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The Constitution and the Political Community

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The United States Constitution (rev. ed.)
How would you rewrite the United States Constitution?

THE CONSTITUTION AND THE POLITICAL COMMUNITY

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The history of constitutional change in the United States is in substantial part a history of expanding the political community. Although the state property qualifications for voting that were common at the Founding were abandoned without the need for a federal constitutional amendment, such amendments were used to widen the polity to include African Americans and other non-white men,[1] women,[2] residents of the District of Columbia,[3] the poor,[4] and young adults.[5] Looking forward, one might ask what other groups now denied political representation could or should receive it in a more perfect Union.

Without denying the importance of other aspects of constitutional design, one might think that the question of who constitutes the polity is both more basic and more outcome-determinative of the collective decisions a polity will reach than are such still-important matters as whether to have a parliamentary, presidential, or mixed system of government, whether to create a federal or unitary state, and whether and how to provide for constitutional adjudication outside of the political

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1. U.S. CONST. amend. XV.
2. U.S. CONST. amend. XIX.
3. U.S. CONST. amend. XXIII.
4. U.S. CONST. amend. XXIV.
5. U.S. CONST. amend. XXVI.

organs of government. To put the point somewhat provocatively, the pre-Nineteenth Amendment male supremacists who argued that extending the franchise to women would alter the whole constitutional system were basically right.[6]

Consider three groups whose interests the Constitution—and the law more broadly—either ignores or grossly undercounts: Non-citizens outside the United States;[7] future generations of citizens;[8] and non-human animals.[9] Political decisions taken by the United States and its sub-units can and do have very substantial effects on members of these groups; yet the Constitution provides them with no effective mechanism to protect their interests.

U.S. policy decisions profoundly affect non-citizens, future generations, and non-humans without seriously consulting any of them or otherwise considering their interests. For example, our military and political leaders decide how much, if at all, to weigh the value of non-citizen civilians sacrificed as "collateral damage" to advance the perceived national security interests of the United States, nominally bound by the international humanitarian law of war, but not answerable at the polls to the foreign victims and their families. Likewise, politicians calculate the long-term costs of borrowing money or despoiling the limited resources of the natural environment, answerable only to the voters of here and now, not to those who will one day inhabit the

6. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998–1003 (2002) (recounting anti-suffrage arguments rooted in federalism purporting to show that even a constitutional amendment could not grant women the vote).

7. *See*, *e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) (holding Fourth Amendment inapplicable to search targeting Mexican citizen in Mexico conducted by United States agents). I set to one side permanent residents and other non-citizens present in the United States because, while they lack a constitutional right to vote, the Constitution does protect them in other respects. For simplicity, in the balance of this Essay, I shall use the term "non-citizens" to mean "non-citizens outside the United States."

8. It is difficult to find a citation to support this point exactly, although *Roe v. Wade*, 410 U.S. 113 (1973) will probably serve. *See id.* at 157 ("[I]n nearly all . . . instances, the use of the word ['person'] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application."). From the fact that fetuses lack constitutional personhood, it would appear to follow *a fortiori* that as-yet unconceived generations lack constitutional personhood.

9. *See*, *e.g.*, Int'l Primate Protection League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 937–39 (4th Cir. 1986) (finding no standing for animal welfare activists to sue to enforce federal law governing treatment of animals used for research without pausing to consider the injuries to the monkeys themselves). As a general matter, American law treats non-human animals as property, with the consequence that it denies recognition to their rights and, except for very limited and largely ineffective protections, their interests. *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995).

world that results. And human citizens decide whether it is acceptable to confine, exploit, inflict suffering upon, and kill non-human animals to satisfy human preferences for food, clothing, and other products.

Suppose one thought that a just legal order would include mechanisms for giving substantial weight to the interests of non-citizens, future generations, and/or non-human animals. What mechanisms could be designed to give them that weight?

Direct political representation is ordinarily a useful starting point in answering such questions, but for future generations and non-humans, it is a non-starter. Even those non-human species (such as great apes and parrots) that can be taught to communicate in human language would not be capable of exercising the franchise intelligently.

Giving voting rights to non-citizens is a theoretical possibility, but it faces practical obstacles and principled objections. A country that has recurring difficulty counting the votes of citizens of Florida would be utterly flummoxed at the prospect of counting votes worldwide, including votes of persons living under nondemocratic regimes unaccustomed and hostile to holding free and fair elections for domestic purposes, much less foreign ones. Moreover, even if the practical obstacles could be overcome, it is not at all obvious that the interests of non-citizens should count equally with those of citizens, or even with one another. Would Mexicans and Canadians receive half-votes, with persons living farther away receiving quarter-votes? For roughly the same reason that the Supreme Court adopted the one-person-one-vote rule in *Reynold v. Sims*[10] and its progeny,[11] any other voting formula would be arbitrary; yet one-person-one-vote would over-value the interests of non-citizens—unless for an election to some sort of world government.

