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# The semi-future constitution: entrenching future-oriented constitutional interpretation

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## ABSTRACT

A recent trend in futures studies has called for strengthening the inclusion of future generations in constitutional law. This is problematic from a practical and a normative viewpoint. This paper introduces a future-oriented theory of democratic constitutionalism that overcomes originalism (which privileges the past) and living constitutionalism (which privileges the present) without resorting to the explicit constitutional protection of the yet unborn. It is divided into five sections. The first challenges the notion that the constitutional entrenchment of the non-overlapping future is the best means of implementing long time horizons in democratic legal systems. The second maintains that constitutions are substantive normative expressions of the ultimate justification of authority. The third demonstrates that the substantive dimension of constitutions is cross-temporal and includes what I call ‘the objective interests in the future’ of all members of the people. The fourth connects such objective interests with rights to political participation. The final section focuses on the cross-temporal role of constitutional adjudication. Because rights to political participation include objective interests in the future and necessarily hold the status of constitutional rights in any legitimate democratic constitution, constitutional adjudication must guarantee their enforcement over government action.

## KEYWORDS

Semi—future constitution; democratic constitutionalism; intergenerational justice; futures studies; posterity protection provisions; constitutional adjudication

Constitutions are often regarded as heightened forms of legislation. It feels natural then to advocates of the long-term view to suggest the inclusion of future generations in written constitutions.<sup>1</sup> They seem the best available means to constrain policymakers (via the most potent legal instrument of the land) to think in distant time frames and citizens to engage in coordination strategies for the long run. This suggestion has seen the light of day in many constitutions that have added ‘posterity protection provisions’

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<sup>1</sup>Émilie Gaillard, *Génération futures et droit privée* (L.G.D.J., 2011); Iñigo González-Ricoy, ‘Constitutionalizing Intergenerational Provisions’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (Oxford University Press 2016) 170–84; Peter Häberle, ‘A Constitutional Law for Future Generations – The Other Form of the Social Contract: The Generation Contract’ in Jörg Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar 2006) 215–29; Jörg Tremmel, ‘Whose Constitution? Constitutional Self-Determination and Generational Change’ (2019) 32 *Ratio Juris* 49–75.

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(PPPs)<sup>2</sup> or ‘clauses for intergenerational justice’<sup>3</sup> to their contents, albeit resorting to different techniques with varied ranges and levels of incisiveness. Around eighty constitutional texts worldwide currently incorporate explicit references to the future, especially regarding rights to a healthy environment that supposedly extend across several generations and impose state duties to ensure long-term environmental protection.

However, this constitutional entrenchment of the (not necessarily overlapping) future is often problematic, especially with regard to national constitutions aligned with democratic principles and institutions. The reasons are both normative and practical. The normative pertain primarily to legitimacy standards, such as sovereignty and welfare.<sup>4</sup> If such standards are not made compatible with the integration of future people in the demos on equal terms with those alive in the present, the ideals of self-government and equality expressed in democratic constitutions might seem endangered by the inclusion of future generations in the exercise of constituent power. As for the practical reasons, there appears to be no direct causal link between the inclusion of future generations in constitutions and real-life success at implementing future-beneficial policies.<sup>5</sup> In addition, even a quick look at the list of countries that have adopted the most robust constitutional references to the future<sup>6</sup> shows little overlap with the list of countries that fare well in democracy indexes.<sup>7</sup>

Such reasons should be given serious consideration, as they suggest potential incompatibilities between the constitutional sphere of democratic states and the promotion or prioritisation of the long-term future, a desideratum of intergenerational justice. However, even if we accept them piecemeal, this does not mean that we must throw our hands in the air and give up on constitutions as necessary commitment devices for the protection of future generations. This paper develops the notion that the democratic constitution is not merely a form of legislation sitting at the top of a democratic legal system but a substantive type of law with extended time horizons that sets the legitimacy criteria and the epistemic categories for democracy understood as a form of government in the present. Democratic constitutions incorporate principles necessarily tied to protecting persons with ‘objective interests in the future’. Adopting a terminology I have developed elsewhere,<sup>8</sup> I call this interpretation of the cross-temporal role of democratic constitutions ‘the semi-future constitution’.

I draw the notion of ‘the semi-future’ from David Lewis’ studies on the metaphysics of time and counterfactuals,<sup>9</sup> and introduce it to the democratic constitutional sphere with a

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<sup>2</sup>Kristian Skagen Ekeli, ‘Green Constitutionalism: The Constitutional Protection of Future Generations’ (2007) 20 *Ratio Juris* 378–401.

<sup>3</sup>Jörg Tremmel, ‘Establishing Intergenerational Justice in National Constitutions’ in Jörg Chet Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar 2006) 187–214.

<sup>4</sup>Cf. Tremmel (n 1); Axel Gosseries, ‘The Intergenerational Case for Constitutional Rigidity’ (2014) 27 *Ratio Juris* 528–39.

<sup>5</sup>Michael Rose, ‘Constitutions, Democratic Self-Determination and the Institutional Empowerment of Future Generations: Mitigating an Aporia’ (2016) 9 *Intergenerational Justice Review* 56–71.

<sup>6</sup>For an almost complete survey, see Elizabeth Dirth, *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* (Utrecht University 2018), available at [https://dspace.library.uu.nl/bitstream/handle/1874/361333/E\\_Dirth\\_5786851\\_Thesis.pdf?sequence=2&isAllowed=y](https://dspace.library.uu.nl/bitstream/handle/1874/361333/E_Dirth_5786851_Thesis.pdf?sequence=2&isAllowed=y).

<sup>7</sup>Cf. Freedom House, *Freedom in the World. Democracy Under Siege* (Freedom House 2021), at [https://freedomhouse.org/sites/default/files/2021-02/FIW2021\\_World\\_02252021\\_FINAL-web-upload.pdf](https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf); and V-Dem’s Liberal Democracy Index report for 2021 in Nazifa Alizada, Rowan Cole, Lisa Gastaldi, Sandra Grahn, Sebastian Hellmeier, Palina Kolvani, Jean Lachapelle, Anna Lührmann, Seraphine F. Maerz, Shreeya Pillai, and Staffan I. Lindberg, *Autocratization Turns Viral. Democracy Report 2021* (University of Gothenburg – V-Dem Institute, 2021).

<sup>8</sup>Andre Santos Campos, ‘The British Academy Brian Barry Prize Essay: Representing the Future: The Interests of Future Persons in Representative Democracy’ (2020) 51 *British Journal of Political Science* 1–15.

<sup>9</sup>David Lewis, *On the Plurality of Worlds* (Blackwell 1986) 105.

double aim in mind. The first is to offer a view of constitutional time that expresses a future-oriented and long-term-friendly framework alternative to PPP-like measures. The second, which derives naturally from the first, is to draw out a theoretical account of constitutional interpretation that is sensitive to the embedded cross-temporality of democratic constitutions.

The paper is divided into five sections. The first four aim to show that an alternative route to PPPs is needed in the cross-temporal context and that the semi-future framework is the viable alternative. The first section challenges the notion that the constitutional crystallisation of PPPs is the most suitable means of developing the long-term view in democratic environments based first and foremost on practical reasons if we regard constitutions as supra-legal instances of legality. The second maintains that constitutions are more than supra-legal instances of legality – they are substantive normative expressions of the ultimate justification of authority, and this involves some sort of cross-temporality. The third develops this view that the substantive dimension of constitutions is cross-temporal by introducing the idea of the semi-future temporal order, which includes the objective interests in the future of all those who partake in constituent power. The fourth section focuses on the rights to political participation in order to show that such rights are shared by all the members of the demos regardless of age and are inherently future-oriented. The fifth and final section pursues the aim of drawing out an account of constitutional interpretation aligned with the democratic semi-future constitution. Its focus lies mainly on the cross-temporal role of constitutional adjudication. Because rights to political participation include objective interests in the future and necessarily hold the status of constitutional rights in any legitimate democratic constitution, constitutional adjudication must guarantee their enforcement over government action. Courts are made to acquire the task of guarding the semi-future constitution, which forms an alternative to originalism and living constitutionalism as standard theories of constitutional interpretation.

