The Indeterminate Side of Constitutions as Precommitment Strategies

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AS PRECOMMITMENT STRATEGIES

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I. Introduction

This paper engages in a time-honored inquiry in American jurisprudence, an inquiry which continues to be invigorated by contemporary studies in Constitutional Law. It is an inquiry into the determinacy of the American Constitution as a legal text, taking into account that it was drafted and approved more than two hundred years ago with the purpose, arguably, to organize present and future political decision-making. Some contemporary authors claim that the discussion about the role of the Constitution is muddled, and that to acknowledge its authority does not necessarily entail a theory of constitutional interpretation.\(^1\) Furthermore, other authors have claimed that different accounts of what American constitutionalism stands for have appeared in different moments of time, and none of them describe accurately the constitutional experience.\(^2\) These arguments raise legal issues that are very significant; given that the Constitution sets a general framework for democratic politics, should it be interpreted as a strategy the limits majoritarian decision-making in order to prevent it from depriving the rights of present minorities or future generations? Or should present-day majorities be allowed to break free from the constitutional constrains and govern themselves as they consider adequate, and let future majorities sort out how they want to govern themselves as well? Or does the Constitution

\(^1\) See, for example, Adam N. Samaha. *Dead Hand Arguments and Constitutional Interpretation* 108 Col. L. Rev. (Forthcoming 2008)

represent a middle-ground compromise between past, present and future majorities, that creates a form of democratic government while at the same time constraining what present majorities can impose on future ones?

The stakes related to how we interpret the Constitution given that there is a tension between the aspirations of self government and considerations for future majorities are very high as well as diverse. They include issues that range from the allocation of political decision-making power in government to the role of rights in a liberal democracy. Assessing how these two conditions weigh on how we conceive the Constitution is very important to determine how we interpret it, and to enhance or curb the consequences that result from that particular choice.

In this paper, I will focus on the doctrine that views the American Constitution as a precommitment strategy. A summary of it can be the following: the Framers intended to create a democratic government that satisfied their ideals of self-government, while at the same time restraining what such government could do, because of their desire to avoid undesirable consequences that result from majoritarian passions or interests. The idea of Constitutions as precommitment strategies is described by Jon Elster in the following terms: “[b]y creating a set of laws that are more difficult to amend than ordinary legislation, or even unamendable in a strict sense, the political community can prevent itself from backsliding and giving into partisan interests or momentary passions.”³ After exploring the different tenets that compose this doctrine and some elements of the American Constitutional experience, I will argue that this doctrine is not determinate enough to interpret and enforce the Constitution according to the demands suggested by the concept of the Rule of Law. Furthermore, this indeterminacy remains even when this doctrine lends itself to complement other doctrines of constitutionalism that lack a

³ Jon Elster, Don’t Burn Your Bridge Before You Come to It: Ambiguities and Complexities of Precommitment, 81 Tex L. Rev. 1751, 1757-1758 (2003). (From now on, Elster, Ambiguities.)
good account of the legitimacy of constitutional binding. These different levels of indeterminacy are problematic, because their existence suggests that when judges decide constitutional cases they are not bound by the legal rules, and thus the separation between reason and arbitrary decision-making – a key tenet of the liberal conception of the Rule of Law – is erased.

In order to develop these ideas, my paper will be divided into several parts and sections. In part II, I will present the relationships between the concept of the Rule of Law and theories of constitutional interpretation and enforcement, like the one mentioned above. In the first section of this part I will describe the concept of the Rule of Law, and the second will present the demands this concept makes on any theory that attempts to interpret and enforce a constitution.

In part III, I will present the core tenets of the doctrine of constitutions as precommitment strategies, as have been developed by Jon Elster, Stephen Holmes and Cass Sunstein. In the first two sections of this part, I will present the various advantages and disadvantages these authors see in this doctrine, as precommitment strategies as well as their qualifications of it. Based on the accounts of these three authors, in the third section of this part I will develop a series of premises that make this doctrine operable for the purpose of adjudication, and thus for interpreting and enforcing the Constitution.

In part IV, I will present a series of criticisms regarding the indeterminacy that is inherent in viewing the American Constitution as precommitment strategies, based on a summary account of the indeterminacy thesis and scholarly insights about the American constitutional experience. In the first section, I will present a general account of the indeterminacy thesis, as has been developed by several American scholars throughout the 20th century. In general terms, the indeterminacy thesis suggests that since legal rules contain gaps and vague expressions, interpretation is necessary to determine a meaning that gives them some sense. When doing so,
these rules can be arranged and rearranged into different structures, which reveals the existence of a choice – of political dimensions – that the interpreter can make when determining how to interpret and accommodate the rules at hand. When considered in the light of the doctrine discussed here, the indeterminacy thesis suggests that this doctrine is insufficient to guide judges in the process of constitutional adjudication, in the sense of providing a meaningful framework that curbs arbitrary choice.

In the second section of this part, I will argue that there is indeterminacy at a fundamental level for the purposes of this doctrine, which is the level of the intentions of the Framers of the Constitution. Since a precommitment strategy requires a clear intention of self-binding by the parties that are deploying this strategy, such an intention has to be clearly established; however, in the case of the American Constitution, such intention cannot be clearly found in the documents left by the Framers. In the third section, I will argue that indeterminacy also pervades the exercise of adjudication when determining how to enforce the constitutional provisions that establish federalism. These provisions are of particular importance to the strategic aspect of the Constitution, because they are about the allocation of political decision-making power among the different levels of government. Finally, in the third section of this part, I will argue that the Constitution, when understood and enforced as a precommitment strategy, may have a flawed design since the day of its conception. This particular critique is not only about indeterminacy, but also about a rather pervasive lack of touch with political reality. My claim here will be that since the Constitution is based on a series of views according to which political parties were not important, it cannot be interpreted and enforced to regulate and correct the political practices that undermine the democratic system it sought to create.
In part V, I will suggest that in spite of its indeterminacy and inadequacy, this doctrine can lend itself to complement other doctrines that try to fit and justify the different elements that compose the American constitutional experience. In this sense, this doctrine would work as an incompletely theorized agreement, which lends itself to work on more concrete aspects of Constitutional adjudication without resorting to grand questions of constitutional legitimacy. This represents an effort on my part to cabin the indeterminacy of this doctrine, although I recognize that it does not diminish it completely. In particular, it does not settle the issue of which of the available doctrines can be used to complement the doctrine discussed here – another issue of indeterminacy. However, I suggest that the selection of the complementary doctrine represents a good opportunity for debating the contours of the strategy embedded in the Constitution.

Finally, in part VI, I will present some conclusions regarding the effort to curb the indeterminacy of legal rules through institutional arrangements. My conclusion is that the indeterminacy of legal rules is neither a blessing nor a curse, but rather, a consequence of accepting that any human enterprise has to be flawed to some extent. Legal systems are bound to be indeterminate. However, the Rule of Law does not require complete determinacy on any particular legal issue, and especially at the level of constitutional analysis. Also, the critiques presented here are context-dependent, and may not be applicable to other legal systems that have more available information about the intentions behind their constitutions, or that have more detailed constitutional provisions.

Part II. The Concept of the Rule of Law.
In general terms, when interpreting and enforcing legal rules we assume a series of normative claims regarding what we understand as adequate or inadequate interpretations and enforcements. Just as we expect interpreters to take into account all the facts that are pertinent in the context in which he or she is called to act, we also expect that their interpretations comply with a set of requirements that makes it reasonable. In other words, we expect that the way interpreters approach legal rules meets certain parameters that differentiate absurd interpretations from sound and reasonable ones. The parameters that I refer here determine the stakes related to the exercise of interpretation and enforcement of legal rules, and so, for the purpose of this paper, I will group them under the rubric of the “Rule of Law”.

The concept of the Rule of Law differentiates between enactments of legal rules that are unreasonable and arbitrary from those which are not. The differentiation between arbitrariness and reasonableness in rule-making is at the core of liberal beliefs, and, taken together with the concept of representation, is one of the most important ideas behind democratic government.\(^4\) However, as Richard H. Fallon suggests, there are other ideals that have also been associated with the Rule of Law, which shows that this is also a contested concept.\(^5\) Of all the ideals that can make up the “Rule of Law”, I am interested in presenting only one of them. It is a minimal ideal, based on the distinction between constrain and an arbitrary exercise of choice, and supported on a liberal conception of human dignity; in American constitutional discourse, it is common to the different accounts of what the Rule of Law accounts for.\(^6\) I will describe here the Rule of Law as a regulative ideal, based on the premises that the enactment of particular legal rules should be determined by a different set of open, general and relatively stable legal rules.

\(^6\) Richard H. Fallon Jr. supra, at Pg. 42 and following, referring to the Rule of Law as an “arquitectural” ideal, whose main guidelines are determined by four different accounts, of whom the historicist or “Diceyian” and formalist are the first and most important elements, although not the only ones.
Both sets of rules should be capable of guiding the behavior of the individuals to whom these rules are directed to. In the following sections of this part, I will develop this conception of the Rule of law, and then suggest how it relates to theories of interpretation and enforcement of legal rules.

A. A Basic Conception of Rule of Law

As mentioned above, I plan here to describe a particular concept of the Rule of Law. It is a concept that is based on two premises: First, the making of particular legal rules should be guided by open, general and relatively stable legal rules. Second, these rules should be capable of guiding the behavior of the individuals to whom these rules are directed to.

The discussion of what we take the Rule of Law to mean should begin perhaps by discussing its most common motto. The Rule of Law is taken to be meant, generally, “government by law, not by men.” It is expected, in general terms, that the actions governments make are governed by rules that have been previously enacted and that determine the conditions and qualifications that government actions should be met to be considered lawful. This general concept of the Rule of Law suggests an idea of objectivity in rule-making, because it supposes that government by law is preferable than government by men. The distinction between these two categories, not unproblematic, suggests in turn that the exercise of government should be done according to some established parameters that constrain what authorities can do. These same authorities, without such parameters, can change of mind easily and act in a biased way.

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Arbitrariness, then, is the opposite account of the Rule of Law. As A.V. Dicey suggested when commenting the Rule of Law in England, this concept means “([I]n the first place), the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.”

However, this concept of the Rule of Law may well embody a tautology and thus can be rendered redundant. Since a government is, by definition, is a government created and defined by laws, a government action that does not comply with what the law says is not a legal action. Just as well, the actions of a government that are not authorized by the laws cannot be the actions of a government constrained by legal rules. As long as a government acts, this concept of the Rule of Law is useless to distinguish between lawful and reasonable enactments from unlawful and arbitrary ones.

To overcome this problem, Joseph Raz suggests that the Rule of Law is not redundant if we distinguish between the professional and the lay understandings of the word “law” and then relate them. For the professional, any rule can be a law if it meets the particular conditions of validity that were established before hand in the legal system. Thus, his understanding represents a generalization construed by aggregating particular rules that share a set of common traits, for he accepts that laws are those rules that satisfy particular requirements. For the laymen, on the other hand, law is composed of general, open and relatively stable rules. If we take the latter, then the Rule of Law is not a tautological concept; the Rule of Law can be understood as the

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10 Raz, The Rule of Law. Pg. 212. An act that results from an arbitrary exercise of powers is, according to this author, that which “(…) was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them. (…) [I]t all depends on the state of mind of the men in power” Pg. 219.
12 Raz, The Rule of Law. Pg. 213.
Rule of general, open and stable legal rules. However, this does not rule out the possibility that legal systems are composed of both general, open and relatively stable rules and of particular rules that are subject to particular conditions. Quite the contrary, the lay and the professional understandings of the word law complement each other. General, open and relatively stable rules are not determinate enough to guide individual behavior, and so they require particular rules to accomplish the purpose of having rules in the first place. Thus, what the Rule of Law demands is that particular rules should be enacted in accordance with the parameters established in general, open and relatively stable rules.\textsuperscript{13} This is especially important if we expect that the enacted laws, to be considered fit under this conception of the Rule of Law, are capable enough of being obeyed by the individuals, who can find out what the law is and act accordingly.\textsuperscript{14}

Underlying the importance that the ends of restraining authority and obedience to the law have in this Rule of Law account is a liberal concept of human dignity. Raz suggests that the observance of the Rule of Law, as sketched so far, is important for respecting human dignity, when we understand it as treating persons as autonomous individuals capable of planning and plotting their future.\textsuperscript{15} However, autonomous individuals never have complete control over their lives. A person may not know what is in his or her best interest, undecided about what options to choose, incapable of realizing them or fail constantly when doing so.\textsuperscript{16} This, in turn may be due to natural causes or to an individual’s limitations, and to a certain extent represent a barrier that is proper of the human condition.\textsuperscript{17} A more serious possibility is that the individual’s control over his life is trumped by arbitrary exercises of power. This can be the case when a person is insulted, and thus treated as if his or her dignity is not to be taken into account for, when a person

\begin{footnotesize}
\begin{enumerate}
\item Raz, The Rule of Law. Pg. 213.
\item Raz, The Rule of Law. Pg. 214.
\item Raz, The Rule of Law. Pg. 221.
\item Raz, The Rule of Law. Pg. 221.
\item Raz, The Rule of Law. Pg. 221.
\end{enumerate}
\end{footnotesize}
is enslaved, and thus “commodified” to the extent that his or her autonomy is completely disregarded, or manipulated to the extent that the factors relevant to his or her autonomy are intentionally changed without his or her consideration.\textsuperscript{18}

From the perspective presented above, it appears to be that the role of the Rule of Law is to protect the meaningful choices that individuals have made according to the legal rules laid down before them. And although a legal system can threaten human dignity and still accord to the basic tenets of the Rule of Law, the pervasiveness of the threats would be increased if such a system disregards the Rule of Law completely.\textsuperscript{19} Such disregard can threaten an individual’s dignity, by creating unnecessary uncertainty about his future, and frustrating his rightful expectations. When considering the former of these consequences, they take place when the legal rules are not determinate enough as to allow individuals to foresee future developments or to distinct expectations. Such uncertainty lends itself to foster arbitrary exercises of power and limiting people’s ability to plan for the future.\textsuperscript{20} In the case of frustrated expectations, they take place when the stability of legal rules, which encourages individuals to rely on them and to make plans for their future, is shattered as if it were a mere illusion. This particular consequence of disregarding the Rule of Law is, for Raz, more serious than any other. It converts individual investments and plans into losses, and may well represent an entrapment, since an individual is encouraged by the law to rely on it only to frustrate its reliance. By retrieving the assurance of stability that was initially offered, an individual’s reliance is turned into a cause for harming him.\textsuperscript{21} As opposed to this, a legal system that observes generally the Rule of Law treats people as autonomous individuals, if only, in the sense that it tries to channel their behavior by affecting