World government—not in the literal sense but in the more limited sense of participation in international institutions—is a more promising avenue for ensuring that attention would be paid to the interests of non-citizens. Here, a change to the constitutional text would be useful. As famously stated in the *Paquete Habana*, "International law is part of our law."[12] True enough, but international law is a subordinate part of our law, valid only to the extent it is not superseded by a later-in-time

10. 377 U.S. 533 (1964).
11. *See*, *e.g.*, Westberry v. Sanders, 376 U.S. 1 (1964).
12. 175 U.S. 677, 700 (1900).

statute or the Constitution. Suppose the following amendment, which would effectively modify the Supremacy Clause itself: "No law in conflict with international law shall be valid." Thus amending the Constitution to require that U.S. law conform with international law—rather than vice-versa—would go at least some way towards ensuring that U.S. law takes account of the interests of non-citizens.

Yet under the Westphalian system under which we still live, international law itself is largely a creation of sovereigns, including, especially, powerful sovereigns like the United States. One might worry that in a world in which the United States were more strongly bound by international law, the United States would withdraw from treaties and otherwise use its power to water down the content of international law. Still, the United States is not all-powerful. If coupled with domestic and international enforcement mechanisms, inverting the relationship between U.S. and international law would appear to be a promising mechanism for taking account of the interests of non-citizens.

To be sure, the people who now complain that our courts should not even look to international or foreign sources for interpretive guidance in construing American constitutional law[13] would undoubtedly oppose an effort to make international law superior to domestic law. And even those of us who think the objections lack force when directed against the current, quite limited use of foreign and international law, might concede that they make more sense as a critique of my thought-experiment. Giving international law real bite would in fact reduce the responsiveness of American law to American voters, making our system less "democratic" in some sense. But that is an inevitable consequence of giving greater voice to the interests of non-Americans. Representation is more or less a zero-sum game, and to a significant extent, so is virtual representation.

What about future generations? Near-term future generations benefit from some virtual representation. People care about their children and grandchildren in ways that affect both private decisions—such as providing for the health, education, and welfare of their offspring—and in their public policy decisions—such as in providing funding for education, environmental protection, and other programs that provide long-term benefits. But such concerns have limited time horizons;

13. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

environmental damage done today may have consequences ten or more generations from now, affecting people only faintly related to anyone now living (either as a matter of genetics or emotions). And even with respect to the near-term future, revealed preferences show only limited concern for leaving, in Locke's terms, as much and as good for others.[14]

It is not difficult to propose policies that would provide greater protection for future generations: less borrowing for consumption rather than investment on the economic side; less and more efficient use of the Earth's resources on the environmental side. But the devil is both in the details and in human shortsightedness. Constitutional rules designed to promote fiscal responsibility, of the sort one finds in state constitutions, can lead to perverse outcomes, such as one-time sales of public resources or pension fund raids. And the classification of some spending as "investment" rather than "consumption," while not infinitely manipulable, can be the sort of judgment call that will lead politicians to game any limits. Meanwhile, on the environmental side, Pigovian taxes on fossil fuels and consumption more broadly would be extraordinarily helpful, but likewise have been quite unpopular in the United States. The very factors that lead the United States to have the lowest gasoline taxes in the developed world would almost certainly frustrate any effort to write similar policies into the Constitution. Concerns about future generations thus seem likely to remain more a matter of political rhetoric than constitutional reality.

I am likewise dubious about the power of constitutional change as a mechanism for protecting non-human animals. Indeed, as I shall explain momentarily, in the medium term I am dubious about the ability of any strategy for substantially improving the lives of non-human animals through law.

In recent years, states have adopted animal welfare laws that regulate such matters as the size of the cages in which chickens, calves, and pigs can be confined, but so long as people insist on confining, exploiting, and killing billions of non-human animals for food and other purposes, it is difficult to imagine any

14. *See* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT § 33 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Locke was discussing the origins of property appropriated by individuals as against others of their generation, but the point clearly holds inter-generationally as well. *See*, *e.g.*, *id.* ("No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst.").

protection for those animals against those very appropriations of their lives. Indeed, it can be argued that current welfare laws actually entrench the practice of animal exploitation. Such laws provide consumers with (mostly false) assurances that the animal products they consume were produced without inflicting suffering on animals, thus stabilizing or perhaps even increasing demand for these products. So long as our politics only allow such feeble laws, it is not clear that people who care about the wellbeing of non-human animals should seek their enactment. Changes in behavior must precede receptivity to legal changes that would actually make a difference—such as a constitutional right of sentient creatures not to be eaten or otherwise treated as things. I would favor such a right, but I do not expect to see it in my lifetime.