In the end, it should be clear that this novel conception of constitutional time forms a prelude to a legal theory of semi-future constitutional adjudication. Because such rights to political participation include objective interests in the future and necessarily hold the status of constitutional rights in any legitimate democratic constitution, constitutional adjudication has to guarantee their enforcement.

### **The problematic constitutionalisation of the long term**

The entrenchment of PPPs in the constitutional text allows normative references to the future to prevail over ordinary statutes and to be enforced by independent courts. Moreover, since constitutions are amended by means more stringent than ordinary law-making, endurance becomes an integral element of these clauses in such a way that the future is always taken into account *qua* future.

However, there are normative and practical difficulties in establishing and applying PPPs. The normative relate to legitimacy standards, such as sovereignty and welfare. The absence of a sufficiently robust and widely endorsed criterion of inclusion of (or attentiveness to) future people in the demos that holds constituent power on equal terms with people alive in the present hinders the overall acceptability of

PPPs.<sup>10</sup> Such difficulties are not necessarily insurmountable, provided that the concepts grounding the democratic constitutional framework are reconfigured sufficiently to encompass the yet unborn. I do not wish to engage in that discussion here for two main reasons. The first is that not all PPPs need to be regarded as problematic from a normative standpoint. For instance, certain long-term friendly PPPs often function as commitment devices that are not necessarily at odds with the basic outlines of democratic constitutions (e.g., related to infrastructure and natural resources). The second is that this discussion is not central to my argument in favour of the need for a novel conception of constitutional time since, even if we solved all the normative difficulties sufficiently, we would still have to face the following practical difficulties.

The fact remains that the explicit inclusion of future generations in constitutional texts has not proven particularly successful in inducing long-term policymaking. Beyond a few exceptions, no direct causal relationship seems to ensue between those provisions and the implementation of further norms and policies that operationalise such legal background. Constitutional PPPs have been mostly symbolic rather than effective – they capitalise on the social consideration of constitutions as expressions of national identity insofar as constitutional law embodies the fundamental values that are shared by several generations of the same community. The fact that explicit references to future generations often appear in the constitutional texts' preambles provides evidence of those references' limited normative capacity and of the constitutional legislator's intent to limit such references' binding force. Governments and elected bodies remain primarily motivated to respond directly to the structural accountability mechanisms that secure their position in office, not necessarily to constitutional PPPs.<sup>11</sup>

Notwithstanding, governments can be encouraged to pursue the constitutional orientation when they are nudged in that direction by constituents or a third party. One of the payoffs of constitutional PPPs is that they are enforceable by some independent body, such as a constitutional or a supreme court, with the ability to review statutes that do not comply with their contents. However, three problems follow from this reliance on constitutional courts to defend the non-overlapping future based on explicit constitutional PPPs favouring future generations.

The first is *functional*. Courts are passive. They can only decide on issues that are brought before them. The impact of constitutional PPPs on policymaking ultimately depends on relevant cases being brought before the courts by entities entitled to do so – an aspect that is often hindered by legal systems that adopt stringent definitions of the concerned parties in cross-temporal legal cases. And even when public litigation involves cross-temporal problems, solutions have only seldom followed from the

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<sup>10</sup>For example, for the view that future people cannot integrate the demos on equal terms based on the all-subjected-to-law principle, see Ludvig Beckman, 'Democracy and Future Generations: Should the Unborn Have a Voice?' in Jean-Christophe Merle (ed), *Spheres of Global Justice: Volume 2* (Springer 2013) 775–98. For an emphasis on a different criterion, the all-affected principle, which does not lead necessarily to the exclusion of future people or to their unequal status see, for instance, Robert E. Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy & Public Affairs* 40–68; Dennis F. Thompson, 'Democracy in Time: Popular Sovereignty and Temporal Representation' (2005) 12 *Constellations* 245–61; Michael Rose, 'All-affected, Non-identity and the Political Representation of Future Generations: Linking Intergenerational Justice with Democracy' in T Cottier, S Lalani, and C Siziba (eds), *Intergenerational Equity: Environmental and Cultural Concerns* (Brill 2019) 32–51.

<sup>11</sup>In this sense, see Dirth (n 6).

constitutional entrenchment of norms concerning the future.<sup>12</sup> If the level of public litigation about the non-overlapping future is low, the constitutionalising of the distant future is likely to be equally low.

The second problem is *epistemic*. Courts are not especially suited to base their decisions on predictions or foresight, much less about the distant future. In fact, they usually perform the opposite: adjudication decides for the future based on verifications of the (more or less proximate) past, not the future. In addition, the lack of widespread endorsement of an explicit legal theory of intergenerational equity<sup>13</sup> prompts judges to decide on cross-temporal cases based on principles most typically entrenched in the respective legal systems that impact on the long term (e.g., sustainable development, the precautionary principle, the principle of custodianship,<sup>14</sup> and fundamental rights to a healthy environment<sup>15</sup>). Since judges are unqualified to predict the long-term future, they find that more general applications of norms involving cross-temporal institutes are more appropriate to legal certainty when compared to deciding on a case by applying a PPP directly.

The third problem consists of the increasing pressure on the principle of the separation of powers exerted by the judicial competencies to overrule statutes – what is usually called *the counter-majoritarian difficulty*.<sup>16</sup> The problem in the intergenerational context arises not merely from the power of a non-elected body to overrule the decisions of an elected body but from the inevitable indeterminacy of the principles inherent in constitutional PPPs. Courts seem to have then a significant leeway to exercise discretion when interpreting such provisions.

Within this framework, a non-elected minority becomes entitled to reverse decisions backed up by authorisation and accountability mechanisms inherent in the operation of duly elected officials. The temptation to engage in judicial activism against current governments by resorting to the abstract notion of ‘future generations’ emerges very

<sup>12</sup>Cf. Dirth (n 6), esp. 53–66.

<sup>13</sup>Cf. Jane Anstee-Wedderburn, ‘Giving a Voice to Future Generations: Intergenerational Equity, Representatives of Generations to Come, and the Challenge of Planetary Rights’ (2014) 1 *Australian Journal of Environmental Law* 37–70. Lawyers and legal practitioners often talk about a principle of intergenerational equity, especially in certain areas of international public law: Edith Brown Weiss, ‘Climate Change, Intergenerational Equity, and International Law’ (2008) 9 *Georgetown Law Faculty Publications and Other Works* 615–27. However, it is at least doubtful whether such a principle (i) has the full status of peremptory law as an international practice, and (ii) whether it is binding across different domestic legal systems.

<sup>14</sup>Cf. Lynda M. Collins, ‘Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance’ (2007) 30 *The Dalhousie Law Journal* 79–134, 124.

<sup>15</sup>Regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life and adversely affect an individual’s well-being and lead to a violation of the right to life without resorting to constitutionally entrenched rights. See, for instance, Inter-American Court of Human Rights, Advisory opinion OC-23/17 of 15 November 2017 on the environment and human rights, series A, No. 23; the African Commission on Human and Peoples’ Rights, general comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (article 4), para. 3. For the European Court of Human Rights, see application Nos. 54414/13 and 54264/15, *Cordella and Others v. Italy*, judgment of 24 January 2019; *M. Özel and others v. Turkey*, judgment of 17 November 2015; *Budayeva and others v. Russia*, judgment of 20 March 2008; *Öneryıldız v. Turkey*, judgement of 30 November 2004. Certain domestic tribunals have recently followed this regional tendency and grounded decisions on a constitutional right to a healthy environment: see mostly the 2021 German Federal Constitutional Court decision on complaints against the Federal Climate Change Act: BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270. Domestic rulings against government inaction regarding climate change have appeared more prominently in certain European countries, but they are filed mostly by NGOs and are not necessarily based on constitutional rights violations: see the Supreme Court decision on *Urgenda Foundation v. The State of the Netherlands*, from 2019; the rulings on the *VZW Klimaatzaak v. Kingdom of Belgium & Others*, from 2021; the *Commune de Grande-Synthe v. France*, from 2019; and the *Affaire du Siècle* case, decided by the Paris Administrative Court in 2021.