\textsuperscript{18} Raz, The Rule of Law. Pg. 221.  
\textsuperscript{19} Raz, The Rule of Law. Pg. 221.  
\textsuperscript{20} Raz, The Rule of Law. Pg. 222.  
\textsuperscript{21} Raz, The Rule of Law. Pg. 222.
the circumstances of their decisions. It thus assumes that such individuals are capable of exercising meaningful choices, and attempts to affect such choices by shifting in a transparent, honest way the consequences that would result from such choices.\footnote{Raz, The Rule of Law. Pg. 222.}

In spite of the rigidity conveyed by this depiction of the Rule of Law, it is important to grant that it also offers some qualifications for flexibility. First of all, it is important to acknowledge that adherence to this concept of the Rule of Law represents a matter of degree, not a matter of complete conformity, since a certain degree of vagueness in legal rules is inevitable.\footnote{Raz, The Rule of Law. Pg. 222.} And second, the general, open and relatively stable rules are usually so in order to introduce flexibility in the legal system by granting the interpreter and enforcer the opportunity to exercise his or her discretion. Flexibility is required to allow government and individuals to cope with changing social conditions, but also threatens the individuals’ dignity and autonomy by justifying a change of the legal rules they relied upon. A way to overcome this is by restraining the indeterminacy that the general, open and relatively stable rules allow, by way of placing a limit on the amount of discretion they allow. This can be done, Raz suggests, by allowing change of rules that operate at a narrow and particular level, while maintaining the stability of the other rules that establish who and under what conditions can such low-level rules be enacted. This will provide stability for the general framework from which particular rules stem, and, in turn, limit the unpredictability that stems from the short life of the more particular and narrow rules.\footnote{Raz, The Rule of Law. Pg. 216.}

B. The Stakes related to the Rule of Law and Constitutional Interpretation.

\footnote{Raz, The Rule of Law. Pg. 222.}
\footnote{Raz, The Rule of Law. Pg. 222.}
\footnote{Raz, The Rule of Law. Pg. 216.}
Much of the exercise of power and authority in a liberal state depends largely on interpretation, to the extent that interpretation and enforcement of legal rules are two actions that go hand by hand. Any person, citizen or authority, who consults the law, can be both interpreter and enforcer of the legal rules that are relevant to his or her purposes. An interpreter usually reads the rules laid down before him, arranges them mentally, and, within the scope of discretion allowed by such rules, makes a choice among several possibilities.\textsuperscript{25}

H.L.A Hart provided a familiar and very useful example of this relation between interpretation and enforcement.\textsuperscript{26} I will present a slightly modified version of it here. A judge is asked to solve a dispute that is related with the interpretation of the word vehicle in a federal law that says “all vehicles are banned from federal parks”. A little girl, accompanied by her parents, is riding a tricycle in a federal park close to their home, and a police officer stops them and impounds the tricycle, alleging that she was violating the rules about behavior in the park. The girl’s parents challenge the officer’s interpretation, arguing that the park is regularly frequented by older men and women in wheelchairs and he has done nothing to stop them. The officer insists in his interpretation, arguing that wheelchairs do not represent threats to the visitants of the park, while tricycles do. The parents file a suit seeking for the devolution of the impounded tricycle, and the dispute is then discussed in court. The judge begins by investigating whether he has jurisdiction to rule on this dispute and whether the federal law was adequately enacted by Congress. After answering affirmatively to both issues, he ponders whether the girl’s tricycle was a vehicle relevant for the purposes of the rules that govern behavior in the park. He acknowledges that there is a core area of meaning and a penumbral one for the word vehicle in this particular case, and that a tricycle falls within the penumbra area, that is, it is not clear from

\textsuperscript{25} For a more detailed account of this ideas, see Hans Kelsen. Pure Theory of Law. Berkeley University Press.

the text of the law that tricycles, among other vehicles, were banned from the park. In order to arrive to a decision, he considers necessary to strike a balance between two conflicting rights; on one hand, the right of children to enjoy public spaces such as parks; on the other hand, the right of federal government to enforce the rules that stem from its powers. Given that it is a tricycle, and that it hardly causes any harm or nuisance to anybody, the judge decides that the right of the girl to enjoy the park trumps the government’s right to prohibit its use, and excludes tricycles from the list of vehicles that are considered dangerous for the purpose of the law. Hence, he decides the case by reversing the officer’s decision, and orders the devolution of the impounded vehicle.

This simple example shows the relationship between interpretation and enforcement by authorities and individuals. The police officer, who has the duty to see that the citizens comply with the rules, sees a particular set of facts and decides to act. He considers that riding a tricycle is an offense to the rules that determine what constitutes acceptable behavior in the park; this stems from his very broad interpretation of the word vehicle. But it also stems from his interpretation of the orders that were given to him about policing citizens’ behavior and enforcing the rules when violations are noticed. As a consequence of his interpretation of the legal rules that compose his duties as an officer, he acts, and thus enforces his interpretation of the law (which bans vehicles from the park), although in an unreasonable way. A similar process appears to take place in the judge’s head. He is a judge; he has been bestowed with the duty of resolving conflicts that arise from legal rules. He has to interpret the rules that are pertinent to the case at hand, but he also has to interpret the rules that grant him jurisdiction to decide some cases and not others, as well as the rules that point to him how he should evaluate evidence and reach decisions. He acknowledges jurisdiction over the conflict brought in front of him, interprets the
word “vehicle” in light of different considerations, balances these considerations in order to reach a decision, and then rules according to the outcome of the balancing test and the guidelines for sentencing.\textsuperscript{27}

Not surprisingly, the parents of the girl also underwent a similar process. They live just by the park, and know that there is a rule that prohibits vehicles in the park. They know, without reflecting too much about it, that the rule was enacted to forbid scooters and motorcycles, because a famous lawyer had been run through a pizza delivery man in a motorcycle.\textsuperscript{28} In spite of the enactment of the rule, they regularly see elder people in their wheelchairs taken to the park. For them, the park represents a perfect opportunity for accompanying their daughter while she learns how to ride her new tricycle. They also know a rule, assess how it is being enforced, and act accordingly.

The experience of interpretation and enforcement implies the acknowledgement of freedom and constraint by the legal rules. H.L.A Hart summarizes this experience in the following way:

\begin{quote}
Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do is to consider (...) whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’ aspects. The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. (...) In the case of legal rules, the criteria of
\end{quote}

\textsuperscript{27} See Hart, \textit{supra}, at Pg. 124.  
\textsuperscript{28} For a detailed example similar to the one provided here, see also William N. Eskridge. \textit{No Frills Textualism}. 119 Harv. L. Rev. 2041 (2005-2006).
relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule.\textsuperscript{29}

This example is useful to show the different stakes related to adjudication at the level of administrative law and constitutional law. The federal law discussed in this example represents what Raz would consider a narrow and particular rule. According to him, these are the kind of rules that can be modified as long as the general, open and relatively stable rules that determine how these particular rules should be enacted are kept relatively determinate. To change these rules falls squarely within the concept of the Rule of Law as described above. However, the case for constitutional adjudication seems much more complex, since the rules embedded in the Constitution represent the rules that determine how the more narrow and particular rules are enacted. Their rigidity and relative determinacy establish the degree to which a legal system complies with the Rule of Law. Even if we accept to change these rules sporadically, to change them affects how authorities interpret and enforce the legal rules that draw upon them and that allow individuals to plan for the future. But more troublesome is the argument, presented in this paper, that in an effort to cabin the indeterminacy of constitutional rules, some theories are not capable to rearrange constitutional rules into a determinate framework of general, open and stable legal rules, which in turn leads to the production of narrow and particular rules.

Thus the argument that I develop here is relevant if we accept that the purpose of interpreting the Constitution is to make of some constitutional rules, which are indeterminate and can be arranged in different ways, an open, general and relatively stable framework that complies to some degree with the Rule of Law, as described here. In other words, any theory of

\textsuperscript{29}H.L.A. Hart, \textit{supra}, Pg. 124.
constitutional interpretation has to depart from an account of the constitutional rules that fits and justifies them having in mind that they are intended to work as a framework that determines the conditions for enacting narrower and more particular legal rules. Therefore, any theory fails to comply with the concept of the Rule of Law if it can not provide the interpreter and enforcer of constitutional rules with an open, general and relatively stable framework that reduces the possibility of the exercise of arbitrary power. It is precisely the fear of arbitrariness that drives interpretation of constitutional rules towards a higher demand for more certainty and constraint.

The idea of interpreting constitutions as precommitment strategies would appear to be particularly well suited to meet the requirements presented by the Rule of Law as described above. Several premises of this doctrine of constitutional interpretation suggest, a priori, that it can justify legal change while preserving the stability of constitutional rules and thus conform to the Rule of Law. For example, constitutional precommitment suggests to some extent the notion of majoritarian constraint for the purpose of respecting individual rights, which is somehow similar to Raz’s arguments about not trumping individual’s expectations. As to what degree this might be so, the purpose of the next part of this paper is to explore in more detail this idea of constitutions as precommitment strategies, while criticisms of it will be offered in the next parts.

Part III. Constitutions as Precommitment Strategies

A. An Introductory Inquiry

Contracts and constitutional law are two fields in which the term “precommitment” is used and identified with a strategy. The reason for this to be so is because both fields address issues of
binding, that is, of restricting what people can or cannot do. In the field of contracts, the reasons seem obvious: a contract is a way of restricting (or enabling) behavior both in the present as well as in the future. In constitutional law, the idea of binding is also important for similar reasons; a society binds itself through political constitutions “(...) in order to prevent itself from backsliding and giving in to partisan interests or monetary passions”.30

There are several dimensions of individual (contractual) and social (constitutional) bindings that are closely related. Just as in private law people have wondered why a son should be burdened with his father’s inheritance, in constitutional law the question is why present majorities should be governed by the choices made by past ones. The following two sections of this part explore two related sets of arguments regarding private and social precommitment. The first set is about the legitimacy of precommitment strategy, and in it I argue that there is a prima facie presumption in favor of constitutions as legitimate precommitment strategies. The second set is about particular characteristics of constitutions as precommitment strategies. In it I argue that the constitutional strategy operates by entrenching a series of “technologies”, which include the entrenchment of individual rights, institutional arrangements and the use of gag rules, with the purpose of shielding certain aspects of government from democratic change.31 Finally, in the fourth part of this section I will translate these theoretical issues into narrower premises for constitutional interpretation and enforcement.

B. Constitutions as Precommitment Strategies

30 Elster, *Ambiguities*. Pgs 1757-1758. It is important to note that the first time Elster exposed some of this ideas was in his book *Ulysses and the Sirens: Studies in Rationality and Irrationality*. Cambridge University Press (1979). I have decided to base my exposition in a different text by Elster, however, because in it he introduces the ideas from a much more legal perspective and develops them much more than in the original text.

31 For the purpose of this paper, I mean by democratic rule that legislation is passed by a majority of representatives publicly elected.
1. Individual and Social Precommitments.

   a. Individual Precommitment

   The concept of a precommitment or self-binding strategy is not a new one. Precommitment, or self-binding, is part of a set of rational behaviors that individuals can adopt in order to obtain a desired result. As Jon Elster describes it, precommitment is “an act undertaken in a moment of tranquility and calmness to prevent the agent from harming himself (or others) on future occasions when he might be in a more turbulent state.”\(^\text{32}\) It consists of binding one’s own will in the present in order to do, or refrain from doing, certain things in the future. It is one of those behaviors that, when properly conducted, is a sign of wit and cunning. Elster is indeed famous for making the case in favor of precommitment by using the Greek hero Ulysses – an archetype of wit and cunning in western culture – as an example of precommitment. Ulysses was able to enjoy the dangerous songs of the sirens without succumbing to the consequences of their enchantment by clogging his sailors’ ears with bee wax and ordering them to bind him to the mast of his vessel.\(^\text{33}\)

   The element of an external act is important, according to Elster, because the precommitment has to produce a change in the external world that can only be undone, if possible, by assuming some costs or burdens.\(^\text{34}\) If a person simply makes a decision and shouts it

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\(^{32}\) Elster, *Ambiguities*, Pg. 1765.


The reference to the Odyssey can be found *The Odyssey of Homer* (Richmond Lattimore trans.) Harpers Colophon Ed. (1975) Pg. 186.

