parliament, who may have electoral or partisan motivations).
3. To ensure diversity and inclusiveness, members of the convention are appointed by lot. To improve descriptive representativeness, some seats are reserved for members of minorities. Members of the convention receive on-going technical and legal advice.
4. If, alternatively, elections are employed to appoint the members of the convention, a proportional system rather than a majority system is used, to improve representativeness.
5. The document drafted by the convention is submitted to popular ratification by referendum and a minimum turnout is required.
6. A deliberation day – a national holiday in which each deliberator is paid to engage in meetings in which experts provide the hard facts – is celebrated before the constitution is ratified by referendum.

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

ever being procedurally legitimate, however serious the interests they purport to protect may look to its framers.<sup>19</sup>

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

In short, commitment theories provide powerful tools to understand the legitimacy conditions of constitutionalism. However, they fail to provide an entirely satisfactory response to the sovereignty concern. If inclusion, deliberation, reflection, and ample consensus are sine qua non conditions of a constitution's legitimacy, then future citizens may still be able to issue a sensible complaint. For, as much as these four conditions could have been met in the adoption process, a legion of future citizens were not included in such process, and never had the chance to deliberate or reflect upon – let alone consent to – the constitution's content.

It should come as no surprise, then, that a fourth option – namely the use of sunset clauses and of regular constitutional conventions – has traditionally informed the debate on the intergenerational legitimacy of constitutional provisions. In the next section, we turn to examine this option as well as its potential benefits and shortcomings.

#### Regular conventions and sunset clauses

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

It is worth noting that, notwithstanding the fact that the quote above refers to periodic constitutional convention in terms of a *right*, Jefferson went way beyond defending a mere *opportunity* to amend or repeal the constitution – as something that each generation could freely decide to exercise or not. He rather argued for *mandatory* periodic constitutional conventions as a way of respecting each generation's sovereignty.<sup>22</sup> After studying a set of actuarial tables, Jefferson estimated that this should happen every 19 years. And, partly inspired by Jefferson, some 14 American states accordingly require the people to be regularly consulted by the legislature about whether to call a constitutional convention. Similarly, the former Fijian Constitution of 1990 mandated review every ten years, and Papua New Guinea's Constitution establishes that a General Constitutional Commission should review the workings of the document after three years.<sup>23</sup>

Regular constitutional conventions are typically aimed at revising and, if appropriate, replacing the entire constitutional text. When particular provisions are targeted, sunset clauses – which Jefferson also supported as a means to ensure that no dead generation could extend its will beyond its own lifespan – may be alternatively employed. Sunset constitutional clauses, which date back to Roman law, are clauses that establish that certain provision or set of provisions shall cease to have effect beyond a particular date, unless further action is taken to extend their duration. As illustration, suppose that an environmental provision setting a limit on national greenhouse gas emissions is given constitutional status. Further suppose that the framers are unsure whether such a limit will be appropriate in the future, as technical change may perhaps allow safe capture and storage of carbon emissions beyond the threshold set by the provision – or that they believe that the next generation should not have its hands tied to decide which level of emissions they want to establish for themselves. A sunset provision establishing that the provision should expire after, say, 30 years if no further action is taken may then make the relevant environmental provision flexible enough to adapt to changing circumstances. It may also make it respectful of the next generation's sovereignty to set the environmental rules by which they wish to be bound. Are these two means appropriate – and under what conditions – to successfully

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

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

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

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

Second, and turning to one of the main

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

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

Third, and related to the previous point, setting *mandatory* expiration and amendment dates may induce amendment or repealing processes that score lower than spontaneous amendment or repealing processes in terms of citizens' inclusion, participation, deliberation, and consensus-reaching. As Ackerman contends, constitutional adoption and amendment processes only achieve legitimacy as a result of slow-motion processes, in which the relevant issue firstly enters the constitutional agenda – pushed by activists and pressure groups – beyond daily competition amongst partisan factions, as it is considered of sufficient depth, breadth, and decisiveness.<sup>25</sup> It then gives way to an increasingly specific proposal, which is followed by the calling for a constitutional convention and a process of intense popular deliberation and engagement, only to final-

ly result, if successful, in formal codification. To be sure, nothing prevents artificially established expiration and amendment dates from being inclusive, participatory, and deliberative in this sense, as well as from generating ample consensus. Yet this is less likely to happen compared to those cases in which constitutional amendment is allowed by the constitution and it occurs, if at all, spontaneously, when citizens are sufficiently mobilised, ample deliberation takes place, and consensus is reached.

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

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



## Conclusion

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

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

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

## Notes

- 1 For comments on a previous version of the paper, I am grateful to three anonymous reviewers.
- 2 For discussions of this sort of provision, see Brandl/Bungert 1992; May/Daly 2009;

- Hayward 2005; Tremmel 2006; Ekeli 2007; Cho/Pedersen 2012; González-Ricoy forthcoming.
- 3 On the idea of intergenerational legitimacy, see Gosseries forthcoming; González-Ricoy/Gosseries forthcoming: 16-20.
- 4 Gosseries 2008.
- 5 I am grateful to an anonymous reviewer for raising this point.
- 6 The label is stipulative. These provisions have also been termed as “posterity provisions” (Ekeli 2007) and as “clauses for intergenerational justice” (Tremmel 2006).
- 7 See May/Daly 2009: 239.
- 8 *Trillium Case*, Decision No. 2.732-96, Supreme Court (March 19, 1997, Chile). See May/Daly 2009 for a more detailed account of the decision.
- 9 For a court decision in which intergenerational standing is even more clearly acknowledged, see *Minors Oposa v. Factoran*, G.R. No. 10183, 224 S.C.R.A. 792, July 30, 1993 (Philippines).
- 10 Buchanan 2016.
- 11 The first and third benefits are examined in greater detail in González-Ricoy forthcoming. See also Hayward 2005; Tremmel 2006.
- 12 On the expressive effects of the law see, *inter alia*, McAdams 2000; Dharmapala/McAdams 2003.
- 13 About this concern, see, *inter alia*, Dworkin 1995; Waldron 1999; Eisgruber 2001. See also González-Ricoy 2013 for an attempt to relate this to the intergenerational angle.
- 14 The degree of rigidity negatively correlates with the number of times that a constitution is amended, as Lutz 2004 has shown.
- 15 Southwood 2015.
- 16 Ekeli 2007.
- 17 Ackerman 1991.
- 18 On these and further conditions, see Elster 1995, 1998; Ackerman/Fishkin 2002; Schwartzberg 2013; Landemore 2015.
- 19 We should bear in mind that, as pointed out above, one might nonetheless want to forgo procedural legitimacy if the stakes are sufficiently high (think, for example, of human rights in the German Basic Law, which along with other fundamental principles are protected by a perpetuity clause).
- 20 Jefferson 1999: 596.
- 21 Jefferson 1999: 216.
- 22 Holmes 1997: 2005.
- 23 Elkins et al. 2009: 13-14.
- 24 Jacobs/Matthews 2012.
- 25 Ackerman 1991.

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