<sup>16</sup>Alexander M Bickel, *The Least Dangerous Branch* (The Bobbs-Merrill Co Bickel) 16–17.

strongly. And the legitimacy standards offering the conditions for judges to be subject to such a temptation derive neither from future generations nor from moral duties to protect the future but solely from the constitution in force in the present that contains PPPs. The constitution redesigns, in the present, the arrangement of the separation of powers in such a way as to befriend the power of current non-elected judges against current elected governments, grounded solely on a presently binding normative document. It is as if the principle of intergenerational protection would be in tension with the principle of democracy – more of the one would require less of the other, and vice versa.

### **A substantive (time-sensitive) notion of the constitution**

Despite such difficulties, constitutions can still be viable instruments to promote the future and be regarded as robust commitment devices for the long-term view. The reason is that we do not have to rely on a notion of the democratic constitution that boils it down to supra-legal instances of legality. In this section, I propose adopting a more substantive notion of the constitution, one which necessarily includes temporalities that are not exclusively present-centred but mostly cross-temporal.

In order to do this, it is necessary to inquire into the nature of the constitution's authority. Political authority consists roughly of a claim to 'change another's normative relations'.<sup>17</sup> Political obligation is the correlative moral obligation of subjects to obey. The connection is justified mainly by content-independence. One is in a position of authority if one's claim to obedience depends simply on the status of one's standing, regardless of what is being commanded. A claim to obedience of this sort is a second-order reason for action as it depends solely on a particular property or quality *P* held by the author of the command (the command being the first order reason for action) rather than on the moral merits of that which is being commanded. Content-independence constitutes a source-based merit-independent reason for action. Correlatively, the question of political obligation boils down to whether there is a general content-independent obligation to obey commands issued by an author holding a particular property or quality *P*.

However, when claims to authority conflict, an additional reason is wanting: a third-order reason that bestows to the author of the command a claim to dominance over other claims to authority. Authority is a second-order content-independent reason for action with underlying reasons. Such underlying reasons are typically normative. They consist of the requirements that a would-be author must meet to qualify as an authority vis-à-vis competing claims to authority. They are, therefore, not necessarily independent of content. Whereas the mere existence of second-order reasons establishes *de facto* claims to authority, the corresponding third-order (underlying) reasons ascertain which *de facto* claims to authority become *legitimate* authorities. Theories of political authority are expressions of different third-order reasons for (legitimate) authority.

Content-independent reasons are then in between content-dependent reasons. They are parts of a triadic set of reasons. Situations involving conflicts between reasons for

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<sup>17</sup>Scott J Shapiro, 'Authority' in Scott J Shapiro and Jules L Coleman (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 398.



action in which one of those reasons is content-independent usually express different levels of conflict. For instance, the problem of obeying unjust laws expresses a conflict between the first-order reason for action and a second-order reason for authority. Secondly, it might also express a conflict between two second-order reasons, such as political authority and divine commands, as in Antigone's dilemma, provided that the moral command opposing the legal one is viewed as source-based (e.g., divine, regardless of content) instead of merit-based. The problem of obeying one authority rather than another expresses a conflict between second-order reasons to be solved only by weighing a third-order reason for legitimate authority.<sup>18</sup>

Dualist forms of democracy<sup>19</sup> do not fare well in such a framework. Dualism refers to the relation between the people and the government: genuine constitution-making moments, when the people speaks, seldom occur; most of the time, the branches of government govern for the people. Such dualist conceptions, supposedly typical of the US constitutional system, struggle with providing third-order reasons for democratic authority. Insofar as they conceive of democracy both as a form of government enabled by constitutional laws and as the natural expression of a people's authority to establish a constitution, they regard the people and its government as separate and hierarchically arranged entities: whereas the former lives cross-temporally, dormant most of the times, but all-powerful when it awakens to speak, the latter governs for the people at those times when the people rests silent.<sup>20</sup> This kind of democratic dualism builds on the assumption that the constitution embodies the sovereign will of the people and that popular sovereignty is the ultimate source of political legitimacy.<sup>21</sup> The problem with democratic dualism here is that it understands authority merely as a connection between second and first-order reasons. The people is the second-order reason that establishes the authority of the constitution. Just because it is what it is, it provides sufficient grounds for obedience.

However, even if a people could exist before the actual expression of its constituent power in the establishment of constituted powers, this very fact would hardly provide a viable solution to cases in which conflicting claims to obedience overlap – as it often occurs in legal pluralism, when different sources of law (national, international, regional, corporate, associative, etc.) claim jurisdiction over certain disputes and matters, or in cosmopolitanism, when moral aspirations of universalisable values endorsed internationally are made to justify overriding domestic claims to political authority.

In addition, the idea that the people is an actual entity that exists here and now meets several temporal difficulties. The existence of a people before the act by which it establishes a constitution and institutes a government is always devoid of actuality. The

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<sup>18</sup>For further developments, see Andre Santos Campos, 'Sovereignty and Legitimate Authority: What Lies beneath Content-Independence' in AS Campos and S Cadilha (eds), *Sovereignty as Value* (Rowman & Littlefield 2021) 73–90.

<sup>19</sup>According to Bruce Ackerman's influential distinction between dualist, monist, and rights-foundationalist forms of democracy: see Bruce Ackerman, *We the People. Foundations* (Harvard University Press 1991) 3–33.

<sup>20</sup>Richard Tuck illustrates this view through the metaphor of 'the sleeping sovereign', whereby the sovereign (the people) sleeps most of the time, leaving the task of democratic governance in the hands of governments: Richard Tuck, *The Sleeping Sovereign* (Cambridge University Press 2016).

<sup>21</sup>The roots of this duality are to be found in the modern distinction drawn by Sieyes between constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*). Political authority lies originally with the people, holder of the foundational right to organize itself – this is the constituent power. The political authority of the government, in turn, derives exclusively from the people in its constitution-making capacity – government branches are then mere constituted powers.



people exists politically only the moment it acts – a silent people who never spoke is no people at all. The act by which a people reveals itself – the foundation of a city, a social contract, the drafting of a constitutional document, etc. – is the act by which the people emerges as the entity that holds and exercises constituent power.<sup>22</sup> If no constituent power as such can exist until it is exercised in the creation of a constituted power, then the definition of a people that holds a constituent power cannot be valid until this people creates a constituted power. In the present, a constituent power still unable to produce a constituted structure of power is nothing more than a project that is continuously delayed. The people understood solely as the holder of constituent power exists out of time – it is never actual. How can it function then as the content-independent source of the authority of a temporally located constitution?

For the constitution that frames constituted powers to have any authority at all, as a second-order reason, the third-order reason of democracy needs to be a people with certain characteristics which can only be acquired when constituent powers establish the conditions for actual governance and policymaking (that is, for newly established entities to issue first-order reasons for action). Some of those characteristics relate to temporality.

The standard way of referring to temporality in the constitutional framework is by invoking the moral superiority of the past (in originalism) or the present (in living constitutionalism).<sup>23</sup> In light of originalism, original founding moments in constitution-making are ascribed typically to a generation in the past. The first historical constitution has its origins in the intentions and deliberations of those who participated in the drafting procedures of the constitution – they are ‘the Founding Fathers’, and we, the subsequent members of the same demos unfolding in a series of succeeding generations, their sons. The past determined the present. In light of living constitutionalism, the constitution’s authority is as cross-temporal as the people that justifies it. The present follows along a unidirectional flow, and the people that exists in the current moment the way it exists is the genuine source of the constitution’s authority, not the people as it existed in the past. The present binds itself in light of the past, not the other way around.