\(^{34}\) Elster, *Ambiguities*, Pg. 1754. In the case of the Ulysses anecdote, the external act represents the binding to the mast; if this binding had not happened, Ulysses might have fallen under the enchantment of the sirens and deviated the course of his ship, and all the negative consequences might have followed.
in an open space, she is not precommitting herself; she is simply engaging in a form of verbal behavior, and her decision can be undone or reversed with little or no costs at all.\textsuperscript{35}

When considering the reasons for precommitment strategies, Elster states that people have three different types of motivations: interests, passions and reason.\textsuperscript{36} He means by interests “the pursuit of individual or group advantage, be it in the form of money, power, status or honor.”\textsuperscript{37} The passions are basically feelings and emotions, as well as states of pain and intoxication that produce cravings and madness.\textsuperscript{38} And by reason he means “any impartial attitude motivated by concern for the common good or for individual rights and duties.”\textsuperscript{39} When deciding whether to precommit himself, a person can be in any of the above mentioned “motivational states”;\textsuperscript{40} he can be motivated by interests, by passions of all sorts or by reasons. This person will see, at time 1, that in the future, time 2, he or she will be in any of these “states”, but not necessarily in the present one. The need for a precommitment strategy appears when this person is able to predict that in time 2, he or she would perform a different and less valuable action (action B) than the one preferred according to the “state” this person is in time 1 (action A). It is important to note that there are two assertions about the future involved in precommitment strategies: first, that in time 1 the person is able to predict what “state” he or she will happen to be in time 2, and second, that there is a pre-established preference of what action he or she should prefer in time 2. If the person at time 1 can do something that will guarantee that in time 2 he will perform action A over B, and if the costs of performing A are less than the difference between the performance between these two actions, as assessed in time 1, the person

\textsuperscript{35} Elster, \textit{Ambiguities}, Pg. 1754.  
\textsuperscript{36} Elster, \textit{Ambiguities}, Pg. 1755.  
\textsuperscript{37} Elster, \textit{Ambiguities}, Pg. 1755.  
\textsuperscript{38} Elster, \textit{Ambiguities}, Pg. 1755.  
\textsuperscript{39} Elster, \textit{Ambiguities}, Pg. 1755. Although Elster himself acknowledges the vagueness of these categories, he simply assumes that there is no need for more precision due to the aim of his text. “Although the phrase is somewhat vague, the vagueness will not create any problems for the specific cases to be discussed later” \textit{Supra}, at Pg. 1755.  
\textsuperscript{40} Elster, \textit{Ambiguities}, Pg. 1755.
has incentive to precommit him or herself.\textsuperscript{41} However, Elster also points out that an individual in
time 1 will not attempt to bind himself if his rationality is affected by emotions – case in which
time 1 represents a “motivational state” of passion.\textsuperscript{42} He will also abstain from precommitting if
his “motivational state” interferes with his ability to predict what his state would be in time 2,
which can happen if the state in either time 1 or time 2 is that of passion.\textsuperscript{43}

b. Social or Constitutional Precommitment

When considering the idea of precommitment as a strategy at a collective level, the same
ideas mentioned above regarding individual precommitment are applicable. “In constitutional
time theory, the idea is often expressed by the metaphor that constitutions are chains imposed by Peter
when sober on Peter when drunk.”\textsuperscript{44} If societies are aware that in the future they may commit
acts that they condemn today, then it makes sense that they self bind today in order to avoid
regrets in the future. Majoritarian rule, after all, is incapable of preventing itself from becoming a
tyrranical rule, or from preventing a majority from stripping a minority of its rights. The pitfalls

\textsuperscript{41} Elster, \textit{Ambiguities}, Pg. 1755.
\textsuperscript{42} Elster, \textit{Ambiguities}, Pg. 1755.
\textsuperscript{43} Elster, \textit{Ambiguities}, Pg. 1755-1756. Although this sounds complicated, a quick example can show that the logic of
this strategy is quite simple. Imagine that Peter and John want to go to a party a Friday evening, and that Peter is
planning to drive them both there. He is aware that he gets drunk pretty easily, and that when he does he thinks he
can drive perfectly well. Because of these assessments, he prefers that John drive him home rather than driving
himself and increase the likelihood of an accident or getting his license suspended. He also knows that John does not
drink. So, before they enter the party, Peter gives John the keys of his car and tells him not to give them back under
any circumstance, independently of how articulate he speaks or how sober he looks. When the party is over, Peter,
who was slightly tipsy, asks John the keys of his car, which he refuses to hand over, remembering Peter of what he
told him before going in. As a consequence of his denial, John drives his friend’s car and each one of them reaches
their destinies save and sound. In this example, time 1 is the moment outside the party, in which Peter tells John
what to do after the party is over, which is time 2. Peter’s assertions about the future in time 1 are two; first, that in
time 2 he would be tipsy, and second, that when tipsy he thinks he can drive perfectly well. He knew that in time 2
he would be strongly tempted to drive in his condition (action B), an action he considered much more undesirable
than having John drive him home (action A) given the consequences that might take place otherwise. Since the costs
of giving John the keys in time 1 are negligible, the precommitment strategy of Peter was successful in the sense that
he avoided doing something that if he were in his senses he might have regretted.

\textsuperscript{44} Elster, \textit{Ambiguities}, Pg. 1765. The reference to “Peter sober” and “Peter drunk” refers originally to an expression
of majoritarian rule – backed up by historical experiences – suggest the need for a set of fixed rules that place limits on what majorities can do. Constitutions are thus supposed to work as that failsafe mechanism that prevents majorities from becoming tyrannies. As Elster suggests “[B]y creating a set of laws that are more difficult to amend than ordinary legislation, or even unamendable in the strict sense, the political community can prevent itself from backsliding and giving in to partisan interests or monetary passions”.45 Just as individuals can adopt a strategy of taking an action in order to foreclose other future possible actions or to make them more costly so as to consider them undesirable, polities can also adopt a strategy of taking a series of decisions and actions in order to foreclose other possible future actions or making future changes more difficult.46

The element of intent is just as important in collective precommitment as it is in the individual mode. In the latter, the argument goes, the intent of precommitment has to be announced to third parties in order for it to be truly a precommitment. An intent that is not communicated creates no costs for the individual who tries to precommit, and therefore the strategy can be easily reversed. By announcing the intention of self-binding, the individual is relying on the efforts of third parties to hold him true to his announced strategy.47 A collective precommitment needs also to have a clear intention, for similar reasons.48 The element of intention is what allows a set of institutional arrangements to work as a strategy, instead of being a set of arrangements that through time produced an unintended set of positive consequences. That is, the intention to bind is what differentiates a constitution as a precommitment strategy

45 Elster, Ambiguities, Pgs. 1757-1758.
46 Elster, Ambiguities, Pgs. 1754-1755. It is important to note that Elster draws a distinction between the bill of rights and the institutional design of government, as if they were two analytically separate parts. This distinction, although highly contested in reality, explains the emphasis he places on precommitment strategies as a way of dealing with agency issues.
47 Elster, Ambiguities, Pg. 1754.
48 “To avoid confusion, this intentional component of the definition of precommitment is essential” Elster, Ambiguities, Pg. 1783
from a constitution that produces unintended positive consequences. Although the difference seems tenuous, it is what prevents present day constitutional analysis from incurring in a functionalist fallacy: “[w]henever social phenomena have consequences that are beneficial, unintended and unrecognized, they can also be explained by these consequences”. In other words, the element of intentional binding prevents analysis in which a set of positive of consequences can run be either causes or consequences of constitutional arrangements.

This analogy between individual and collective precommitment has to be qualified in some ways due to considerations of feasibility and fairness. Regarding the feasibility of the analogy, it is important to acknowledge that to a certain extent it is meaningless to refer to a society as an autonomous being that can bind itself. Individuals can resort to others to help them with their precommitment; it was Ulysses’ sailors, following his instructions, who tied him to the mast. Collectivities, on the other hand, have nothing else beyond them to tie them to masts or to prevent them from changing their minds. In light of this, it is suggested that the institution of judicial review is perhaps the closest a society (that follows a constitution) can get to self bind itself, and thus to overcome this issue. However, this solution is not unproblematic, because

49 Elster, Ambiguities, Pg. 1784.
50 However, Elster, among others, have accepted the possibility of interpreting a Constitution as a precommitment strategy even if no intention can be found. He considers that once the positive consequences of the restrain exercised on the majorities are acknowledged, the element of intention can be dropped altogether, or at least relaxed. In Elster, Ambiguities, Pg. 1761, he states: “(...) it may be useful to consider the benefits of being bound even if they cannot be traced to an intentional act motivated by the prospect of those benefits (...) [e]ven if a procedure comes into being for motives not related to such benefits it may be kept in place once the agents discover its virtues.” I consider that this statement contradicts with his previous position, according to which intention does matter to avoid the problems suggested by the functionalist fallacy (supra, ftnt. 47). From now on, I will work with the assumption that intention does matter precisely because it makes the doctrine stronger and prevents it from falling into the pitfalls of the fallacy suggested.

51 Elster, Ambiguities, Pgs. 1758. Elster assumes a methodological individualism position, and thus assumes that societies are not governed by holistic or supra individual forces. This is also a phrasing of J.W.N Watkins’ statement of the doctrine of methodological individualism. See supra, ft.nt. 19.
52 Elster, Ambiguities, Pgs. 1759-1760.
53 For a condensed tour of the different views that argue in favor and against judicial review, see: Jeremy Waldron. The Core Case Against Judicial Review. 115 Yale L. J. 1346 (2006).
judicial review can be bended to suit the unconstitutional demands of particular groups. Legal rules that seem unconstitutional would not be considered so by a constitutional court that makes summary examinations of rules that give a particular group a benefit no other group enjoys. On the other hand, without judicial review the binding force of a constitution is minimal, because majorities would lack any constrain on the decisions they make, which implies that the purpose for having a constitution is defeated.

Regarding the fairness of the analogy, it can be analyzed in two different scenarios. The first one has to do with the fairness of the precommitment at the time it is established, while the second has to do with the fairness of the precommitment across time. An example of the first scenario can be the following: At the time of their ratification, constitutions are adopted by a majority against the opposition presented by minorities. In this case, a majority of the members of a constitutional assembly decides to bind itself as well as the contending minorities. It may also be the case that it is relatively easy for a small majority to write its interests or prejudices into a constitution and adopt stringent amendment rules that will preserve them if in the future it becomes a defenseless political minority. From this perspective, constitutions as precommitment strategies seem like an unfair mechanism for preserving the status quo rather than for enjoying the benefits of democracy without incurring in its pitfalls.

Two solutions to this problem can be suggested. First, different cases of constitutional entrenchment can be located in a continuum (rather than classified in rigid categories) in order to determine whether they can be considered as precommitment strategies properly speaking. So,

\[54\] Elster, Ambiguities, Pg. 1760.
\[55\] Elster, Ambiguities, Pg. 1760.
\[56\] Elster, Ambiguities, Pgs. 1758.
\[57\] Elster, Ambiguities, Pgs. 1758. This idea of constitutions as a precommitment strategy from certain political groups has received scholar attention recently, especially in the work of Ran Hirschl. See Hirschl, Ran. Towards Juristocracy The origins and Consequences of the New Constitutionalism. Harvard University Press. 2004. Pg 49
\[58\] Elster, Ambiguities, Pg. 1760.
for example, the case of a legislature that, acting also as a constitutional assembly, votes unanimously to limit its powers by creating a constitutional court, resembles much more the idea of a precommitment strategy than a small majority binding a minority during a constitutional assembly, especially if this majority does so because it fears that it will soon lose its influence.\textsuperscript{59}

The second scenario regarding the fairness of binding through constitutions as precommitment strategies has to do with binding through time – the “dead hand” issue. For example, the “Founding Fathers” of the American Constitution intended to bind themselves and bind future generations. These issues will be discussed in the following section of this part.

At first glance, the concept of constitutions as precommitment strategies seems a conservative one. If the idea of constitutions is to limit the consequences of collective passions, it is truly hard not to assess that passions arise as the need for change is keenly felt – and in the political arena, the need to change the \textit{status quo} – which is a conservative perspective. However, a \textit{conservative} precommitment is only one of the possibilities the Elster suggests; passion-based precommitments against reasons and interests are also possible. Even more, it seems counterfactual to characterize constitutions as devices that will avoid passion-driven behaviors, since most modern constitutions were drafted and ratified in moments of highly political instability that followed from different political upheavals or revolutions.\textsuperscript{60} The Colombian Constitution of 1991, for example, was drafted amidst very intense different social and political pressures, ranging from the war against drugs to the demobilization of a well known guerrilla group. Because of the existence of different possibilities regarding how constitutions came to be, Elster suggests that the contrast between the constituent assemblies and regular

\textsuperscript{59} Elster, \textit{Ambiguities}, Pgs. 1760-1761.
\textsuperscript{60} Elster, \textit{Ambiguities}, Pg. 1768. See also, Jon Elster. \textit{Forces and Mechanisms in the Constitution-Making Process}. 45 Duke L. J. 364 (1995-1996) at Pg. 370: “By and large, however, the link between crisis and constitution-making is quite robust.”
legislatures, which is usually seen in terms of reason against passion, can also be viewed in terms of passion against interests.61

2. The Legitimacy Of a Constitution as a Precommitment Strategy
   a) Arguments against the Legitimacy of Precommitment

   The arguments against allowing the “dead hand” of the past exercise constrains on present-day majorities in this question by Michael Klarman: “Why would one think, presumptively, that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today? (…) Why should today’s generation be ruled from the grave?”62

   It seems to make no sense that past majorities should be allowed to govern the present-day ones, since there is no common ground between them: the social context, framed by ideology, material circumstances and factual assumptions has changed radically. Simply put, there is nothing that past generations cans discern better than present ones. Constitutional democracy is simply an oxymoronic expression.

   It is important to note that the argument against constitutionalism stated above is not an argument against establishing a general form of government for present-day majorities. The objections present in this argument are to creating forms of government that are based on self restraint and that can be projected through time, in order to bind the present as well as the future. These objections have a respectable lineage, which can be traced to authors like David Hume, John Locke, and Thomas Jefferson, among others. In the context of the American Revolution,

61 Elster, Ambiguities, Pg. 1768.
the temporal reach of the constitutional binds was framed in terms of the analogy between
precommitment involving a parent and his children, and its collective counter part. Constitutions
that last for several generations imply the “(…) consent of the fathers to bind their children, even
to the most remote generations”. 63 Jefferson, following Adam Smith, 64 asserted that a father had
no right to bind his children with the debts he had incurred in. In political terms, he phrased this
assertion in terms of whether one generation could incur in massive debts expecting later
generations to pay them. Since the view was that an individual could only incur in debts as long
as he paid them personally, the political majority should contract no debts that it can not pay
during its reign. 65 This analogy assumes that financial burdens represent a limitation on the
choices individuals have; by creating a frame from which majorities can not depart,
constitutional assemblies are in fact imposing limitations that are analogous to financial
hardships. But if democracy is seen as a restless, dynamic and inventive system that allows
collectivities to change the circumstances in which they live, it is a revolt against the past and the
limitations that come from it. By controlling how present day majorities attempt to rule
themselves, the past continues to exercise an influence in the present that is unjustifiable. 66 Since

Democracy. Jon Elster and Rune Slagstad Eds. (1993) Pg. 199. (From now on, Holmes, Precommitment.)
64 “A power to dispose of estates for ever is manifestly absurd. The earth and the fullness of it belongs to every
generation, and the preceding one can have no right to bind it from posterity.” Smith, Adam. Lectures on
Holmes, Precommitment. Pg. 204
65 Holmes, Precommitment. Pg. 205
66 The views of Thomas Paine, who was one of the most prominent enemies of constitutionalism, have been echoed
by authors from different postures today. For a contemporary view of democracy as a revolt against the past, see for
example Allan C. Hutchinson. It’s all in the Game: A Nonfoundationalist Account of Law and Adjudication. Duke
a father can not export the costs of his decisions to his successors, a majority can not export the costs of its form of government to future majorities by limiting their choices.\(^{67}\)

b) Arguments in favor of the Legitimacy of Precommitment

The arguments in defense of constitutions as precommitment strategies assert that past majorities can justifiably bind future majorities, in spite of the fact that social conditions have changed. The “dead hand” of the past can be binding by acknowledging the advantages provided past decisions. Because the two arguments are entwined, I will first describe the argument related with past and present majorities, and then discuss the issues of changing social conditions. Both of them have are also analogical to private law arguments.

