

AGAINST VERY ENTRENCHED CONSTITUTIONS

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Written constitutions are a double-edged sword. They seek to constrain political actors—including even the people themselves—within limits in order to protect cherished values, but they also can prevent those same actors from taking steps that they believe necessary for the public welfare. They tie down the government, but in order to be effective they must constrain even in times and conditions when they are no longer wanted. Securing desired political limits means risking being limited in undesirable ways.

The passage of time may exacerbate these tensions, but the difficulty is not intrinsically temporal in nature nor a function of an aged constitution. The passage of time, however, might make it more likely that the difficulties of a given constitutional provision will be exposed or that changing circumstances will render a once desirable constitutional provision newly problematic.

In this Essay, I simply want to offer some considerations on the process of constitutional change, with particular consideration of the problem of constitutional entrenchment. Most constitutions are understood to be supreme law within their particular legal systems, but they vary as to how entrenched they are against revision and change. Although constitutions should be resistant to very easy change, we might hesitate to endorse an approach to constitutionalism that seeks to deeply entrench constitutional provisions against future reconsideration.

I. A LIVABLE CONSTITUTION

Regardless of whether a constitution is “living” (i.e., easily adaptable), a constitution may be livable. A livable constitution, as dictionaries might suggest, is one that is “suitable to live in” or simply

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“endurable.”¹ Theorists have often debated the idea of constitutional perfectionism, in which the governing constitution is assumed to be “perfect” or at least perfectable. Ronald Dworkin’s approach to constitutional interpretation, for example, would advise that the constitution should be made “the best it can be.”² A livable constitution, however, is evidently imperfect. Even if read in a way that might make a given constitution the best it can be, the constitution’s best might not be very good. The question is how tolerable the imperfections might be. A constitution is livable to the extent that its imperfections can be endured, politically and normatively. A sufficiently flawed constitution might give rise to legitimacy problems that are ultimately morally intolerable or that spark such a level of dissent that this form of constitutional government is not politically viable.³ A livable constitution might not be the best imaginable, but it is not intolerable. Politics can be reasonably organized around such a constitution.

What are the conditions of a livable constitution? Procedural considerations are probably not sufficient. Whether adopted through a process of democratic deliberation⁴ or supermajoritarian decision rules,⁵ a constitution might well contain provisions that are morally insufferable or politically unacceptable. Procedural considerations might be sufficient to establish the prima facie legitimacy of a constitutional text, but an ultimate assessment of its viability will be unavoidably substantive and take into account the content, and not just the pedigree, of the constitutional rules. But the bar for judging a constitution livable is necessarily low.⁶ A second-best constitution might be the best available.

Potential constitutional rules might be divided into three categories. Rules might fall within the range of political consensus, the politically contestable, and the politically unthinkable. A livable constitution should maximize the extent to which its provisions fall within the range of political consensus and minimize the extent to which its provisions fall within the class of the politically unthinkable.

Unthinkable constitutional provisions are not those that are unlikely to be adopted if they were now put to a vote but those that are beyond the

1. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/livable> (last visited Jan. 15, 2015) (defining “livable”).

2. RONALD DWORKIN, *LAW’S EMPIRE* 229 (1986).

3. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 2–3 (2006); J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1706 (1997).

4. See, e.g., BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 6–7 (1991).

5. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 62–66 (2013).

6. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 86–88 (1999).

pale, or well outside the mainstream, of contemporary politics. Such provisions are almost certainly the product of constitutional obsolescence. A contemporary constitution is unlikely to contain provisions that are beyond the pale of contemporary politics; the path by which such a provision would successfully be incorporated into a constitution would necessarily be politically perverse. An inherited constitution, on the other hand, might well contain provisions that were regarded as politically acceptable—even desirable—at the time of its adoption and yet exemplify political principles that have fallen out of favor since that time. Whether the result of fast moving events or gradual developments over an extended period of time, shifting public values or political circumstances might render a once valued constitution intolerable. A constitution containing such provisions would no longer be livable.

Optimally, a constitution would embody the political consensus. Rather than entrenching contestable values and questionable commitments, the text would reflect what are regarded to be the most fundamental commitments of the political system. Such a constitution could seemingly stand “above politics” precisely because politics would focus on areas of social disagreement and leave untouched issues of widespread social agreement. The constitution would not be apolitical, but it would be foundational to contemporary politics. While constitutions should preferably avoid all issues that are politically unthinkable, they need not seek to cover all issues about which there is political consensus. Leaving some of that ground uncovered is unlikely to render a constitution unlivable; indeed, some areas of current political consensus might preferably be left open to future political debate rather than locked in.