The problem with both views is that they fall short of realising the multitemporal aspect of each generation of the people in its capacity of holder of constituent power. The people capable of functioning as a third-order reason for authority in multitemporal contexts must have a kind of actuality in which the present involves several temporalities. Some of those temporalities are specifically oriented towards the future. In the following section, I identify one of such temporalities as ‘semi-future’ and trace it back to what I call

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<sup>22</sup>In adopting this view, I am expressing the so-called constructivist turn in democratic representation: Lisa Disch, Mathijs van de Sande, and Nadia Urbinati (eds), *The Constructivist Turn in Political Representation* (Edinburgh University Press 2019). For articulated expositions of this ‘turn’, which dates to the writings of Hobbes, Burke, Carl Schmitt, Eric Voegelin, or Claude Lefort, see, for instance, Michael Saward, *The Representative Claim* (Oxford University Press 2010); Lisa Disch, ‘The “Constructivist Turn” in Democratic Representation: A Normative Dead-End?’ (2015) 22 *Constellations* 487–99; Eline Severs, ‘Substantive Representation Through a Claims-Making Lens: A strategy for the identification and analysis of substantive claims’ (2012) 48 *Representation* 169–81; Pieter de Wilde, ‘Representative Claims Analysis: Theory Meets Method’ (2013) 20 *Journal of European Public Policy* 278–94; Sofia Näsström, ‘Democratic Representation Beyond Election’ (2015) 22 *Constellations* 1–12; Jonathan W Kuyper, ‘Systemic Representation: Democracy, Deliberation, and Nonelectoral Representatives’ (2016) 110 *American Political Science Review* 308–24; Nadia Urbinati and Mark E Warren, ‘The Concept of Representation in Contemporary Democratic Theory’ (2008) 11 *Annual Review of Political Science* 387–412.

<sup>23</sup>For a different, non-linear, perspective of constitutional time, more specifically a cyclical one within the US institutional framework, see Jack M Balkin, *The Cycles of Constitutional Time* (Oxford University Press 2020).

objective interests in the future embedded in the substantive element of democratic constitutions.

## Introducing the semi-future: constitutional objective interests in the future

Both originalism and living constitutionalism express a threefold temporal order that separates the past, the present and the future. In this section, however, I show that the substantive elements embedded in the exercise of constituent power are necessarily cross-temporal. Drawing on the work of David Lewis concerning the similarity of truth conditions throughout different moments in time, I identify such cross-temporality as ‘the semi-future’<sup>24</sup> insofar as members of the people who partake in constituent power are holders of ‘objective interests in the future’.

Lewis’ *semi-future conception of the present* comprises the set of all sortable temporal intervals beginning at a present moment  $t_1$  and including  $t_1$  itself, as though the present were the first moment of the future. In the past-present-future temporal order, the truth values of  $x$  at moment  $t_1$  are irrelevant to the truth, at  $t_1$ , of the exclusively future versions of everything that follows. In the semi-future temporal order, however, there are some  $x$ ’s that, if true at  $t_1$ , will continue to be so after  $t_1$ . The truth value of  $x$  at  $t_1$  depends on  $x$ ’s continuing to be equally true at all succeeding intervals, including a future (perhaps even distant) moment  $t_2$ . The upshot is that not all statements about the future are future-contingent statements. Instead, some statements about the present contain predicates about the future, which in turn share the truth conditions of the present, grounded in some uncontested notion of actuality.

The semi-future is thus a form of presentism with a robust supervenience base for tensed truths about the future. It is the temporal order that lies between hard presentism (the view that only the present exists) and eternalism (the view that things exist equally regardless of whether they are past, present or future). On the one hand, it allows for claims about the future, the truth values of which are grounded in the present; on the other hand, it affords actuality mainly to what exists in the present, a view that is far from being as counterintuitive as eternalism.

The truth values of statements about the future in the semi-future temporal order depend on how predicates about existents express a temporal dimension. Consider two different statements:

(A) Ellen is six years old.

(B) Ellen is a child.

Both statements are true at moment  $t_1$  if at  $t_1$  Ellen meets the actual conditions for existing in line with the predicates included in those statements. The truth value of the statements at  $t_1$  depends, then, on the correspondence between the contents of the statements at  $t_1$  and the fact that (i) Ellen exists at  $t_1$ , (ii) Ellen was born on a day between the 6<sup>th</sup> and the 7<sup>th</sup> year of an accepted calendar counting backwards from  $t_1$ , and (iii) the concept of childhood adopted by the cultural and social context in which the statements are issued includes 6-year-olds. The difference between both statements is that one of them contains predicates

<sup>24</sup>Cf. Lewis (n 9).

about the future from the viewpoint of a semi-future temporal order. Statement (A) is true of the present in light of information about the past. In order to assess whether it is true at  $t_1$ , all that is needed is the fact that Ellen exists at  $t_1$  and the belief at  $t_1$  that Ellen was born on a day between the 6th and 7th year of an accepted calendar counting backwards from  $t_1$ . Statement (B), however, says something different: it predicates that Ellen exists at  $t_1$ , that she is believed to have been born on a day that falls under the purview of the adopted concept of childhood, and that she is not an adult. Since the notion of childhood correlates with the notion of adulthood, and since both are conceived of in linear and succeeding terms, statement (B) predicates something of Ellen at  $t_1$  that concerns Ellen's future: that at  $t_1$  she is an actual child and a potential adult, a status she will likely achieve only at some indeterminate interval after  $t_1$ . Her childhood status at  $t_1$  is inherently temporary at  $t_1$ . When (and if) Ellen does become an adult at some future moment  $t_2$ , her recently acquired status will be determined by the truth conditions of  $t_2$ ; from the viewpoint of  $t_1$ , however, statement (B) about  $t_1$  already contains a true predicate of  $t_2$ , namely that a living Ellen at  $t_2$  is an adult.

The usefulness of the semi-future framework to the constitutional order emerges from the possibility it affords to focus on the truth conditions of statements about interests.

Interests are often understood as indistinguishable from preferences or subjective inclinations. This particular notion of an interest is temporally volatile. What people want or believe today may not be what they want or believe tomorrow. Interests can also be regarded in an objective sense, however – a sense that does not depend on the subjective whims of the bearer but is attached to the value of a person. 'Having interests' differs then from 'having needs' or 'wanting something'. To have interests in this sense is to have objective reasons to want something. To have an interest in some  $x$  is to have a reason, all things considered, to want that  $x$ . Statements about persons' objective interest in  $x$  depend not on whether the interested parties actually want or need  $x$  but on whether such statements express justifications that interest holders would endorse in ideal conditions of reasonableness and information.<sup>25</sup>

The interest attached to a person  $A$ 's value is constituted by the reasons for favouring or disfavouring a state of affairs related to  $A$  for the sake of  $A$ .<sup>26</sup> In simple cases, where

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<sup>25</sup>In the context of future ethics and climate ethics/law, many authors prefer to focus on 'needs' instead of 'interests'. See, for instance, among others, Edward A Page, *Climate Change, Justice and Future Generations* (Edward Elgar Publishing 2006); Ian Gough, 'Climate Change and Sustainable Welfare: The Centrality of Human Needs' (2015) 39 *Cambridge Journal of Economics* 1191–14; Jörg Tremmel, *A Theory of Intergenerational Justice* (Earthscan 2009), 96–100. I admit that 'basic needs' has a more objective dimension than 'interests', but I prefer to focus on the objective status of interests for five reasons (and I thank an anonymous reviewer for pressing me on this matter). First, issues such as what interests consist in, whose interests are affected by certain political authorities, and what persons or procedures are capable of identifying interests have historically been at the very core of political debates. Second, interests have recently gained prominence as the most comprehensive means of grounding robust normative entitlements such as rights, especially vis-à-vis the will. Third, interests are normative elements that are more readily available for assessing membership of a political community for the purposes of establishing the identity and competencies of the legitimate political authority of that community. Just think of the all-affected-interests principle that has a widespread use when tackling the range and scope of demoi. Fourth, different uses of the concept of an interest are characteristically entangled with different temporalities. Since interests can be ascribed to entities with different timespans and different time horizons, they tend to absorb, more than 'basic needs', the corresponding temporal dimensions. Interests can then be understood as a locus of self-regarding rational calculation by human individuals or as lifetime-transcending inclinations or values imputed to entire communities. Fifth, in the context of political representation, interests seem more likely than needs to prompt responsiveness by elected representatives, specifically if responsiveness is regarded as a yardstick for measuring the quality of democratic representation.