There are two arguments for allowing past decisions bind future ones; a weak argument, which involves a tacit acceptance of past rules, and a strong one, that involves the inheritance of both benefits and costs as necessary for making decisions in the present. An example of the first argument was provided by John Locke, who argued that in spite that no father can bind his children, when inheriting their state the latter can tacitly accept the debts it contains or reject the estate altogether. When accepting an inheritance, an heir, who did not agree to the contract that created the debts, implicitly consents the conditions that make the inheritance enjoyable. Just as well, a non-signer to the social contract tacitly accepts the constraints it imposes on him by accepting as well the positive aspects that result from a pre-established order.\(^{68}\)

\(^{67}\) It is important to note that in the American context, the institution of marriage, which implies self-binding through time, had been radically transformed by the time of the Independence in order to allow divorces. See Holmes, *Precommitment*. Pgs. 201-202.

The stronger argument, suggested by James Madison, is that past majorities can bind future ones because the costs they incur in will produce benefits that will be enjoyed by future majorities. In this sense, the costs incurred in the past are closer to an investment than to an unproductive burden. The decisions of the past imply certain costs, but they also produced positive benefits without which present-day majorities could not express themselves. “If benefits are distributed across many generations, burdens should be allotted in the same way. Such an arrangement corresponds to equity and provides rewards for all parties in an intergenerational alliance.” 69 This argument suggests the existence of a sort of division of labor among generations. If certain procedures and institutions are fixed in the past, more concrete goals can be achieved in the present than what could be achieved if the need for establishing a framework for political decision-making had been unsatisfied. In this sense, a constitution hinders but also enables democratic government, because it places limits to what government officials can do, and thus provide a Rule of Law sense of reliance, and it disencumbers the political arena by providing an instrument for government. 70

However, this defense also comes with certain qualifications. Jon Elster distinguishes between two cases of constitutional decision-making in order to show in which scenarios constitutions can truly be understood as legitimate self-binding efforts. In the first one, the enactment of a constitution is seen as a response to concerns that are supposed to be important for all generations. So, for example, it is in the interest of present and future generations to have a relatively stable political and legal framework, embodied in a constitution, which is not being frequently changed. Therefore, to prevent wasteful efforts by small minorities through time to change the constitutional provisions, the procedures that govern constitutional amendments

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69Holmes, Precommitment. Pg. 219.
70Holmes, Precommitment. Pgs. 215-216, 221-222.
should be more demanding than the procedures required for repealing or amending ordinary laws.\textsuperscript{71} In this sense, constitutionalism enables democracy rather than burdening it. In the second case, the authors of the constitution write in it their preferences and prejudices, which may or may not be shared by future generations, like the right to abortion or the prohibition on abortion.\textsuperscript{72} Only the first case can properly be considered a precommitment strategy, in the sense that it reflects an attempt of the “founding generation” to take into account the predictable concerns of present and future generations.\textsuperscript{73} By doing so, they are acting on their own behalf as well as in behalf of them. Although this “virtual representation”\textsuperscript{74} argument is very weak, it is not without substance.\textsuperscript{75}

This perspective suggests that the boundaries between generations are not as clear as the criticisms suggest. Past, present and future generations are intertwined in history, and the decisions taken by the first create effects through time. Some of these are negative, but others are positive. Whoever, it seems fair that if present majorities benefit from having a framework for expressing their will, they also assume the costs that come from using such a framework. In this sense, constitutions resemble much more an agreement within a society than an exchange between separate parties.\textsuperscript{76} Such a society is composed by the dead, the living and those yet to come. Just as today’s society has individuals of different ages and takes them into account through different political decision-making procedures, so should a constitutional order take into account the costs and benefits different majorities assume across time.\textsuperscript{77} This argument is stronger if we think that the decisions of the present become past decisions for future majorities.

\textsuperscript{71} Elster,\textit{ Ambiguities}, Pg. 1759.
\textsuperscript{72} Elster,\textit{ Ambiguities}, Pg. 1759.
\textsuperscript{73} Elster,\textit{ Ambiguities}, Pg. 1759.
\textsuperscript{74} Elster,\textit{ Ambiguities}, Pg. 1759.
\textsuperscript{75} Elster,\textit{ Ambiguities}, Pg. 1759.
\textsuperscript{76} Holmes,\textit{ Precommitment}. Pg. 209.
\textsuperscript{77} See Holmes,\textit{ Precommitment}. Pg. 208.
Past majorities prevent present ones from depriving future majorities of their significant choices. As Stephen Holmes argues,

The Paine – Jefferson formula, for example is only convincing if we restrict our views to the short run, to relations between two generations. A wider perspective changes the equation. By means of a constitution, generation $a$ can help generation $c$ protect itself from being sold into slavery by generation $b$.\footnote{Holmes, \textit{Precommitment}. Pg. 226.}

The arguments above suggest that the burdens and benefits of past decisions have to be seen in light of changing social conditions. By providing a framework for political life, a constituent assembly does not solve all the issues that present and future majorities may face. A constitution as a precommitment strategy is best understood as providing a set of institutional arrangements that allow space to each generation to find solutions \textit{through} this framework than \textit{in} it. In other words, constitutions as precommitment strategies do not provide all the answers, but the means for finding them. This allows present and future majorities to modify the details of how the constituted government works – that is, to adapt to changing social conditions – and thus supports the argument of constitutions as an intergenerational commitment.

So far, the arguments expressed here suggest that constitutions as precommitment strategies are presumably legitimate because they answer the criticisms posed by the arguments against allowing the “dead-hand” of the past govern the future. In the next section, I will develop the argument of how constitutions as precommitment strategies enable rather than limit democratic rule.
3. The Technologies of Precommitment.

Individual precommitment strategies can be organized through different mechanisms or “technologies”. The combination of these represents the different ways of implementing a constitution as a strategy. When precommitting himself, an individual may delete some of the possible actions that he might do in the future, or modify the consequences attached to choosing some of the particular actions that are available to him. At a collective level, majorities take analogous courses of action to ensure that particular objectives are attained.

Constitutions as precommitment strategies enable democratic rule by providing each generation with a frame for governance composed of different “technologies”. These can be organized in three large groups: the entrenchment of institutional arrangements, the entrenchment of rights and the entrenchment of gag-rules. Regarding the first set of technologies, democracy is enabled by entrenching institutional arrangements that determine how power should be exercised. For example, by establishing a federal system, a constitution determines the relative weight the federal states have regarding the central government. Regarding the second set of technologies, democratic rule is also enabled by the entrenchment of individual rights, because by doing so it allows dissent and fosters political participation. But also, because by entrenching rights, it disencumbers the political agenda from an issue that involves abstract values that can hardly be accommodated, and gives space to issues that can be agreed upon by deliberation. Finally, the third set of technologies enables democratic rule by incorporating gag rules, which permits political institutions not to engage in discussions and enact decisions that could produce more social unrest than cohesion and agreement. I will discuss each of these technologies in the following pages.

Elster, Ambiguities, Pg. 1754.
a. Entrenchment of Institutional Arrangements

A democratic polity that cherishes individual rights may entrench institutions like federalism or a separation of political powers because of fear that an all-encompassing government may be too powerful. By dividing a governments’ capacity to formulate legal rules, it becomes more difficult for it to act in directions that threaten these rights. A disabled government, for example, one divided into three bundles of institutional arrangements – the executive, legislative and judiciary branches – requires more effort to reach agreements on a political subject than a single, unified government.\(^{80}\) However, the entrenchment of these institutions can also be seen as enabling. By providing the formal rules that are necessary to reach agreements, a constitution provides a stable framework that canalizes political energy into legal rules. Cass R. Sunstein, for example, makes an analogy between political rules and the grammar of a language; in order to make decisions, following these rules allows all the participants to conduct their discussions in a better, more organized fashion.\(^{81}\) Just as well, a division of powers can foster specialization and sensitivity to social issues that require attention, which implies that attention is paid to diverse interests and government adaptation to changing social conditions.\(^{82}\) In general terms, the entrenchment of these institutions creates a framework through which present and past majorities can make sound political decisions,\(^ {83}\) and represent a perfect example of the advantages posed by constitutionalism in terms of its legitimacy through time.


\(^{81}\) Sunstein, *Constitutionalism*, Pg. 638.


\(^{83}\) Sunstein, *Constitutionalism*, Pg. 639.
The entrenchment of political institutions can also be viewed favorably from a perspective of coordinating social behavior. Political institutions might engage in a “race to the bottom” phenomenon associated with a prisoners’ dilemma. Sunstein illustrates this by pointing out that determined institutional features of the American federal design are prone to produce “(...) situations in which the pursuit of rational self-interest by each actor produces individual outcomes that are destructive to all actors considered together, and that would be avoided if all actors agreed in advance to coercion, assuring cooperation.”  

Sunstein suggests that the Commerce Clause of the American Constitution is an example of this strategy; by disabling the capacity of individual states to control inter-state commerce, this clause limits the capacity of states to create legislation that would be beneficial from an individual perspective but very harmful from a national perspective. Hence, by solving this issue in favor of a national control of inter-state commerce, the constitutional strategy prevents these political problems from arising.

b. Entrenchment of Individual Rights

There are several reasons for entrenching rights in a constitution, and thus place them away from the reach of present-day majorities. Among the rights that are usually entrenched in contemporary constitutions are property rights and rights to bodily integrity, privacy and freedom from self-incrimination. The first reason for doing so has to do with the belief that people should be able to enjoy certain rights *independently* of what majorities think of; that is, 

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84 Sunstein, *Constitutionalism*, Pg. 640. (Footnote omitted)
85 Sunstein, *Constitutionalism*, Pgs. 640 – 641. The Commerce Clause of the American Constitution can be found in Article 1, Section 8, Clause 1.3, which states: “The Congress shall have power (...) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;” 
86 Sunstein, *Constitutionalism*. Pg. 637.
persons should be able to exercise certain rights whether or not a majority has an opinion about it.\textsuperscript{87}

A second reason for entrenching rights has to do with the argument that a democracy could not function without them. In this sense, rights are a precondition for democratic rule. To a large extent their constitutional status is not at odds with democratic rule, but rather, is implied by it. For example, the right to vote is essential for having democratic processes in the first place. Other examples include the right to free speech and freedom of assembly. By entrenching these rights, constitutions protect democratic processes from potentially dangerous future excesses, like, for example, proposals that limited the right to vote of certain minorities.\textsuperscript{88}

A third reason for entrenching individual rights has to do with the argument that by doing so highly divisive confrontations are averted and social cohesion is preserved. Thus, such entrenchments represent a strategy to minimize social contention on highly divisive topics that may arguably produce more damages than agreements.\textsuperscript{89} The entrenchment of these rights displaces the discussion of what rights to recognize, which is among the most divisive questions in a liberal society, towards the discussion of how to recognize them. By doing so, it is assumed that regarding divisive issues sometimes it is better to solve things imperfectly now than to engage in wasteful discussions that may provide in the future a better definition at a social cost that is prohibitive. In other words, the entrenchment of rights in a Constitution implies a trade-off between precision and justice, on one hand, and social cohesion and stability, in the other. It is also implied, however, that the discussion of how to enforce the entrenched rights is less divisive than the first one. This may (arguably) be so, because the new discussion departs from an undisputed premise (since a determined set of rights are entrenched in a constitution), and is

\textsuperscript{87} Sunstein, Constitutionalism, Pg. 637.
\textsuperscript{88} Sunstein, Constitutionalism, Pg. 637.
\textsuperscript{89} Sunstein, Constitutionalism, Pg. 639. (Making the case for property rights)
more context-dependent, which makes it easier to resolve amidst highly divided societies. A negative consequence of this entrenchment is that it implies making a choice in an undemocratic way from the perspective of present and future generations. To take off an issue from the political arena by entrenching it in a constitution is a decision that resolves the issue one way or another, and hence may be objectionable from a majoritarian perspective.90

c. Gag Rules.