In practice, no constitution is likely to follow these precise boundaries, especially since the boundaries between the fundamentals, the disputed, and the unthinkable are mutable over time. The extent to which an existing constitution is livable is determined by whether its commitments encroach into areas that are now regarded as politically unthinkable or politically contested. A constitution that commits the political system to the unthinkable is impossible to tolerate. A constitution that commits the political system in ways that would otherwise be subject to contemporary political contestation and settlement is hard to tolerate, and the more and more salient those issues are, the harder to tolerate the constitution will be. The less livable a constitution, the more imperative constitutional change becomes.

II. WHY CONSTRAIN?

But why bother to constitutionalize political values and commitments at all? Correctly specifying the purpose of constitutional constraints can also clarify the goals of any process of constitutional revision. The process of constitutional revision should be designed so as to serve the broader purposes of constitutionalism and increase the likelihood that the resulting constitution will be livable.

A theory of constitutionalism frequently advanced by originalists is that constitutions are designed to constrain the future.⁷ From this perspective, the intertemporal—indeed, intergenerational—quality of constitutions is their greatest virtue. Justice Scalia has argued, for example, that the “whole purpose” of constitutions “is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”⁸ Such constitutions should necessarily be designed so as to resist change. Constitutional commitments should, as much as possible, be beyond the reach of subsequent generations to alter. Their effect should be to sharply delimit contemporary politics.

Such a theory requires some kind of great generation narrative that would justify entrusting such power to the constitutional Founders. Most strongly, we might believe that the constitutional draftsmen were unusually wise and insightful, capable of identifying and codifying fundamental political principles that subsequent political actors would themselves fail to recognize or preserve. More weakly, we might believe that the constitutional Framers were simply better positioned to act on correct principles than subsequent political actors. Perhaps the Founders were not wiser statesmen; they were just operating in fortunate circumstances. A relatively modest theory might simply assert that the deliberative context of constitutional decision making is likely to reflect a moment of “Peter sober” that should trump the more rash or “drunk” decision making of normal politics.⁹ In such moments of sobriety, or of heightened virtue, constitutional drafters would want to deeply entrench political commitments that would not be adequately respected in the fallen future.

Such theories are difficult to maintain, at least in their strong form. There can be little doubt that James Madison and his colleagues excelled at their task and approached the effort at constitutional drafting with deliberation and care. Nonetheless, there is little reason to believe that

7. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40 (1997).

8. *Id.*

9. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 135 (1995).

the Founders were uniquely virtuous or intelligent, or that their effort at constitutional design was able to anticipate the full range of problems that would eventually confront American government and society. The idea that one generation ought to have the authority to bind another runs rather strongly up against the kind of objections raised by Thomas Jefferson¹⁰ and Jeremy Waldron.¹¹

Rather than imagining that constitutions serve the purpose of freezing time, it is more productive to understand constitutions as serving to constrain government officials. As such, constitutions are tools of the sovereign people to help discipline their governmental agents.¹² This understanding of constitutionalism would not emphasize its intertemporal character, except incidentally. From Scalia's perspective, the best constitution is an intergenerational constitution, one that binds the current generation to the values and commitments of a prior generation.¹³ The goal of such a constitution is to be bind the people themselves. From a democratic perspective, the best constitution is one that helps the citizenry control government officials.¹⁴ This constitutional function is fundamentally contemporary. Although there is bound to be some temporal separation between the moment a constitution is adopted and the moment when it is applied, there is no reason why that gap need be a long one or why a lengthy separation between adoption and application would even be desirable. So long as democratic citizens are not convinced that electoral mechanisms are sufficient for preventing government officials from abusing their powers, constitutions are potentially useful devices for advancing immediate political objectives. Constitutions, more or less adequately, serve the contemporaneous purposes of current citizens. Indeed, the older a constitution is, the less adequate it might be to serving those objectives.

If constitutions are better understood as imposing democratic constraints on government officials rather than intertemporal constraints on future generations, then the principles and mechanisms of constitutional change will be different. The objective of intertemporal binding suggests the need for deeply entrenched constitutions that are very hard for anyone to change over time. The objective of democratic constitutionalism suggests the need for the people themselves to be able to control the process of constitutional revision. The appropriate level of

10. Letter from Thomas Jefferson to Samuel Kerchival (July 12, 1816), in 7 THE WRITINGS OF THOMAS JEFFERSON 9, 14-15 (H.A. Washington ed., 1854).