<sup>26</sup>Alternatives to the phrase can be found in Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1993), 19–20 ('with due regard for'); and in Stephen Darwall, *Welfare and Rational Care* (Princeton University Press 2002), 14 ('on [someone's] behalf').

someone's will or preferences constitute a reason to act, one has a reason to act for that person's sake. Suppose I am a representative of person *A*, and I have a reason to promote *x* simply because person *A* would prefer that *x*. Suppose further that the role of *A*'s preference is not incidental: it is not the case, for example, that the preference is a reason because it is a sign for or means of achieving something else. The reason boils down to the consideration that *A* would prefer that *x*. Then, I generally have a reason to promote *x* for *A*'s sake, and *x* can be said to have an *A*-related value.

With regard to objective interests, the content of *x* is not necessarily equivalent or opposed to the actual will and preferences expressed by interest holders. Instead, it preserves a certain measure of independence from them. Volitions and preferences may be suitable means of accessing individual persons' subjective interests or preferences at any given moment in time (and, consequently, of providing data concerning what it means to act for their sake substantively). Still, they seem insufficient to determine objective interests, and this is for various reasons. For instance, subjective preferences at the present moment  $t_1$  may not coincide (and may even conflict) with the contents of objective interests due to epistemic immaturity or because preferences are induced by some external framing or nudging that obstructs or silences reasons for the best preferences. Some people may lack the means to adequately voice their genuine preferences, as in cases of idiomatic difficulties or extreme poverty. Ultimately, the objective interest is related to a person, but it is not subjective in the sense that it is what a person values, takes to be valuable, or wants. Often, the fact that *A* values or wants *x* makes this state of affairs valuable to her and for her sake, as a matter of substantive fact, but this is not necessarily the case. Sometimes, the fact that *A* values or wants *x* is irrelevant or is outweighed by other reasons to act for *A*'s sake, as occurs if *A* is an infant and *x* would harm her.<sup>27</sup>

This independence of objective interests from subjective interests (or preferences) suggests that the contents of both kinds of interest are also independent of one another. Objective interests relate to the conditions for being fully respected as a moral person. Certain states of affairs seem so fundamental to individuals' lives that they can easily qualify as necessary conditions for such respect. Access to basic goods that sustain life and provide a minimum enjoyment of freedom and well-being seem obvious candidates for such states of affairs. John Rawls calls these 'primary goods', i.e., 'things that every rational man is presumed to want'.<sup>28</sup> They are so fundamental that a person's moral value is violated when she is detached from them.<sup>29</sup>

Unlike preferences, objective interests are inherently cross-temporal in two respects. First, the cross-temporality of objective interests has *lifespan durability*. The person's moral value remains constant throughout her lifetime. And a lifetime, the collection of

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<sup>27</sup>I derive this association of personal value with objective interests from my fruitful discussions with Pedro Múrias, to whom I am very grateful. Some of the sentences contained in this paragraph are almost a verbatim paraphrase of Pedro Múrias, 'Personal Value in the Analysis of Rights' (2018) 2 *Católica Law Review* 25–40, 29.

<sup>28</sup>John Rawls, *A Theory of Justice* (Harvard University Press 1971) 54–55.

<sup>29</sup>Somewhat similar specifications of the primary goods that make up the core values of democracy can be found in Philip Pettit's 'freedom from non-domination' and in Thomas Christiano's 'fundamental interest in being at home in the world': see, respectively, Philip Pettit, *Republicanisim. A Theory of Freedom and Government* (Clarendon Press 1997) 80–92; and Thomas Christiano, *The Constitution of Equality* (Oxford University Press 2008) 61–62. The notion of objective interests in the future is different from these specifications in that it emphasizes the temporal aspect while being more 'ecumenical', that is, independent of a fully worked-out theory of moral personhood (and, therefore, acceptable under any plausible specification of the primary goods for the democratic ideal).

days and years between a baby shower and a funeral, is conceptually cross-temporal. The threat of basic deprivation is largely ageless and non-comparative. Regardless of their age, all individual persons need food and clean water, clothing and shelter, healthcare, education, and access to institutions whose function is to safeguard people from considerable vulnerability and degrading treatment – and to the degree that is respectful of their autonomy as persons and that liberates them from the tyranny of the immediate ‘now’. In other words, they need that without which they can never be recognised as free individuals.

Lifespan durability implies constancy. The content of objective interests in sufficient primary goods can be ascertained for any person at any given moment at which she is alive. Constancy, however, should not be mistaken for sameness. Objective interests in particular states of affairs that rise above a certain threshold relate to the same minimum threshold throughout a lifetime, but the means required to satisfy those interests vary depending on how close to the threshold a person is at different moments of her life. Certain ages are more liable to vulnerability, which ultimately means that age groups have unequal requirements among the temporal line concerning the satisfaction of their objective interests. Older people and infants, for instance, may require more primary goods than healthy adults to meet the threshold they all share equally.

Second, the cross-temporality of objective interests has a *futures tendency*. Person *A* has an interest in having free access to primary goods at any given moment of her life. If she has reasons to want them now, then she necessarily has reasons to want them in the future. For such reasons, what induces her to want them now is also that which will induce her to want them in the future. The truth conditions of statements regarding these objective interests are the same along the temporal line at which the individual person is (or is expected to remain) alive. The interests at  $t_1$  are interests in (i) obtaining a state of affairs at  $t_1$  that guarantees access to all those primary goods and institutions that are necessary conditions for respecting one’s moral status as a person, and (ii) preserving the same state of affairs throughout all of the future moments in which one is expected to remain an interest holder. In this latter sense, they are *objective interests in the future* (that is, interests of the present regarding the future).

The contents of such objective interests relate to a qualitative moral threshold – the access to goods that allow the full exercise of civil and political rights on equal terms. This threshold is both general and presentist. It is general because it is attached to the very notion of an autonomous person, and therefore apparently consistent throughout time and never very low (as opposed to thresholds merely dependent on welfare). And it is presentist because the specification of the actual means, institutions and entitlements that comprise this minimum access for any conceivable autonomous person is determined by the means, institutions and entitlements at the disposal of the autonomous persons living in the present.

‘For the sake of’ refers to a moral status rather than a factual or desired state of affairs. The emphasis on primary goods is justified by the equivalence of such goods with the necessary conditions for claiming that a person’s moral status is not being disrespected as such. Thus, the contents of objective interests are non-relational because they are independent of the particular circumstances of other individual persons at any time  $t_1$  or before  $t_1$ . One’s objective interests are continuously directed at meeting an ideal threshold below which one’s status as a moral person is necessarily disregarded. Still,

this ideal does not have to be detached from and insensitive to actual temporal contingencies insofar as it is conceived as the threshold constituted by the rights, freedoms and resources recognised in a given moment in time as inherent in the notion of moral personhood and universalisable (that is, valuable at any moment as what should be held and enjoyed by all living moral persons regardless of whatever is actually held and enjoyed by those best-off or worse-off at that moment).

The upshot is that all who can integrate a people, regardless of age, hold objective interests in the future. The younger the interest-holder, the further the time horizon of her objective interests extends. It does not extend indefinitely, but it does extend in a way that is not short-term. Such interests are embedded in the very idea of being a member of the people that holds and exercises constituent power. The constitution's authority derives only from a people that is regarded in such a substantive way. Objective interests in the future are one of the substantive characteristics of the people that function as a third-order reason for authority.