Just as constitutionalism can enhance democracy by providing a stable, background setting for present political decision-making procedures and by entrenching rights, it also enhances democracy by avoiding the discussion of certain topics. The rationale behind this approach is that conflict shyness and self-gagging can serve positive goals.91 Because many conflicts and issues can not be resolved by political means, or are subject for a strict rational discussion – for example, conflicts that stem from irreconcilable views about religion – it makes sense not to attempt to solve them, or to side step them for other time, in order to resolve the remaining controversies that can be solved by political means.92

It is important to note here that self gagging may imply either renouncing to answer highly divisive issues, or to compartmentalize them to different scenarios, where what is at stake is politically less significant.93 An example of the first case is when an institution that faces a political divisive issue with high political stakes decides that it is not competent to answer it

90 Sunstein, Constitutionalism, Pg. 639, ft.nt 23.
92 Holmes, Constitutionalism, Pg. 23.
93 For a development of this topic, see Duncan Kennedy, Strategizing Strategic Behavior in Legal Interpretation, 1996 Utah L. Rev. 875 (1996).
according to the law. The American Supreme Court, for example, has developed several arguments that allow it to not to discuss such issues; examples of such arguments include the Political Question doctrine as well as considerations regarding the ripeness of the case and the standing of the plaintiff.\(^{94}\) An example of compartmentalizing divisive issues takes place when, again, an institution like the American Supreme Court faces a question regarding the role of religion in public life, and especially in public education;\(^{95}\) by stating that religious issues belong to the private sphere of society, away from majorities and jurisdictions, it is settling the issue at hand by preventing religion, and religious freedom, to be a contested topic in politics.\(^{96}\)

When a government body takes the decision of gagging itself on highly divisive issues regarding rights, two consequences are achieved: first, the private sphere of individuals may be sheltered by unwarranted incursions of the public, and second, public sphere is unburdened from discussions that are unlikely to produce agreements. As Stephen Holmes points out, “[w]hen ultimate ends color all concrete political acts, compromise or piecemeal reform becomes next to impossible.”\(^{97}\) By compartmentalizing highly political issues, and thus deleting them from the political arena, the remaining controversies are those that can be amenable through politics.\(^{98}\)

\(^{94}\) Holmes, Constitutionalism, Pg. 21.
\(^{95}\) Here the obvious allusion is to the cases in which it was debated the role of prayers in public schools, like, for example, *Meek v. Pittenger*, 421 U.S. 203 (1975) and *Lemon v. Kurtzman*, 403 U.S. (1971), among other decisions.
\(^{96}\) Holmes, Constitutionalism, Pg. 23. For example, in *McCullom v. Board of Education*, Justice Frankfurter stated: “Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous people, the public school must be kept scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups (...) requires strict confinement of the State to instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice” *McCullom v. Board of Education* 333 U.S. (1947). In Holmes, Constitutionalism, Pg. 46.
\(^{97}\) Holmes, Constitutionalism, Pg. 25.
\(^{98}\) Holmes, Constitutionalism, Pgs. 23-24. Perhaps this is the insight that is presented by Justice Scalia in a commentary about *Roe v. Wade*: “Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. (...) Profound disagreement existed among our citizens over the issue – as it does over other issues, such as the death penalty – but that disagreement was being worked at the state level. (...) Roe’s mandate for abortion-on-demand destroyed the compromise of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.” *Roe v. Wade* 410 U.S. 113 (1973)
However, the use of gag rules and self-censorship as a strategy for stable governance has its limits, as Holmes acknowledges. In many circumstances, leaving an issue unresolved implies to take side with the position that is favored by silence. This position may not only be a biased one; it can also be an immoral one.\textsuperscript{99} Just as well, some pluralism can not be accommodated indefinitely, and the highly contested issues are prone to appear again and again in different contexts, which suggest that the exercise of self-gagging is more difficult with time and exacerbates social factions.\textsuperscript{100} In the end, divisive issues are prone to become part of the central stages of politics. Even when certain issues are compartmentalized by, for example, allocating their discussion at the level local politics instead of allocating it at the levels of national or international politics, following gag rules does not eliminate the consequences of the conflict, but rather may continue to exacerbate it. In this sense, the continuous use of gag rules ends up creating more instability than preserving political unity.\textsuperscript{101} Another limit of persistent self-gagging is that it will likely produce a systematic thinning of the issues debated, to the extent of making public discussions trivial.\textsuperscript{102} This, in turn, has several drawbacks. Democracy is made imperfect because the issues that are set under democratic debate are too few, or too irrelevant. By removing all issues of moral importance from the political agenda and compartmentalizing them to other spheres or to non-accountable institutions, democracy may become incredibly bland and useless as a space for national education.\textsuperscript{103} Also, the bias present in gag rules may undermine alternatives to contested policies and assure the consistent victory of a political

\textsuperscript{99}Holmes, \textit{Constitutionalism}, Pg. 39.
\textsuperscript{100}Holmes, \textit{Constitutionalism}, Pg. 56.
\textsuperscript{101}Holmes argues that slavery was one of the topics that were gagged in different circumstances during American history, and as a consequence of such strategy the animosities between the pro-slavery states and the anti-slavery ones were exacerbated to the point that national union was threatened. However, by the time the Civil War exploded, the anti-slavery states had the capacity to overcome the others through the use of force. Just as well, the issue of gagging slavery was a prominent topic in the debates between Lincoln and Douglass in 1858. See Holmes, \textit{Constitutionalism}, Pgs. 38 and following.
\textsuperscript{102}Holmes, \textit{Constitutionalism}, Pg. 56.
\textsuperscript{103}Holmes, \textit{Constitutionalism}, Pg. 56.
faction over others, to the extreme of exacerbating social conflicts. But perhaps the biggest objection to a persistent use of self-gagging and conflict avoidances in a democratic society is that it makes it a perfect target for threats of conflict. Again, what this argument suggests is that too much self-gagging can be counterproductive, because the avoidance of conflict invites threats of conflict from third parties. As Holmes acknowledges, “[i]f a group habitually gags itself on divisive questions, it will give individuals and groups a powerful incentive for bluffing. If threats trigger collective silence, threats will be forthcoming.”

Cass R. Sunstein summarizes how constitutions as precommitment strategies reinforce democratic rule in the following statement:

In all of these cases, the decision to take certain question off the political agenda might be understood as a means not of disabling but of protecting politics, by reducing the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective-action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself. In this respect, the decision to use constitutionalism to remove certain issues from politics is often profoundly democratic.

C. From Theory to Practice: Interpreting Constitutions as Precommitment Strategies.

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104 Holmes, Constitutionalism, Pg. 56.
105 Holmes, Constitutionalism, Pg. 56. This argument is not foreign to American constitutional doctrine; for example, regarding affirmative action issues, Richard Posner argued: “The Realpolitik argument (…) is that preferential treatment of blacks and other militant minorities is the price the white majority must pay for avoiding the sort of unrest and violence of which the race riots of the 1960s were arguably but the portents.” In: Richard A. Posner. The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities. 1974 Sup. Ct. Rev. 1 (1974).
106 Sunstein, Constitutionalism, Pg. 642.
Up to now, this paper has presented the most salient aspects of constitutions as precommitment strategies without any reference to constitutional interpretation as a practical enterprise. The purpose of this last section is to present a series of premises that, based on all the arguments presented so far, will allow an interpreter and enforcer of a constitution to do so as a precommitment strategy. The purpose of these premises is to make operational the concept of constitutions as precommitment strategies as a method of constitutional interpretation, in the sense of providing a series of guidelines regarding how the constitution and its practice should be interpreted by different legal actors.\(^\text{107}\)

I acknowledge that to deduce from the arguments presented so far a set of premises intended to guide interpretation and enforcement of a constitution involves a creative process done by me, and that a different person may come with a different set of premises that are aimed at the same purpose. I am not making a straw man just to dismantle it myself; I honestly believe that these premises are necessary for interpreting a constitution, since that particular task implies departing from very abstract arguments, like the ones presented above, and aims to be applicable to very particular issues, like the ones judges face when solving disputes. Any interpreter of legal rules undergoes a mental process in which he accommodates the rules laid before him, as well as his approach to how interpret these rules in accordance to an ideal that might be of fidelity to the law, but not necessarily.\(^\text{108}\) Due to the intricacies of collective precommitment strategies

\(^\text{107}\) It is important to notice that some scholars, namely Michael J. Klarman and Samuel Issacharoff, consider that this interpretative approach is different from other traditional approaches. This approach does not pretend to determine the precise meaning of particular expressions found in the Constitution or in Supreme Court decisions, as many interpretative approaches do. However, it is an interpretative approach in the sense that it tries to make some sense of the constitution as a blueprint of institutional arrangements and its implementation by the Court by pointing to the purpose of the Constitution as it was drafted and ratified. See Klarman, at ft.\textsuperscript{2} supra, and Samuel Issacharoff, \textit{The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections}, 81 Tex. L. Rev. 1985 (2002-2003).

\(^\text{108}\) Consider this statement: ‘It is always possible for the judge to adopt a strategic attitude towards the materials, to try to make them mean something other than what they first appeared to mean, or to give them one to the exclusion of other initially possible meanings. On the other hand, it is never necessary that he does this and never certain that
presented above, I believe that to interpret a constitution as one it is necessary to translate those arguments to a set of premises that illustrate both the advantages and pitfalls of precommitment strategies. By providing these premises, I plan to fill a gap that is present between abstract considerations and particular situations.

1. Four Premises of Interpretation for Constitutions as Precommitment Strategies

For the purpose of the ongoing discussion, the premises I suggest are based on the topics addressed so far regarding constitutions as precommitment strategies: intention to limit majoritarian decision-making, institutional arrangements, entrenchment of rights and use of gag rules, and flexibility.

1. *(Intention to limit majoritarian decision-making).* A government that is somehow responsive to majoritarian decisions has to have bodies that are specialized and proficient in order to do their job well. However, the scope of the decisions majorities can adopt through these bodies must be limited, because in time 1 they may act in such ways that may be considered undesirable in time 0.\textsuperscript{109} Therefore, to interpret a constitution as a precommitment strategy, there has to be clear evidence that the adoption of such constitution was intended to limit the scope of what majorities can decide.

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he will succeed if he tries. (...) It is always possible to behave strategically in the sense of trying to make a particular rule interpretation look good. There is no definition of the rule of law that could prevent judges from making this effort, and it is at least plausible that the rule of law requires judges to make the effort some of the time.”


It is important to take into account that Elster suggests that the drafting of constitutions, and their further implementation, can take place in times of passion or interest as well as of reason. The classical view that constitutions are drafted in times of reason to avoid the mistakes that can be committed in times of passions is just one of the possible views he explores.
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2. *(Institutional arrangements)* Constitutions can disable as well as enable democratic politics. They disable them by creating rigid rules that limit how and when the majorities can act, and enable them by providing a set of rules that canalize political initiatives into majority dynamics that produce legal rules. These rules amount to the institutional arrangements that shape government. Without such background rules, majorities wouldn’t be able to express themselves in a significant manner.

3. *(Entrenchment of rights and use of gag rules)* Constitutions can also disable democratic politics by deciding substantial issues – like individual rights – through either constitutional entrenchment, or the use of gag rules, and consequently place these issues beyond the scope of regular majorities. However, this can also be enabling for democratic politics, since this entrenchment implies that these substantial issues, which are usually highly divisive and stem political factionalism, will not encumber the agenda of everyday politics and thus allow issues which are more given to agreement to be discussed.

4. *(Flexibility)* In spite of its usefulness, the enabling role of constitutionalism can be counterproductive and flexibility is required. For example, excessive decentralization can decrease a polity’s welfare, not increase it; constitutional rules that stifle amendment procedures too much invite constitutional change by other means, and an excessive use of gag rules can thin democratic debate to the point in which it is useless.

When interpreting a constitutions as a precommitment strategy, the interpreter will try to make sense of the constitutional rules laid down before him by appealing to the strategic advantages of certain particular features of these documents, like federalism, separation of powers and individual rights, and how such features bind both government agencies and
individuals through time. The strategic account of these rules represents their justification and suggests how they should be fitted together. Their purpose – restraining future behavior that is undesirable – arranges the constitutional rules and determines how they ought to be considered altogether. In other words, these ideas represent purpose-like considerations for reading the constitutional rules in a particular order and from a particular perspective. Interpreting constitutions as precommitment strategies represents a doctrinal attempt to make sense of the role constitutions play in a democratic polity.

2. Distinguishing Constitutional Precommitment from other approaches to Constitutional Law.

In order to develop better the idea of constitutions as a precommitment strategy, it may be useful to distinguish it from other theories of constitutional interpretation that also take into account the intention of the Framers in American constitutional doctrine. Specially, it is important to distinguish the arguments and ideas presented here from the doctrine of Originalism. According to this doctrine, the American Constitution should be interpreted in such a way that it reflects the intentions of the persons who drafted and adopted it. In the words of Mark Tushnet, “Originalism claims that the courts should invalidate legislation only if it is inconsistent with the text of the Constitution as understood by those who wrote and adopted it”110.

There are several differences between the ideas discussed so far and Originalism, and so I will focus on two of them, which I take to be the most prominent. First, Originalism sponsors an

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idea of complete fidelity to a set of intentions which seem to be unmovable. For example, if the Framers of the Constitution had the intention of designing a democratic government that tolerated public-school segregation as an expression of racism, then segregation should not be unconstitutional now, for it wasn’t then.\footnote{This is, for example, Robert Bork’s position regarding Bolling v. Sharpe. See Daniel A Farber and Suzanna Sherry, Desperately Seeking Certainty The Misguided Quest for Constitutional Foundations. University of Chicago Press. (2002) Pgs. 25, 176 Fnt. 66.} From the perspective of constitutions as precommitment strategies, the intent of the framers is important, but the interpretation of such intent can not work as a suicide pact against itself.\footnote{Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J. dissenting) in Supra, Elster, Ambiguities, Pg. 1774.} The legal system created in the Constitution, and amended later on, should allow change as long as to preserve the system itself; for example, by recognizing that public school segregation was unconstitutional, the legal system recognized that public values change through time. These adjustments follow from the considerations of constitutional legitimacy through time discussed before.\footnote{See sections B and C of this part.} Such adjustments are necessary to cope with the situations brought upon by social change in order to prevent a disruption of the legal system itself. In other words, the precommitment strategy embedded in a constitution has to be flexible enough not to work against itself, which falls squarely within one of the most important goals from the perspective of the Framers, to build a long – lasting and stable legal system.\footnote{This view fits squarely with the Preamble of the American Constitution: “We the people of the United States, in order to form a more and perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote general welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for United States of America”}

A second, and perhaps most subtle distinction, has to do with how determinate the intentions of the Framers were. Originalists claim that such intentions can be clearly discerned, and thus they should be followed, whatever they were. However, they do not make a claim of why such intentions should be supported and advanced beyond claims of fidelity to the Constitution itself.
Originalism thus takes the intentions as given, and from there works its way up. Interpreting constitutions as a precommitment strategy also considers that the intentions of the Framers are very important, but they have to be intentions to bind the future as well as the present (even though the political correctness of that intention can be contested). As mentioned before, the intentions have to amount to intentions of binding. An originalist may claim, on the other hand, the intentions the Framers had in mind were not related to binding present and future generations in any useful way. Surely, they intended to devise a system of government that enabled democratic government, but such a position may not bind future generations in any significant way; after all, there are several possible explanations as well as approaches to constitutionalism that do not require binding in the sense mentioned here.\textsuperscript{115}

Just as well, it is appropriate to differentiate briefly this approach from other approaches that consider the American Constitution as a document whose meaning has changes through time – a “non-originalist” position.\textsuperscript{116} According to this view, the Constitution has to be adapted in such a way that it reflects the changing values of society through time. Thus, for example, the question of whether the Fourteenth Amendment requires judges to determine whether homosexual relations are protected from state intervention, does not depend on the view of the Framers on this topic, but rather on how society today understands and values such conduct.\textsuperscript{117} The precommitment strategy approach has little or nothing to say to such questions from the perspective of their substantive value; however, its arguments lend themselves more easily to a position in which such conduct is protected rather than penalized. (And even more if such issues

\textsuperscript{115} See, for example, Michael J. Klarman, \textit{What’s so Great About Constitutionalism?} 93 Nw. U. L. Rev. 145 (1998). An example of one of such intentions can be to preserve the symbolic value of national symbols, like for example, the National Anthem or the Flag.