11. JEREMY WALDRON, LAW AND DISAGREEMENT 270-75 (1999).

12. See Whittington, *supra* note 6, at 135-42.

13. See *supra* note 8 and accompanying text.

14. See also EMILY ZACKIN, LOOKING FOR RIGHTS IN THE ALL THE WRONG PLACES 59-63 (2013).

entrenchment is just enough to get the job done but not so much that contemporary citizens cannot alter their fundamental text.

III. GOLDBLOCKS CONSTITUTIONALISM

The United States Constitution is notoriously difficult to amend. As a formal matter, the process of constitutional amendment laid out in Article V of the U.S. Constitution creates a high hurdle.¹⁵ As a practical matter, the U.S. Constitution is relatively rarely amended, whether the underlying cause of that low amendment rate is primarily cultural, institutional, or sociological.¹⁶

There is no evident way to assess whether a given constitutional amendment process is too difficult or too easy. Whether a constitution “should” have been amended more often or less often than it actually has been is likely to degenerate into a partisan assessment of the merits of particular constitutional proposals.

Here I want simply to point to some principles that ought to guide the structuring of a constitutional amendment process. In particular, the considerations offered here urge finding a path between Scylla and Charybdis. An amendment process that is either too easy or too difficult undermines the goals of a democratic constitutionalism. The aim of a constitutional amendment process should be to find a middle ground, at least minimizing the risks associated with the two dangers of constitutional revision.

A constitutional amendment process should be hard enough to avoid constitutional mistakes. Whether any specific constitutional proposal should be regarded as a mistake that we would prefer to filter out can be set aside. What is important is that we can readily recognize that some constitutional proposals *should* be filtered out. We would prefer that a well-functioning amendment process exclude the products of momentary passions or narrow factions. If the contents of the constitution are to consist primarily of matters of political consensus rather than matters of political controversy, the amendment process needs to be strict enough to exclude the momentarily dominant from entrenching their own policy

15. Bjørn Erik Rasch and Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY* 319 (Roger D. Congleton and Birgitta Swedenborg eds., 2006); Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 *J. THEORETICAL POL.* 339 (2005); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *AM. POL. SCI. REV.* 355, 362 (1994) (stating “the U.S. Constitution has the second-most-difficult amendment process”).

16. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty* (Coase-Sandor Inst. for Law & Econs., Working Paper No. 682, 2014).

preferences over the dissent of their opponents and the briefly popular from becoming enduring features of the constitutional landscape.

The danger of an amendment process that is too difficult is perhaps less obvious (laying aside the issue that drove the living constitutionalism debate in the first place, the problem of unchangeable constitutional provisions that seem to obstruct necessary policymaking).¹⁷ The practical impossibility of amendment in the face of necessity is, of course, a concern. Ultimately, however, I suspect this problem is more formal than substantive. As the theory of living constitutionalism advanced by early twentieth century progressives itself suggested, necessity is the mother of invention. If the formal amendment process is regarded as “practically impossible,” other means will be found to accomplish the desired end.

The greater danger is not that a too strict amendment process will bottle up constitutional change, but that a too strict amendment process will encourage reformers to find a political workaround.¹⁸ An effective mechanism of constitutional change should channel reform efforts along the desired course. A defective mechanism will instead encourage reform efforts to overrun the constitutional banks and flood out into the political system broadly. Once reformers turn to political workarounds in order to achieve their constitutional objectives, whatever particular virtues a formal amendment process might have in encouraging formality, deliberation, and consensus formation will be lost. If it is easier to pack the courts than amend the constitution, political actors will take the path of least resistance. A sustained political movement will have the resources to alter inherited constitutional practices and norms. A successful amendment process will guide how those alterations will take place. A too strict amendment process will be overrun by events.

17. See, e.g., CHARLES A. BEARD, AMERICAN GOVERNMENT AND POLITICS 62 (rev. ed. 1917) (“The extraordinary majorities required for the initiation and ratification of amendments have resulted in making it practically impossible to amend the Constitution under ordinary circumstances . . .”).

18. For a different consideration of workarounds, see Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503–04 (2009).