### **The fundamental right to political participation<sup>30</sup>**

Members of the semi-future people have objective interests in the future, which acquire normative force in a constitutional system by acquiring the status of rights. The rights arising with the membership of the people are rights held by actual persons who attain a specific normative status in light of belonging to a collective institution, the existence of which can only be explained and justified by the existence and exercise of such rights. This collective institution, the people, the holder of constituent power, is the sole entity that legitimises authority. When the people architectures a political structure via a constitution, the constitution-making process cannot be conceived without those rights in play. As members of the people, rights-holders have such a normative status because they share constituent power, the power that engages in constitutional design and brings about the constituted powers. The rights of the members of a semi-future people, inherent in the very procedure by which a constitution comes about, are then necessarily constitutional rights. The utmost expression of this right is political participation – the individual actuality of constituent power.

Such a right to political participation is entrenched in all democratic constitutions, which means it acquires the status of a constitutional right. In general, the constitutionalisation of rights produces two outcomes: (i) it spawns a range of procedural obstacles to legislative and executive action that vary depending on the extent to which each action departs from the substantive presumptions expressed in constitutional rights norms; (ii) it ensures the protection of rights through judicial control of the constitutionality of the normative acts regulating these rights. Constitutional rights are positive law and primordially political, even if they are morally charged.

The right to political participation is an indispensable part of a democratic constitution in at least three ways. The first is through explicit inclusion in constitutional texts. Some constitutions include the phrase 'right to participate' in their list of

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<sup>30</sup>This section takes on the argument already put forward in Andre Santos Campos, 'Long-term Urgent Interests and Human Rights Practice: A Challenge to the Political Conception' (2022) 25 *Critical Review of International Social and Political Philosophy* 143–64.



fundamental rights. Others establish obligations to foster and guarantee individual forms of participation in public affairs, e.g., by recognising rights that follow procedurally from a moral entitlement to participation (such as the right to vote or the right of association).<sup>31</sup>

The second is through international human rights practice. The right to political participation is generally acknowledged in the so-called International Bill of Human Rights, specifically in Article 21 of the Universal Declaration of Human Rights and in Article 25 of the International Covenant on Civil and Political Rights, as well as in certain regional human rights charters. This inclusion, of course, turns them into human rights, not constitutional rights. But, as human rights, they have a domestic manifestation that makes them capable of performing the same functions as constitutional rights. On the one hand, it is a well-accepted principle of international law that states cannot rely on national (constitutional) law to evade obligations under international law.<sup>32</sup> States are obliged to effect constitutional reforms within the boundaries provided for by all elements of international law. On the other hand, even if this relation between international documents and national legislation were not an integral part of international law, the rights embedded in international human rights practice have delved deeper into the contents of *jus cogens*. Consequently, they can percolate into democratic constitutions, thereby imposing limits on domestic (constitutional) legislative processes.

The third way of constitutionalising the right to political participation is the most decisive since it is conceptual rather than empirical, necessary rather than historically contingent. The right to political participation is inherent in the very procedure by which a democratic constitution comes about, even if it is not written down explicitly in a bill of rights. Since a democratic constitution arises from the process by which a people comes about as a normative entity while establishing a common structure of constituted powers, the individual right to political participation attached to the members of the people corresponds to the normative status of holding some degree of constituent power. This right materialises political representation as a normative relation. Even though it is perfectly possible to develop a persuasive moral argument in favour of the right's binding force, the right to political participation is chiefly procedural. Whether concerning written constitutions that limit law-making rigidly or customary constitutions that shape law-making more fluidly, a *democratic* constitution that does not respect this right held by the members of the people fails to become legitimately authoritative.

Even admitting that it expresses moral value, the right to political participation is born solely with the formation of the demos, the existence of which, in turn, depends on the right being born in the first place. It is not a moral right preceding and determining a priori the fairness conditions of the democratic procedure. The right only arises as participation in something that already exists – it does not make sense to say that one has the right to participate in that whose existence depends on participating in it. The right to

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<sup>31</sup>Constitutions that include the phrase 'right to political participation' are, for instance, East Timor's, Peru's, Portugal's, Spain's, Slovakia's, Hong Kong's. The list of constitutions that value and prescribe obligations regarding participation is broader: see, for instance, Vivien Hart, 'Constitution Making and the Right to Take Part in Public Affairs' in Laurel E Miller and Louis Aucoin (eds), *Framing the State in Times of Transition* (United States Institute of Peace Press 2010) 20–56.

<sup>32</sup>Such a peremptory status derives from the doctrine of *opinio juris sive necessitatis* in International Law: see Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006).



political participation is the necessary counterpart of a constitution that endorses the principle of democracy, that is, a constitution that is born and justified by a people which is born in the very act by which it justifies the constitution.

Because of its primary procedural nature, the right to political participation can be easily mistaken for a moral right to democracy. The common understanding of political participation as involving the elimination of unjustified obstacles to actions such as voting and running for office – an understanding shaped mostly by the International Bill of Human Rights' wording – has reinforced this interpretation. Regarded in this light, many human rights theorists have undervalued or even eschewed this right from the lists of basic human rights embedded in international human rights practice since its violation does not seem to sufficiently justify intervention into the affairs of non-respecting states.<sup>33</sup>

However, the right to political participation has slightly different content. It is a right to partake in any procedures that lead to collective decisions that might affect one's person, interests or rights. This is the sense in which this right can be called 'a right about rights', that is, a right that helps to settle disagreements about rights.<sup>34</sup> It can thus become an essential instrument in determining the legitimacy of decisions affecting different persons, especially when they affect them negatively. It functions not as a moral entitlement to a specific political arrangement but as a constitutive rule without which the constitutional democratic game cannot be played. In the act of constitution-making, it exists in the form of objective interests enclosed into the substantive nature of the constitution; in the act of establishing constituted powers, it exists in the form of membership of the representative relation, i.e., in taking part in representation.

The standard view of the right as containing entitlements to active participation in public affairs faces certain obstacles concerning the semi-future temporal order. Government decisions can undoubtedly have a significant impact on people of all ages, for instance regarding policies that either promote adequate welfare conditions or that undermine the quality of life. With regard to younger members of the demos, their interests in developing their capacities to exercise civil and social rights by themselves can also be relevantly affected by laws and policies established by states today. But, concerning constitutionally protected citizens of a certain age, such as children and the young, they have interests even though they do not as yet have the capacity to exercise political participation. How can they be said to participate in the conduct of public affairs and be holders of the right to political participation?

Regarded as the necessary entitlement of any member of the demos that exercises constituent power, the right extends to the semi-future sphere with less difficulty. Participation occurs not at the level of the franchise alone but mainly at the level of the class of the represented. Participating politically as a represented entails being able to choose one's representatives and to provide some level of input in the collective decision-making procedures, but also having one's objective interests taken into account in the representative action – in the action that is forced upon constituted powers. Since children and the young have interests in fulfilling their average life

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<sup>33</sup>See mostly Charles Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 174–86; James Griffin, *On Human Rights* (Oxford University Press 2008) 247–51; John Rawls, *The Law of Peoples* (Harvard University Press 1999) 65–70.

<sup>34</sup>Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 *Proceedings of the Aristotelian Society* 307–37.

expectancy at birth and in becoming full-fledged citizens and participants in law-making, those interests justify political representation in the present. Rather than being synonymous with the right to vote or to democracy, the right to political participation would be, first and foremost, a right to being represented. Such a right implies a duty on the part of the authorities established in the constitution as constituted powers (whether elected or non-elected) to consider the relevant interests of all the members of the people in their representative actions, regardless of who is (or is not) included in the franchise due to age. The constitution is then legitimate only insofar as it arises from such a right and to the extent that it binds ordinary lawmakers to protect such a right in the first place.<sup>35</sup>

This temporal strategy incorporated in the democratic constitution for representing everybody's interests in the future shows that, at any given moment, the impact of actions, norms and policies must be taken into account in collective decision-making for the remaining duration of the lives of all living members of the people. The constitutional status of the right to political participation extends then cross-temporally.