\textsuperscript{117} See, for example, \textit{Lawrence v Texas} 539 U.S. 558 (2003)
are divisive enough to invite a compromise rather than a “correct” solution.) The difference would be that when addressing these issues from the perspective of a precommitment strategy, it would emphasize on the legitimacy of social change that result from the strategic purpose of having a Constitution in the first place. Individual rights are granted and entrenched as a way of disencumbering everyday politics and serve as a limit to governmental action. By arguing, for example, that homosexual relations are part of an individuals’ right to his or her self determination, and therefore should be protected, the issue is (apparently) settled by pointing out that it is part of a major issue that has been settled in the past. Just as well, by pointing out a gag-rule according to which such issue should be decided in a different forum, political actors are able to gag themselves and preserve a modicum of legitimacy.  

Part IV. The Ambiguities of Constitutions as Precommitment Strategies

A. Mapping the Indeterminacy of the Precommitment Strategy

The purpose of this part is to criticize the interpretative approach of constitutions as precommitment strategies by showing how it is indeterminate and inadequate. The critiques aim at showing that this interpretative strategy does not solve the issues of indeterminacy of legal rules it is supposed to solve, nor does it constrain judges enough to ensure that their decisions are what the Rule of Law demands from them. Just as well, the strategy, in order to work, has to be

in touch with reality. To make these arguments I will use examples drawn from the American constitutional experience.

In general terms, the critiques presented here are common within the agenda of the American strand of Legal Realism and Critical Legal Studies, and more specially, fit within what is usually referred as the indeterminacy thesis. A brief formulation of such thesis can be the following: Since legal rules – and especially constitutional rules – contain gaps and vague expressions, interpretation is necessary to determine a meaning that gives them some sense.\textsuperscript{119} When doing so, these rules can be arranged and rearranged into different structures,\textsuperscript{120} which reveals the existence of a choice that the interpreter can make when determining how to interpret and accommodate the rules at hand.\textsuperscript{121} Furthermore, indeterminacy remains even when the rules are arranged systematically under an ideal, such as a principle, a policy or a purpose, because they can be fitted and justified in different ways under different and competing ideals.\textsuperscript{122} As long as there is a possibility of exercising arbitrary choice, it can not be claimed that adjudication, and especially constitutional adjudication, is politically neutral.\textsuperscript{123} The aspect of indeterminacy seems not only unavoidable but augmented as the attempts to overcome the problems suggested by it gain abstraction and complexity. This also reveals that legal indeterminacy depends to a large extent in the capacity of particular groups to challenge the ideals embedded in the structure of legal rules.\textsuperscript{124}

\textsuperscript{120} See, for example Ronald Dworkin. \textit{Hard Cases} 88 Harvard Law Review (1975)
\textsuperscript{121} See, for example Mark V. Tushnet, \textit{Legal Scholarship: Its Causes and Cure}. 90 Yale L. J. 1205 (1981)
\textsuperscript{122} See, for example Duncan Kennedy. \textit{Form and Substance in Private Law Adjudication} 89 Harv.L. Rev. 1685 (1976)
\textsuperscript{124} See, for example, Duncan Kennedy. A Critique of Adjudication (fin de siècle). Harvard University Press (1997)
The indeterminacy thesis represents a challenge to the ideals that compose the Rule of Law, as presented before in part II of this paper. This is so because an adequate theory of constitutionalism has to provide the interpreter and enforcer of a constitution with a set of general, open and relatively stable set of legal rules that limits the chance for exercising arbitrariness. Although it is important to acknowledge that indeterminacy will always be present, especially in such a set of legal rules, the key emphasis is on limiting the opportunity for arbitrariness the interpreter and enforcer of such rules can exercise. If the exercise of arbitrary power is dangerous by itself given particular and narrow rules, it is much more at the constitutional level, since the rules the interpreter and enforcer finds at that level are those that determine the creation of the other ones. Because of this, the stakes are much higher and the exercise of arbitrariness has a larger effect among individuals and the legal system. The indeterminacy thesis thus suggests that the whole enterprise of constitutional interpretation and enforcement according to the Rule of Law has gone astray; the incapacity of theories of interpretation to cope with the indeterminacy of constitutional rules gives the interpreter and enforcer the opportunity to exercise his powers in an arbitrary way.

The view of constitutions as precommitment strategies is a “foundationalist” project that aims to organize the legal rules in the constitution under a set of premises that act as foundations. In terms of the premises that compose the indeterminacy thesis as presented above, this view contains a series of ideals – in this case, purposes – that fit and justify the legal rules laid down in order to create with them a coherent structure about constitutional law. The

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126 As presented in the previous section, those premises are:

1. (Intention to limit majoritarian decision-making). A government that is somehow responsive to majoritarian decisions has to have bodies that are specialized and proficient in order to do their job well. However, the scope of the decisions majorities can adopt through these bodies must be limited, because in time 1 they may act in such ways that may be considered undesirable in time 0. Therefore, to interpret a
first three premises presented in the preceding chapter (intention to limit majoritarian decision-making, institutional arrangements, entrenchment of rights and use of gag rules) represent justifications for having constitutional rules, which limit democratic rule, and entrenching individual rights; the fourth premise (flexibility) introduces a technical argument for having elasticity in the system without which it would be rendered useless. All the four arguments justify many of the rules in a constitution, and criticize those ones which are at odds with the rest.

However, just as the indeterminacy thesis suggests, this approach is flawed pervasively by the indeterminacy of the strategy itself. The indeterminacy thesis suggests that legal rules are indeterminate to some extent, but it also suggests that when attempting to cope with such indeterminacy, legal doctrines, like the one discussed in this paper, are also indeterminate, and thus cannot give an account of why judges interpret the rules the way do. In sum, this doctrine is inadequate because it is indeterminate, and it is so because it fails to constrain adjudication in a way that is consistent with the Rule of Law.

The indeterminacy of this doctrine can be evidenced in at least two different ways, which I will describe in this part by using the American constitutional experience as an example. The

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2. (Institutional arrangements) Constitutions can disable as well as enable democratic politics. They disable them by creating rigid rules that limit how and when the majorities can act, and enable them by providing a set of rules that canalize political initiatives into majority dynamics that produce legal rules. These rules amount to the institutional arrangements that shape government. Without such background rules, majorities wouldn’t be able to express themselves in a significant manner.

3. (Entrenchment of rights and use of gag rules) Constitutions can also disable democratic politics by deciding substantial issues – like individual rights – through either constitutional entrenchment, or the use of gag rules, and consequently place these issues beyond the scope of regular majorities. However, this can also be enabling for democratic politics, since this entrenchment implies that these substantial issues, which are usually highly divisive and stem political factionalism, will not encumber the agenda of everyday politics and thus allow issues which are more given to agreement to be discussed.

4. (Flexibility) In spite of its usefulness, the enabling role of constitutionalism can be counterproductive and flexibility is required. For example, excessive decentralization can decrease a polity’s welfare, not increase it; constitutional rules that stifle amendment procedures too much invite constitutional change by other means, and an excessive use of gag rules can thin democratic debate to the point in which it is useless.
first aspect of indeterminacy has to do with the intention of binding future generations. The idea of having a fixed constitution that binds several generations was one of the discussions that took place during the adoption of the American Constitution, a discussion that was left unsolved in the sense that this document does not necessarily prove right one set of arguments or the other. On the other hand, it is clear that the amendment process established in article V is drastic, but its stringency did not prevent amendments from being enacted, and specially, did not prevent other modifications, which today are widely accepted, from happening outside the process established by this article.\textsuperscript{127} However, the discussion here is centered on the extent to which the American Framers really viewed the Constitution as a long-lasting binding mechanism. The main claim is that the reconstruction we make today of the Framers’ intentions produces contradictory results, as the scholarship of several constitutional law scholars suggest.\textsuperscript{128}

A second level of indeterminacy becomes evident when we consider that each of the premises that compose the precommitment strategy view is indeterminate to some extent. Particular institutional arrangements implemented in the American Constitution (premises 1, 2 and 3)\textsuperscript{129}, like, for example, the provisions related to the establishment of a federal government, can produce some of the expected achievements, and others results that are equally feasible but produce negative consequences. Thus, they have to be mitigated by considerations of flexibility (premise 4) in order to deal with the counterproductive consequences produced by any of the other three premises. This represents a “thrust but parry” behavior, just like the one observed by

\textsuperscript{127} Regarding constitutional amendment outside of Article V, see, Bruce Ackerman. \textit{We the People – Foundations}. Harvard Belknap Press (1992)

\textsuperscript{128} For example, Robert Bork, Antonin Scalia, Bruce Ackerman and Akhil Amar claim that the intention of the Framers is very important for their foundational accounts of American constitutional law; however, they all “find” different intentions that allow them to pursue different foundationalist attempts.

\textsuperscript{129} Intention to limit majoritarian decision-making (No. 1), Institutional arrangements (No. 2), and Entrenchment of rights and use of gag rules (No. 3).
Karl Llewellyn almost fifty years ago when reviewing canons of interpretation.\textsuperscript{130} However, the idea of flexibility is not determinate enough to constrain judicial behavior, and thus represents an opportunity for interstitial constitutionalism. For example, in the American Constitutional tradition, some of the Framers and some contemporary authors have emphasized that federalism adequately allocated political power because it creates incentives for each of the states to pursue the best conditions for their inhabitants; however, such a race can produce bad results as good ones. This in turn calls for constitutional constraints like the ones mentioned by Elster and Sunstein regarding the coordination of the different governmental bodies. However, these constraints – which would be clearly justified by the view of constitutions as precommitment strategies – represent a limitation that can be achieved in many different ways. The regulation of government agencies can be done through different paths, and the view of Constitutions as a precommitment strategy doesn’t suggest any path in particular – it only suggests that constrains are justified. When solving these cases, the judges have to claim that the solution they come up with was required by the law, when it was not. In the particular case of the American constitutional experience, this suggests that the precommitment strategy relies on an unhindered enforcer.

The claims stated above indicate that indeterminacy permeates this interpretative approach at two different but closely connected levels. First, there is indeterminacy regarding what where the intentions of the Framers of the Constitution, an indeterminacy that seriously undermines the project of viewing the Constitution as a precommitment strategy because several different “intentions” can be found. But if indeed a constitution can be seen as a precommitment strategy because the intent is clear, once the premises that compose this view are applied, they

have to be mediated by considerations of flexibility which are in themselves indeterminate and to a large extent case-sensitive.

There is also a different critical approach to this theory, one related with structural foreclosing. By fixating on the importance of preserving the constitutional provisions in terms of the supposed intent of the Framers, this perspective supposes that each branch of power and each level of national administration have different and competing interests, when this is not necessarily so. In the case of the American constitutional experience, the fixation of this theory (and others that are related to it) has pushed analysis in directions that foreclose the possibility that political parties are the *Deus ex machina* behind the functioning of each branch of power and at the different levels of the national government. By supposing that each branch of power represents a faction and a set of interests of its own, traditional analyses are blind to the possibility that in a determinate moment of time a single party may control all three branches of power. By focusing only in the institutional design of the Framers intent, the whole constitutional strategy may have been compromised. I will now develop these critiques more thoroughly.

B. Indeterminacy in the Framer’s Intent

To argue that there is indeterminacy when wondering what the intent of the Framers of a constitution was is not an old argument, at least in American legal scholarship. When it has been used, it has been directed against Originalism as a theory of constitutional interpretation. In spite of the differences that originalism has with viewing constitutions as precommitment strategies, it also has similar aspects, mainly, the same desire to find out what the intent of the American Framers was.
The case for the precommitment strategy view appears to be both more difficult and easier at the same time than the case for originalism. It may be more difficult because it supposes that among the several intentions that can be “found”, the right one is that which supports the precommitment view, and easier because the discussion of whether a present generation could bind others actually took place among prominent Framers, notably, Thomas Jefferson and James Madison. However, this duality is only apparent; the precommitment approach is twice more difficult to support than the originalist perspective. Although a debate about precommitment certainly took place, it was left as an unsettled question; however, the stringency of article V arguably supports Madison’s view in favor of allowing past generations to bind future ones. The advantage of the view presented here is also apparent because the discussion of whether a present generation could bind future ones was not the only discussion regarding how the Constitution should be interpreted; there were other discussions about constitutionalism, at least as important as the present one. Because of this, the idea of finding a clear binding intention can be disbarred by arguing that when reconstructing the past, several plausible intentions can be found, which suggests the first level of indeterminacy of this approach.