So much for the possibilities of further expanding the polity in ways that parallel the changes wrought by the Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments. Now consider whether we might want to *shrink* the polity. Here I shall briefly consider how the Constitution provides considerable protection for, or at least reflects the wishes of, two groups whose interests would appear to be much less substantial than those just noted—namely, corporations and dead people.

It remains to be seen whether *Citizens United v. FEC*[15] substantially changes campaign finance or politics more broadly in the United States, in the way that its critics fear.[16] In my view, large corporations, unions, other associations, and wealthy individuals already had ample opportunities to influence politics before *Citizens United*, and so the decision's net impact will likely be minor.[17] But one impact of *Citizens United* is already certain: The case has galvanized a political movement to amend the Constitution to strip corporations of at least some First Amendment protection.[18]

15. 130 S. Ct. 876 (2010).

16. *See*, *e.g.*, Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, at 63; Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Jan. 28, 2010, at 39 .

17. *See* Michael C. Dorf, *The Marginality of* Citizens United, CORNELL J. L. & PUB. POL'Y 739 (2011).

18. *See* Letter from Jeffrey D. Clements et al. to Hon. Patrick Leahy et al. (Oct. 4, 2010), *available at* http://freespeechforpeople.org/sites/default/files/finalfsfppfaw.pdf. The letter of attorneys and law professors urges Congress to "explore all potential remedies, including proposals for a 28th Amendment," but does not specify the content of such an Amendment.

Such an amendment could be worded as follows: "This Constitution shall not be construed to afford free speech rights to anyone other than natural persons and artificial entities formed for the specific purpose of communication." I would include some artificial entities in an amendment restricting corporate speech because such entities may be essential to facilitating the speech of natural persons. Of course, an amendment of this sort would require private actors, judges, and other government officials to draw some difficult lines about what counts as a protected artificial entity, but such line-drawing is inherent in the law, and does not strike me as qualitatively more difficult in this area than in any other. A bolder effort to de-personify artificial entities (which I do not favor) might strip such entities of all constitutional protection.

Dead people present other issues. The dead may have direct constitutional rights. Thus, although no Supreme Court case directly addresses the issue, it is possible to imagine recognition for a limited property or "privacy" right in a dead body. Other sub-constitutional laws and doctrines—such as the common law of attorney-client privilege[19] and the state law of wills—grant substantial recognition to the interests of the dead. But these protections do not strike me as excessive.

However, the political preferences of the dead have a very large impact on our law and politics. Because we are so accustomed to thinking of the "dead hand" problem as a metaphor, it is easy to forget that it is more than that. The continuation on the books of laws passed decades or centuries ago means that we are, in an important sense, ruled by decisions taken by people who are long dead. For statutes and other sub-constitutional law, the ability of contemporary majoritarian processes to repeal or modify old laws reduces the influence of the dead. Because of the difficulty of overcoming legislative inertia and the baroque structure of the federal lawmaking process under Article I, § 7, the dead retain substantial influence over sub-constitutional law. But we might think that such influence is justified, or at least tolerable, on Burkean or other grounds that favor the claims of stability over the claims of contemporary values. Yet the very high bar for constitutional amendment—impossibly high in the case of the fundamental matter of representation in the Senate—makes Burkean and like

19. *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

justifications untenable as a defense of the dead's continuing influence.

I can make the point most clearly with a thought experiment. Suppose that the Constitution was not adopted in 1789 but in Roman times, or suppose that despite repeated efforts to abolish the Senate, the equal-suffrage clause prevented such a change, leaving the Constitution in place in the year 4000. Unless one independently thought that the equal-suffrage clause was a worthwhile principle of political justice that trumps contemporary consensus, could its adoption thousands of years earlier by a very different society possibly justify its retention?

Absent revolution or resort to amendment outside of Article V,[20] the near-impossibility of amending the Senate and the difficulty of amendment more generally mean that any proposal to make the Constitution easier to amend is unrealistic as a practical proposal. A constitutional requirement that laws sunset would address the problem of statutory rule by the dead, but that problem seems to me not nearly so acute as the difficulty of amending the Constitution itself.

Thus, the dead-hand problem reduces to the following core question of constitutional design: How difficult (and difficult in exactly what way) should it be to amend a constitution? Rather than trying to specify an ideal amendment procedure, I will simply conclude by noting that this kind of structural question is, in an important sense, also a question about who comprises the polity. No less than the amendments expanding the franchise, Article V reflects at least a tacit judgment about who We the People are. That is quite possibly a bad judgment, but it is a judgment nonetheless.

20. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).