### Semi-future constitutional review

The process by which a people comes into existence in the exercise of constituent power affording authority to the constitution has something substantive working in the background. If a constitution fails to embrace and reflect the objective interests of all the members of the people, including those with interests in extended time horizons, the actions of the constituted powers established in the constitution suffer from a legitimacy deficit even if they conform with the written letter of the constitutional text. It is the features of the semi-future people that communicate constitutional dignity to a document or convention, not the other way around.

The constitution is, therefore, a formal authority determined and backed up by *substantive* elements, specifically by the characteristics of inclusion and individual access to political participation across different time horizons that are typical of the semi-future people. Individual freedom and equality of treatment and respect are the standard underlying principles of the democratic tradition that connect easily with this notion of the people. Since members of the people relate among themselves and *vis-à-vis* constituted powers, at this point, solely in their capacity as members of the people, a capacity they all share on equal terms, there is no reason why such a minimum concern and respect should be allowed to be unequal.

The constitution is the embodiment of the semi-future's constituent power and, therefore, mirrors such substantive elements. It is not an enhanced form of legislation but a distinctive type of law suitable to serve as a normative foundation for an all-encompassing political community. Its contents are not simply what a prior people decides to

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<sup>35</sup>My focus on participation in the representative relation for determining who gets to be a member of the semi-future people is akin to the all-subjected principle as a solution to the problem of constituting the demos (also called 'the boundary problem'), except the semi-future view I endorse prioritizes rights-holding (to being represented) rather than subjection to laws, even if both rights and subjection are correlative in the representative relation. Additionally, insofar as children and the young share with other members of the demos the equal status of being represented, they can also be said to become members of the demos in light of an equal relations principle: Andreas Bengtson, 'Finding a Fundamental Principle of Democratic Inclusion: Related, not Affected or Subjected' (2022) *Inquiry*, doi.org/10.1080/0020174X.2022.2111603.

establish. Rather, they are limited beforehand by the qualities resulting from the normative status of the people and its members vis-à-vis the constituted powers.<sup>36</sup>

These qualities stem from the process by which constituted powers come to existence, not necessarily from specific contents traced back to those constituted powers. The authority of the constitution, as a second-order reason, is limited by the normative characteristics of those who form the third-order reason, not by the moral status of the actual contents of first-order reasons. Since no specific first-order reasons for action follow from the nature of the demos that is the third-order reason, but only a second-order reason that establishes a claim to authority as dominant, it follows that constituent power is hardly suited to pursue specific policies.

Overall, there is a great chasm between questions concerning the organisation of political power and questions concerning the contents of collective choices. Parliaments, governments, courts, elections, procedures, acts – these are all constitutional institutions, not facts that exist out there in the world. The legitimacy of the constitutional entrenchment of constituted powers in the sphere of political organisation is based on the fact that they are inevitable: it is a logical impossibility for the constituent power to entrust governments in charge of the ordinary political process with an entitlement to make decisions which have to be presupposed for governments to exist in the first place. But the same does not occur with questions concerning policy decisions. The constitutional lawmaker, acting as an agent of the genuine holder of constituent power, is hardly apt to bind ordinary lawmakers to balancing judgements.

How, then, can we employ the constitution at the service of the semi-future conception of the people?

The answer lies not necessarily in entrenching novel future-oriented provisions into presently binding constitutional texts but in upholding the semi-future dimension already embedded in current democratic constitutions. This task belongs primarily to the guardians of the substantive dimension of the constitution. The solution to our difficulty depends on establishing the legitimacy of semi-future *constitutional review* with respect to the principle of democracy.

Proposals for overcoming problems associated with the long-term capability of democratic institutions often focus on institutions that are not subject to the vagaries of an election. Institutions such as unremovable judges, monarchs, irremovable members of certain bodies, lifetime senators, and specialist institutions, all have the suggestive quality of continuity and are aimed at ensuring impartiality and independence,<sup>37</sup> thereby adopting the long-term view more effectively. They promote institutional stability and help to reduce uncertainty.

Courts with the competencies to develop constitutional review have these qualities for two reasons. First, a provision in the constitution has a different legal meaning from the same provision in a statute – there, it contains a principle open to balancing; here, it typically embodies a hard and fast rule. Principles, unlike rules, cannot be applied in an all-or-nothing fashion but are optimisation requirements. They can be realised to the

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<sup>36</sup>For a similar view, albeit reached by following a different argumentative path, see Gonçalo de Almeida Ribeiro, 'What Is Constitutional Interpretation?' (2022) 20 *International Journal of Constitutional Law* 1130–61. See also Gonçalo de Almeida Ribeiro, 'Between a Rock and a Hard Place: Constitutional Theory and Intergenerational Equity' (2022) 9 *e-Publica* 4–25

<sup>37</sup>Cf. Juan J. Linz, 'Democracy's Time Constraints' (1998) 19 *International Political Science Review* 19–37, 29.

greatest extent possible given empirical and normative constraints, including other principles that compete with each other. The upshot is that a constitutional document cannot be interpreted as if it were just another statute. Constitutional norms, especially constitutional rights norms, are mostly principles. They can contain rules as well, although the obligation to follow rules derives from underlying formal principles. When interpreting principles, constitutional jurisdictions are required to balance several reasons and settle for the most robust ones, thereby engaging in an argumentative task of justification and deliberation that is likely to escape subjection to short-term contingencies. Second, precisely because courts that develop constitutional review are principles-driven, they are hardwired to be somewhat sensitive to anticipatory knowledge. This much is visible in the effects of public interest litigation in promoting the long-term view, e.g., in areas involving climate change.<sup>38</sup>

As stated before, courts seem ill-suited to decide on issues that counter majoritarian-based policymaking in favour of uncertain (non-overlapping future) states of affairs and interests. Not only are they incapable of specifying undetermined concepts related to the distant future in particular decisions and rulings – they also lack the legitimacy to oppose the future to the present. This latter, negative, aspect of constitutional review consists of attributing the principle of democracy that supports ordinary law-making a lower weight in comparison to the performance of constitutional review. Even if constitutional courts make up for direct democratic deficits by having members nominated by elected officials and by adopting procedures that culminate in majority rule, the democratic principle is always stronger with the legislature. The lower weight of the democratic principle connected to legislatures is always proportional to the degree of discretion accorded to the court, which is considerable in the case of decisions about the long term.

No such problems occur with the defence of constitutional rights, such as the right to political participation, which exist in the present and are inherent in any democratic constitution. By willingly protecting such rights that involve objective interests in extended time horizons, and are therefore semi-future, courts ensure that the principle of democracy is active in ordinary policymaking just as in constitutional review. In this sense, constitutional review is legitimate because it protects the conditions presupposed by a democracy, the foundations of which are semi-future. Simultaneously, the courts also participate in the representative process – their very existence and competencies follow from the constitutive process by which the people comes about in exercising constituent power. Constitutional review is then an exercise of state authority and representative of the semi-future people.

There are two ways courts intervene in the collective decision-making process. The first is by invalidating statutes and regulations issued by ordinary lawmakers that are expressive of ‘harmful short-termism’, in a sort of ‘negative act of legislation’.<sup>39</sup> The basis for this invalidation is a matter of principle, specifically the application of constitutional rights norms that protect the right to political participation. Unlike rules,

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<sup>38</sup>Brian J. Preston, ‘The Influence of Climate Change Litigation on Governments and the Private Sector’ (2011) 2 *Climate Law* 485–513.

<sup>39</sup>I borrow the first expression from Simon Caney, ‘Political Institutions for the Future: A Five-fold Package’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (Oxford University Press 2016) 135–55; and the second from Hans Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’ (1942) 4 *The Journal of Politics* 183–200, 187.

which tend to work mechanically and help to lock particular decisions binding on constitutional jurisdictions, principles are flexible and call for reasonable, equitable and substantive justificatory judgement concerning the statutes and regulations issued in the representative policymaking action. For this reason, decisions about conformity with the constitution are entrusted to the constitutional jurisdiction, which is charged with controlling the democratic foundations of legislative activity. The people thus delegates to an entity immune to the immediate pressures of elective systems the power to prevent the degeneration of the democratic political process. Because the people is semi-future in that it contains members with objective interests in extended time horizons, this delegation to a court is crucial to the actual constitutional organisation of representative power. The court is not merely a guardian of the constitution – it is a representative of the semi-future people.