The “standard” argument for arguing against an interpretative approach to the Framer’s intentions in American constitutional scholarship was presented by realist-oriented scholars like Mark Tushnet back in the early nineteen eighties. According to this author, the critique of this

131 For an interesting discussion regarding the debate of whether a generation could bind future ones, see Holmes, Stephen. Precommitment and the Paradox of Democracy in: Constitutionalism and Democracy, Jon Elster and Rune Slagstad Eds. Pg. 195 and following.
132 For example, Michael Klarman shows that there are ten possible ideals according to which to reconstruct the American constitutional experience. Just as well, other authors have discussed the importance of institutional design as a way of institutionalizing distrust without suggesting that it represents a binding effort. The permanence of such institutions can be argued by, for example, the realization that each generation has of the virtues of maintaining such institutions.
approach can be laid down in three steps.\textsuperscript{134} The first step consists of arguing that the knowledge of past intentions has to rely on some knowledge of history more elaborate than the presumption that past intentions are directly accessible to present day understanding. The second step suggests that to know former intentions and views about the world it is necessary to recreate former categories into categories of our own – that is, in order to understand the past views of the world, it is necessary to represent it in terms that are our own. The third step suggests that converting past views into our own – what Tushnet calls “imaginative transposition” – is not determinate enough to restrain a decision-making process, because it can be done differently, with a different results, and it is impossible to determine which result is better than the others.\textsuperscript{135}

Regarding the first step, Tushnet argues that an inquiry conducted with the purpose of finding the Framer’s intent presupposes that historical data will produce definite and clear answers regarding what that intent was; otherwise, it would not be enough to provide clear answers to constitutional issues or restrain judicial interpretation.\textsuperscript{136} However, the expectations of the interpretivist project – a project founded on the need to interpret the Constitution based on the Framers’ intent – are betrayed by the seasoned historians’ experience, because where the former seeks clarity and determinacy, the latter finds ambiguity.\textsuperscript{137} However, when the primary materials run out, interpretivists have to rely on supplementary evidentiary rules which are both helpful and misleading to some extent. They may be helpful because they are supported by historiographic principles that are reasonable, like, for example, “(…) that it is reasonable to require more evidence to show a radical discontinuity than to show a steady continuity in

\textsuperscript{134} Tushnet, \textit{Interpretivism}, Pg. 793
\textsuperscript{135} Tushnet, \textit{Interpretivism}, Pg. 793.
\textsuperscript{136} Tushnet, \textit{Interpretivism}, Pg. 793.
\textsuperscript{137} Tushnet, \textit{Interpretivism}, Pg. 793.
However, they may also be misleading, because such evidentiary rules may contain policy decisions that have nothing to do with their role in creating a precise reconstruction of the past. The intent rule, for example, may be justified because the interpretivist is looking for a political “intent” that is expressed in formal occasions and with formal terms, rather than a “private intent” like the one expressed in letters and other documents. To limit the study only to “formal” expressions of intent is to make a policy judgment that privileges formal expressions of intent over informal ones. As a consequence of this, evidentiary rules may distort the interpretivist project, because the best guides to what the Framers actually intended may be found, for example, in their personal correspondence. But even more, the project is flawed because the validity of its assumptions rest on policy judgments, which implies that the project relies ultimately on a particular vision of politics and society.

The visions of society and politics implied in the interpretivist project and alluded above point to the second step of the critique presented by Tushnet. Underlying this project’s faith in finding unambiguous historical data and records is the premise of methodical individualism – that is, the “(...) view that individuals are the primary units of human experience and history and that larger social wholes are best understood as aggregates of such individuals.” This perspective suggests that an individual’s intentions are independent of, or prior to, the social context in which he interacts, which in turn suggests that his intentions are determinate entities that are consigned in historical records of different sorts. This chain of reasoning is flawed,

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140 Tushnet, *Interpretivism*. Pg. 795. Here Tushnet quotes the work of H. Hyman regarding the 14th Amendment as much more accurate for describing what the authors of the Amendment were trying to do than specialized legal inquiries into history, and most specially, Raoul Berger’s book, Government by the Judiciary. (1977)
however, because it presupposes that the meanings of words can be detached from the entire set of complex meanings that the Framers attached to their political vocabulary, as well as from the larger political, economic and intellectual world in which the Framers lived.¹⁴⁵ As Tushnet points out, “(…) interpretivists slip into the error of thinking that they can grasp historical parts without embracing the historical whole”¹⁴⁶. Even more, such attempts are impossible because the specific intentions of historical actors can not be singled out without denying the social settings and personal experiences that led different individuals to present different perspectives of what the different provisions of the American Constitution should mean.¹⁴⁷

By suggesting the need to go beyond the intentions of the Framers and take into account the contexts in which this intentions were expressed, Tushnet then steps forward into the third and final step of the critique summarized here. Since the social, political and economic contexts are required for us to understand the intentions of the Framers, the interpretivist project needs to take a hermeneutical approach, according to which “(…) historical knowledge is seen as ‘the interpretative understanding of [the] meanings’ that actors give their actions. The historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms’”.¹⁴⁸ The interpretivist has to abandon the premise of wholly determinate intentions, and enter into the world of the past to understand it and creatively reconstruct it.¹⁴⁹ Such a creative reconstruction is necessary because interpretivists need to express the categories of the past in

¹⁴⁷ For example, Stephen Holmes argues that one of the reasons why Noah Webster was so opposed to the idea of binding future generations was because for him the idea of having the past ruling the present and the future seemed antagonistic with the purpose of having a revolution that broke the chains established by past aristocracy. Since for him the past represented aristocracy, he rebelled against the idea of present and future generations not being able to break the hold of past bindings. Of course, Holmes’ analysis doesn’t explain what Madison’s views on aristocracy were, so the debate regarding this point is simply unresolved and shows why historical arguments can not solve all the inquiries regarding intention. See Holmes, *Supra* at Pgs. 215 and following.
¹⁴⁸ Tushnet, *Interpretivism*. Pg. 798. (Quotations and brackets in the original text, citations omitted)
terms of present ones. However, this process of conversion introduces a large amount of indeterminacy because past understandings can be converted into different present understandings.\textsuperscript{150} Tushnet presents the following example regarding \textit{Brown v. Board of Education}\textsuperscript{151} and the Fourteenth Amendment:

Suppose that we did turn back the clock so that we could talk to the Framers of the Fourteenth Amendment. If we asked them whether the amendment outlawed segregation in public schools, they would answer “No.” But we could pursue our conversation by asking them what they had in mind when they thought about public education. We would find out that they had in mind a relatively new and peripheral social institution designed (say) to civilize the lower classes. In contrast, they thought that freedom of contract was extremely important because it was the foundation of individual achievement, and they certainly wanted to outlaw racial discrimination with respect to this freedom. Returning to 1954 and the question for the Court in \textit{Brown}, we might, in an antic moment, challenge the interpretivists with their own weapons. Our hermeneutic enterprise has shown us that public education as it exists today - a central institution for the achievement of individual goals - is in fact the functional equivalent not of public education in 1868, but of freedom of contract in 1868. Thus, \textit{Brown} was correctly decided in light of a hermeneutic interpretivism.\textsuperscript{152}

\begin{flushright}
\textsuperscript{150} Tushnet, \textit{Interpretivism}. Pgs. 800-801.  \\
\textsuperscript{151} \textit{Brown v. Board of Education of Topeka (I)} 47 U.S. 483 (1954)  \\
\textsuperscript{152} Tushnet, \textit{Interpretivism}. Pg. 800. (Emphasis in the original)
\end{flushright}
As can be concluded from the arguments presented so far, the interpretivists face a dilemma: in order to capture fully the intentions of the Framers, they need to embrace a hermeneutical approach, but such approach implies a reconstruction of the world that is creative and indeterminate. An interpretivist approach, like the view of constitutions as precommitment strategies, claims that it can limit the indeterminacy in legal rules and restrain judicial interpretation, but, by permitting judges to convert past categories into present ones, it reintroduces the discretion that it meant to reduce.¹⁵³

So far, the main argument presented is that the quest for an intention in the Framers’ world will not produce a single answer, but rather, many. Contemporary scholars in American Constitutional Law simply recognize that this is the case – without going into too much detail – either by arguing that the cases and commentaries suggest different possible accounts of the purposes served by constitutionalism,¹⁵⁴ or, more interestingly, by suggesting that even if a precommitment strategy approach is adopted, it can not be clearly derived from the intent of the Framers. For example, after discussing some historical material regarding a possible intention by the Framers to bind future generations, Samuel Issacharoff states:

The foregoing thumbnail sketch of the intellectual underpinnings of the U.S. Constitution is consistent with an emphasis on the precommitment bounds of constitutional law. But that is as strong a claim as can be made. For certainly the evidence adduced from selected views of a handful of the Framers, albeit eminent

¹⁵⁴ Michael J. Klarman, *supra* ft.nt. 2, at Pg. 155.
ones, cannot establish the proposition that this was the decisive intent of the founding generation to any degree of acceptable historical certitude.  

In spite of all the arguments suggested above, being able to determine that there was for sure an intention to bind future generations is key to the interpretative approach of constitutions as precommitment strategies. Not only because without such intent this approach will fall into the functionalist fallacy, but also because determining what kind of intent was behind the Constitution should make a difference.  

From the perspective of interpreters who are trying to make sense of the constitutional text, it matters whether the intent of the Framers was based on rationality, passions or interests. A constitution that was drafted in times of interests or passion, for example, should not be interpreted in the same was a one that was drafted in times of cool rationality. By not being able to discern if the intention of the Framers had anything to do with this states of mind, this interpretivist approach becomes even more difficult to work with.

Just as well, it is important to remark the fact that in the case of the American Constitution it has always been assumed that the intention of the Framers was to avoid the negative consequences of behaviors that were inspired in a setting of passions. This was Madison’s perspective, but it is not clear that other drafters saw it in those terms. In other words, it has always been assumed that the American Constitution represents a conservative precommitment strategy. But due to the fact that historical material seems to be unreliable to a certain extent, it might be the case that it represents an interest-based precommitment strategy,

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156 It is important to note that Elster points that to find an intention in the constitutional set-up is key to this project. However, he also points out that such intention, or set of intentions, can be mediated by rationality, interests or passions, and that each of this states of mind will produce different precommitment. See Elster, Ambiguities.

157 See Sunstein, Constitutionalism Pgs. 37, 39. (References to The Federalist No. 51, by James Madison.)
and several generations have followed it because they prefer to have some things settled, even if it is not settled correctly, than to incur in the costs, and risks, of settling highly divisive constitutional issues precisely. In any case, to argue that since the American Constitution represents a precommitment strategy it has to be interpreted as a conservative one seems to me a deduction that goes astray.

C. Indeterminacy in the Flexibility required by Federalism.

I will now continue my analysis of the indeterminacy present in interpreting the American Constitution as a precommitment strategy. My focus will now shift from a primary level of indeterminacy in the Framers intentions, to a second and more complex level that involves the premises that compose this approach. More specifically, my claim is that the content of the precommitment strategy is indeterminate in the sense that the arguments that it proposes are, by themselves, impossible to implement without a healthy dosage of interstitial constitutionalism in the name of flexibility. Hence, any of the first three premises that compose the precommitment approach (intention to limit majoritarian decision-making, institutional arrangements, and entrenchments and use of gag rules) are inadequate to ensure a foundational account of a constitution unless they are restrained to some extent (the fourth premise – flexibility) because of the negative consequences they may produce if they were carried to their full extent. Hence, we can see here a “thrust but parry” argumentation, like the

158 Elster, Ambiguities, Pg. 1776. It is important to note that Elster acknowledges the need to have restraints when developing constitutional institutions. However, he also acknowledges that judges should have a limited amount of discretion. (Elster, Ambiguities, Pg. 1779.) By presenting his views as an interpretative approach to constitutional law, however, the theory becomes a set of purposes that argue in favor of judicial restrain. Thus, the claim presented here implies that ideology is inescapable.
one observed by Karl Llewellyn sixty years ago. The need for flexibility is indeterminate by itself, because there is no legal recipe on how to exercise flexibility. Even more, flexibility invites considerations of different sorts when interpreting constitutional provisions, and such considerations are not constrained by the constitutional rules or the strategy embedded in them.

In order to develop this point, I will again use the American constitutional experience as an example, and will center my analysis on the institution of federalism as a central element in the Framer’s precommitment strategy. More precisely, I argue that federalism, understood here as the relationship between the state governments and the federal government of the United States, represents an institutional arrangement that aims to allocate political decision-making power among the two different levels of government mentioned above. I base my arguments on premises 1 (Intention to limit majoritarian decision-making) and 2 (institutional arrangements), which together suggest that the view of constitutions as precommitment strategies requires adequate government bodies that nonetheless have to be limited in order to avoid, for example, the violation of individual rights. Federalism, As Cass R. Sunstein points out, aims to do precisely that:

In the American experience, federalism was designed to ensure local self-determination while at the same time providing and thus benefiting from governance at the national level. Federal systems can allow a large degree of governance by

160 The constitutional provisions that deal with federalism, for the purpose of this paper, are confined in Article 1, sections 8, 9 and 10, and the Tenth Amendment, since these are the articles that allocate the decision-making power between Congress and each of the states. Special attention should be given to Art. 1, section 8, Par. 3, which defines the scope of commerce regulation by Congress. The Tenth Amendment states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The general rule is that Congress can act only in pursuance of the powers established by the Constitution, while the states can exercise their police power as long as they do not incur in the conducts stated in it. But see Erwin Chemerinsky, Constitutional Law Principles and Policies Aspen Publishers (2006) at Pg. 234 “Yet, this classic formulation of governmental powers does not fully reflect the reality of the federal government’s authority.”
subunits claiming cultural and territorial integrity. Indeed, the national constitution may restrict the central government to certain enumerated powers, including provision of national defense or regulation of interstate commerce, or it may expressly reserve certain powers of internal self-governance to the subunits.\footnote{Sunstein, \textit{Supra}, \textit{Constitutionalism}, Pgs. 664-665. Sunstein also argues that “[i]nstitutional arrangements can also be understood as an effort to protect a private sphere from majoritarianism. (…) Private liberty flourishes because government is partially disabled. So too, a federal system might ensure that the nation and its subunits will check each other, generating a friction that enables private liberty to flourish.” See \textit{Supra} Sunstein, \textit{Constitutionalism}, Pg. 638.}{161}

Following Michael McConnell’s analysis of this institution,\footnote{Michael McConnell, \textit{Federalism: Evaluating the Founders’ Design}. 54 U. Chi. L. Rev. 1484 (1987) (From now on, McConnell, \textit{Federalism}.)} I will present two argument for federalism related with the premises that compose the precommitment strategy, and then suggest two counterarguments for each, suggesting that if federalism was left untrammeled – two much state power or two much federal power – it would produce negative consequences that would undermine the purposes of having the Constitution in the first place.