The second way courts can function in the representative process is by issuing directives to legislatures concerning positive state action in the field of protective and social rights. This comes close to a positive act of legislation, which can only be legitimate if it proceeds and is justified by the people as a third-order reason. For a court, a non-elective branch of government, to have the authority to interfere in policymaking actively, it can only be as a consequence of representing the people and for the protection of that very normative representation relation. The constitutional jurisdiction, in light of the connection between the semi-future people and the right to political participation shared by all the members of the people, regardless of age, is the guarantor of the integrity of the representative action that follows from the constitution in force.<sup>40</sup>

Representation, in a democratic constitutional framework, is both formal and substantive.<sup>41</sup> Formal representation refers to the legitimacy nexus between the operation of government bodies and the people: government bodies act representatively on behalf of the people and as a people, and only in that capacity can they bind the people through their actions. However, constitutionally framed democratic representation is not reduced to a mere delegation of popular power to constituted structures. The legitimacy of government bodies is also based on the content of their acts. Beyond the many differences between them regarding doctrinal, cultural and political conceptions of justice, the members of the people expect the first-order reasons for action issued by established authorities to genuinely reflect and protect the fundamental interests embedded in the entity that forms the third-order reason for authority. Without this correspondence at the level of content, representation can be said to exist only formally, not substantively.

Representation in a substantive sense occurs within political action when (formal) representative bodies update and manifest in the contents of their ruling the people's

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<sup>40</sup>Authors associated with conceptions of deliberate democracy often view constitutional jurisdictions as agents of 'argumentative representation': see, for instance, Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572–81. However, the absence of direct legitimacy and accountability mechanisms between the judiciary and the franchise does not have to entail that courts only represent the people in an argumentative way. As branches of government of a democratic constitution, courts are necessarily representative bodies of the people and they are entrusted with the task of preserving the constitutional commitment of the very representative relation they are engaged in.

<sup>41</sup>This distinction can be found in Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie* (Suhkamp 1991) 379–405. This terminology seems to mirror the distinction between elemental and existential representation developed by Eric Voegelin, *The New Science of Politics. An Introduction* (The University of Chicago Press 1952) 31–41.

objective interests, which are thus reflected in their performance. Substantively, representation is the operation of acting in (or caring for) the interests of all members of the people, as a disposition to decide in accordance with the needs and interests of those who are affected and bound by the acts of the representatives, and as a dialectical process between representatives and represented in the sense of giving actuality to the interests of the members of the people who exist presently in the people. In its substantive dimension, representation no longer centres on the representatives' competencies to compel the represented by their decisions but on their ability to generate acceptance.

Now, it is precisely as the guardian of this substantive element of representation that the judiciary can intervene in its capacity of being a branch of government inherent in the formal representative structure.<sup>42</sup> Courts can then repel legislation that violates current semi-future constitutional rights and recommend legislatures to push for legislation aimed at reinforcing the conditions for the protection of the same rights. Such rights are violated if governments establish norms and implement policies that are likely to affect their right-holders' capacity to exercise them in the future. They are ascertained of rights held at  $t_1$  by persons existing at  $t_1$  concerning legislation and policymaking developed at  $t_1$  that affects at  $t_1$  the constitutionally protected prospect that such rights will continue to exist by the same holders at  $t_2$ .

Whenever legislatures or executive branches of government compromise today the ability held by persons of today (e.g., children and the young) to acquire a capacity for exercising civil, political and social rights (that they are incapable of exercising by themselves today) in the future on equal terms with the exercise of the same rights by persons who hold them and exercise them freely today, the semi-future constitutional rights to political participation (whether written or not) are violated, and governments overstep their authority insofar as they deny a significant portion of the people to participate fully and equally on the very act by which they (the governments) come about in the first place. Court action is needed then to re-establish the legitimate democratic connection.

This semi-future dimension of the constitution relies neither on originalism nor on living constitutionalism, the two most well-known approaches to constitutional interpretation that express different perspectives on the quality of linear time. Originalism maintains that the 'true' meaning of the constitution decays as time leads further away from the original moment, which should then be restored; living constitutionalism, on the other hand, embraces the contrary view that the original constitution is unable to meet the transformations brought about by the passing of time, and its meaning should then be updated. The former is focused on retrieving the past, and the latter on improving the present. Instead, the semi-future constitution is intrinsically cross-temporal, with a keener eye towards the future. The constituent powers of the present that are passed on from the past are necessarily forward-looking. If there is a 'true' meaning of the semi-future constitution, what lies ahead is already contained in the constitutional principle

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<sup>42</sup>This proposal is likely to be interpreted either as an attack on the independence of judges (by understanding courts as representatives) or as an supplementary weapon in the already extensive armoury of judicial activism (by empowering judges at the expense of the political branches of government). This, however, is not the case. Not only does this proposal apply only to the constitutional jurisdiction (and not to the entire judicial branch), it also suggests that judicial accountability is possible, desirable, and paramount to a viable semi-future conception of democratic legitimacy.



of democracy. Any revival or reinterpretation of the constitution that neglects this feature calls for court correction.

Courts are not only entitled to do so. They are obligated to do so. Since constitutional rights are open to balancing, the task of constitutional jurisdiction is to protect the fundamental elements of the constitution by upholding those rights. This task is embedded in the very nature of the constitutional jurisdiction. For this reason, the balancing must be justified and well-argued in light of the substantive criteria of the constitution that are binding in the present. No indeterminate concepts are admitted in such constitutional rulings. On the contrary, constitutional jurisdiction ensures the integrity of the representative process by specifying the cross-temporal nature of the rights that already exist today and are under threat today concerning the future. The best way to ensure the efficiency of this protection is to push for more public interest litigation based on the violations of semi-future political and social rights<sup>43</sup> so as to nudge courts to develop semi-future legal theory and lock in the cross-temporal protection via precedent.

## Conclusion

This paper develops the notion that the democratic constitution is a substantive type of law with extended time horizons that encompasses principles necessarily tied to protecting persons with objective interests in the future. This interpretation of the cross-temporal role of democratic constitutions follows from the application of David Lewis' semi-future temporal order to the constitutional sphere, the result of which is a cross-temporal role assigned to constitutional adjudication that hardly functions when constitutions are regarded solely as supra-legal instances of legality (such as in PPPs). Because rights to political participation include objective interests in the future and necessarily hold the status of constitutional rights in any legitimate democratic constitution, constitutional adjudication guarantees their protection. Courts acquire the task of guarding the semi-future democratic constitution, which forms then an alternative to originalism and living constitutionalism as standard theories of constitutional interpretation.

Strictly speaking, the semi-future is unable to embrace the far-off future, as it provides a reason to consider the future up to the point where there is no reason to assume that anyone alive would still be alive. Age cohorts whose members are yet to be born do not fall under the direct purview of the semi-future. Its foundations are entirely actual – based on actual living people at any present time  $t_1$ . To some extent, it falls short of providing a fully future-oriented theory of constitutional interpretation, even if transtemporality (of continuously emerging new objective interests in the future) and similarity (between objective interests of people in the present and the expected objective interests of people in the future) provide a hint for how future-beneficial the semi-future framework can be. That is a bullet the semi-future constitution neither dodges nor aims to dodge. The long-term view that it suggests does not face an infinite time horizon but rather the time horizons that the constitutional structures of democracy allow us

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<sup>43</sup>My main inspiration for thinking that increased public litigation and judicial review can contribute to political justification, enlarge the public sphere, and empower citizens with stronger objective interests in the future is Cristina Lafont, *Democracy without Shortcuts* (Oxford University Press 2020) 219–42.



legitimately to pursue. If we are willing to perceive it, there is already so much future in our present that we do not need to look more into the future in order to find further futures.

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