1. Federalism as an Institutional Arrangement that secures “the Public Good”

The first argument for federalism, as an institutional arrangement entrenched in the Constitution, is that federalism represents a better allocation of political power than a unitary national government. Federalism preserves decentralized political decision-making, and is therefore more representative of the people’s determinations. Local decision-making implies a higher responsiveness to diverse interests and preferences than having a unique, centralized, decision-making center for political power. By preserving local decision-making, the argument goes, the people’s determinations will be better represented in the legal rules, and thus would be

\footnote{Sunstein, \textit{Supra}, \textit{Constitutionalism}, Pgs. 664-665. Sunstein also argues that “[i]nstitutional arrangements can also be understood as an effort to protect a private sphere from majoritarianism. (…) Private liberty flourishes because government is partially disabled. So too, a federal system might ensure that the nation and its subunits will check each other, generating a friction that enables private liberty to flourish.” See \textit{Supra} Sunstein, \textit{Constitutionalism}, Pg. 638.\footnote{Michael McConnell, \textit{Federalism: Evaluating the Founders’ Design}. 54 U. Chi. L. Rev. 1484 (1987) (From now on, McConnell, \textit{Federalism}.)
better satisfied. Because states’ governments are supposed to represent better the population that lives within them, they are preferable to a national government that has to take into account diverse interests.\textsuperscript{163} According to this logic, the more decentralized the political decision-making process is, the more representative it will be.

A similar argument is that local decision-making units have incentives to adopt popular policies beyond the political process. This is so because local decision-making, when mobility is possible, may attract the attention of people that identify themselves with the politics of a particular unit. This implies that states compete among themselves in order to attract the biggest number of taxpayers. By having additional taxpayers the overall costs of government are proportionally reduced. Attracting foreign individuals and pleasing all ready established ones suggests that local decision-making units can, as a whole, make things better for everybody.\textsuperscript{164} National governments, on the other hand, tend to stifle and, like a monopoly, have no incentive to behave in a competitive way and provide the demanded goods and services.\textsuperscript{165}

However, these arguments in favor of federalism can be answered back by pointing out that the interaction between local decision-making units (like states) may produce negative consequences (externalities) that have to be mediated in one way or another. For example, a decision to reduce or increase water pollution in the state of Kentucky can produce positive or negative consequences in other decision-making units, like the state of Louisiana. Just as well, competition among the states does not always produce positive consequences; regarding welfare policies, where the negative effects of this phenomenon are more acutely felt, competition among states may creates a “race to the bottom” phenomenon. Since immigration of wealthy people and investments are considered desirable, but immigration of welfare recipients is

\textsuperscript{163} McConnell, Federalism, Pgs. 1493-1494.  
\textsuperscript{164} McConnell, Federalism, Pgs. 1498-1499.  
\textsuperscript{165} McConnell, Federalism, Pg. 1498.
considered a drain on the community’s resources, generous welfare benefits that come from high taxes will create incentives for the wealthy to leave and for the poor to come.\textsuperscript{166}

The counterarguments suggested above point to the need of introducing flexibility in the allocation of political decision-making instances between local and national units. Thus, flexibility is required for achieving the desired results of federalism. In terms of interpreting the Constitution as a precommitment strategy, the enforcement of federalism represents the enforcement of premises 1 (\textit{Intention to limit majoritarian decision-making}) and 2 (\textit{Institutional arrangements}), which is mediated by premise 4 (\textit{Flexibility}). Because of the consequences of allocating too much power in local-decision making units, it makes sense to transfer some of it to national decision-making units. There, the argument suggests, we can expect a wider view of the issues that can be expected at a local level.\textsuperscript{167} As McConnell suggests, “The framer’s awareness that ill consequences flow as much from excessive as from insufficient centralization is fundamental to their insistence on enumerating and thus limiting the power of the federal argument.”\textsuperscript{168} However, no guide about how to strike the right balance is suggested (beyond a case to case basis),\textsuperscript{169} and the requirement of flexibility is so indeterminate that several solutions are possible.

2. Federalism as an Institutional Arrangement that Protects Individual Rights

\textsuperscript{166} McConnell, \textit{Federalism}. Pgs. 1499-1500. The author considers that this effect is reduced because he claims that to some extent poor people migrate more due to job opportunities rather than to welfare benefits. See McConnell, \textit{Federalism}, Pg. 1500, ft.nt. 64.
\textsuperscript{167} McConnell, \textit{Federalism}, Pgs. 1493-1495.
\textsuperscript{168} McConnell, \textit{Federalism}, Pg. 1495.
\textsuperscript{169} “Often one’s view of the allocation of authority for specific issues will depend on a prediction as to substantive outcomes rather than a general theory of federalism” McConnell, \textit{Federalism}. Pg. 1500.
James Madison, in the *Federalist 10*, asserts that the biggest threat to individual liberty comes from the tyranny of a majoritarian faction. Since such a faction can appear easily in any given locality, it is much more possible that such locality can become repressive of individual liberty – even though such majority tends to be a minority at national level. Although a tyranny of a minority can be neutralized by majority vote, minorities are rendered useless when confronting a majority. Because of this, Madison asserted, the factional majorities could sprang up more easily in local decision-making units than in national ones.\(^{170}\) Individual liberty is better protected by a centralized government than by local decision-making units.

Although contemporary analysis suggests otherwise – that well organized minorities can disproportionate affect national political outcomes\(^{171}\) – Madison’s arguments suggest that it is not adequate to transfer too much political power to a centralized government.\(^{172}\) As McConnell argues, Madison’s arguments are “intermediate” between local and national government.\(^{173}\) A balanced position seems desirable for several reasons: first, the fact that factional oppression is more likely to take place in local decision-making units does not deny that when it occurs at a national level it can increment the scope of the negative consequences produced, because it becomes unavoidable. Madison was assuming that people could move freely from state to state, which supposes that an oppressed minority could escape to another place in order to end its condition.\(^{174}\) By limiting the power that is transferred to the national government, this danger is averted. Second, the abuse of power by factions has to be considered in the light of a closely related problem: that of self-serving politicians.\(^{175}\) Although Madison considered that the issue of


\(^{171}\) The classical argument is found in: Mancur Olson Jr., *The Logic of Collective Action* (1965)


\(^{173}\) McConnell, *Federalism*. Pg. 1504.

\(^{174}\) McConnell, *Federalism*. Pg. 1503

\(^{175}\) McConnell, *Federalism*. Pg. 1504.
factionalism was better addressed by national than by local politics, the latter seems more prone or amiable to self-serving politics, because the bond created by direct representation is much stronger than the bond of the indirect representation. In other words, since direct popular control is stronger on a local level, it should retain those political powers that could repel political self-serving. And third, federalism represents a way of diffusing political power, in the sense that a divided, but not impaired, form of government protects liberty. As McConnell argues, “[i]n Federalist 51, [Madison] underscored that ‘the rights of the people’ are best understood in a system in which ‘two distinct governments,’ federal and state, ‘will control each other.’”

As a passing remark, it is important to note that the contemporary understanding of the protection of individual rights differs widely from the Madisonian perspective. Regarding issues like religion and equal protection, the constitutional experience of the United States suggests that the federal government has assumed the burden of protecting individual rights in the face of oppressing states. This is perhaps too broad a generalization; however, it should not surprise us that some scholars like Raoul Berger have associated, perhaps unconsciously, “States’ Rights” with “Southern condonation of lynchings, with official oppression of blacks, and with demagogues who duped their constituents.”

Again, this view of federalism as a way of protecting individual rights invites consideration regarding how to adequately allocate power between the two levels of government. This position is to some extent different from the one presented before. The first position - federalism as a way to solve the problems that arise from a government that tries to protect the “public good” – is different, and perhaps at odds, with that of federalism as a mechanism to limit

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176 McConnell, Federalism, Pg. 1504
177 McConnell, Federalism, Pg. 1504. (Citation omitted)
a government that is controlled by dangerous factions. However, both positions invoke balancing arguments, and thus are alike. Local decision-making units can threaten the rights of individuals by, for example, curtailing their religious freedom; however, if this happened at a national scale, the consequences would be far worse. The tyranny of a majority is indeed likely to happen at a local level; however, the bond of direct democracy can deal better with self-serving politics. Too much power at any level is thus considered as an invitation for disaster, and the best that can be hoped is for a constrained government, one that was born to be limited by limiting itself – which falls squarely within premise 1 (Intention to limit majoritarian decision-making). Both positions stem from premises 1 and 2 (Institutional arrangements), but the second position, which is concerned directly with rights, incorporates premise 3 (Entrenchment of rights and use of gag rules) as well. Again, both positions invite a flexible approach, in terms of premise 4 (flexibility), without having clear guidelines of how to achieve it. Both views of federalism, as part of a constitutional precommitment strategy, are alike; the flexibility required to make the precommitment strategy work implies a level of indeterminacy that neither provides clear solutions nor constraints judicial interpretation.

D. A Structural Critique: How the Foreclosure of Partisan Politics may have compromised the Precommitment Strategy

Until now, the arguments that I have presented suggest that interpreting the American Constitution as a precommitment strategy is inadequate because such approach is indeterminate. I will now attempt a different approach. I will now argue that being faithful to the Constitution as a precommitment strategy may well be a bad strategy to follow. My argument is that fidelity to
the precommitment strategy can defeat its purpose, if the political conditions that emerge from
the constitutional foundation are different from the political conditions that the precommitment
strategy supposes.\textsuperscript{179} In other words, if the precommitment strategy supposes the absence or
limited existence of certain political factors, it may be simply wrong to accept this strategy if
those factors exist and are predominant. And the reason for arguing that it may be wrong is
because the strategy fails to relate with the reality of politics under the actual constitutional
order. That is, the strategy fails to regulate a vital feature of government because it didn’t take
into account some of the vital elements that happen to compose it in the present as well as in the
future.

The case in point for the American Constitution as a precommitment strategy is the
predominant role that political parties have played through history, in spite of the fact that the
Framers viewed these negatively and the constitutional blueprint had little, if anything, to do
with them.\textsuperscript{180} For the Framers the parties represented dangerous factions and therefore intended
to create a “‘Constitution against parties’”.\textsuperscript{181} The Framers, and specially James Madison,
attempted to design a government that, by avoiding an excessive concentration of political power
in a few hands, would provide the citizens with the security needed to live freely.\textsuperscript{182} Since
political ambition was so potentially dangerous, Madison himself considered that to demarcate
the limits of the different agencies and branches of power was not enough to avoid a high
concentration of political powers. “[A] mere demarcation on parchment of the constitutional
limits of the several departments is not a sufficient guard against those encroachments which

(From now on, Levison & Pildes.) I actually rely here of Professors’ Levinson and Pildes arguments, only to point
out that a precommitment strategy that misses common and important referents with the practice it tries to regulate
cannot be very successful because it can’t constrain any activity that is beyond its content.
\textsuperscript{181} Levinson & Pildes, Pg. 2320.
\textsuperscript{182} Levinson & Pildes, Pg. 2316. Referring to The Federalist No. 48 (James Madison) Clinton Rossiter Ed., 1961.
Pg. 308.
lead to a tyrannical concentration of all the powers of government in the same hands”.  

The solution to this dilemma was to tie the motives of the members of government to the interests of the branches they belonged to, so that each branch of government competed against the others. (Here, again, we find the American Constitution characterized in terms of premises 1 - *Intention to limit majoritarian decision-making* – and 2 – *Institutional arrangements.*) If each member of the different agencies has the adequate means and personal views to resist intrusion of other agencies, then, Madison argued, each branch of power would constrain the others within certain bounds and government would not become a visible threat to individuals.  

“Ambition would counteract ambition”.  

Madison’s perspective, as briefly depicted above, supposes that each branch of power will be motivated enough to keep the others in place. This personification of competing branches of power, working under a kind of invisible-hand dynamics, is a common place in American constitutional law and doctrine. However, it is rather unclear how each branch of power could actually have a “will of its own”, that is, a will or volition that is politically distinctive from the will of the individuals that compose it, as well as distinctive from the will of the individuals that compose the other different branches. As Levinson and Pildes suggest, government institutions do not have wills of their own that are different from the will of the people that compose them. Even if we assume that office-holders are driven by their own interests and ambitions, these are not necessarily channeled in order to increase the influence of their agencies or defending them from the ambitions of other office-holders. Although we expect from

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ambitious individuals to acquire and exercise their influence by winning elections, and by achieving their personal or political goals, this does not necessarily traduce (in a straight-forward way) into the interests that each branch of government may have according to the Madisonian personification. Rather, this personification requires individual office-holders to care more for the interests of the branch they belong to than to care for their own personal interests or those of the people they represent.\(^{187}\)

Perhaps three considerations regarding why this institutional design made sense to the Framers are in order to understand to what extent it is not closely related with the dynamics of contemporary government. First, Madison’s view regarding elections was different from what they turned out to be. Elections were conceived back then as a matter of popular praise, in which the important considerations were the personal qualities of the candidates that were running for office.\(^{188}\) Just as well, political issues were discussed from a civic republican perspective, which disdained direct appeals to factional, particular interests. Even more, some institutions were designed to block or minimize the influence of factional or particular interests; the Presidency and the Senate, for example, were chosen by indirect elections, and the House of Representatives was composed with members who were voted in nation-wide elections. Due to these in-built barriers, Framers like Madison actually expected that the members of government would be distant from constituent pressures and competing policy goals that might produce a conflict of interests with their constitutional duties.\(^{189}\) Thus, elected officials were supposed to be wise enough to “(…) best discern the true interest of their country.”\(^{190}\) Finally, Alexander Hamilton, another prominent Framer, also relied on “the people” as failsafe for abusive government, in the

\(^{187}\) Levinson & Pildes, Pg. 2318.
\(^{188}\) Levinson & Pildes, Pg. 2318.
\(^{189}\) Levinson & Pildes, Pg. 2318.
\(^{190}\) The Federalist No. 10 (James Madison) Clinton Rossiter Ed.,1961. Pg. 82. In: Levinson & Pildes, Pg. 2318.
sense that regular elections push towards an alignment of the interests of the people with the interests of the elected officials. Since the fates of these officials depended on the interests of the voters, this forces those officials who want to be or remain in office to provide their constituencies with measures that fall squarely within their interests.\textsuperscript{191}

In spite of these considerations, and of the institutional blueprint laid down in the Constitution,\textsuperscript{192} elected officials responded to material incentives and began forming political organizations – proto-parties – that took sides on contested issues and competed among themselves for support by the other branches of power. As this political competition emerged and eventually settled, these proto-parties became well established, and alliances among like-minded officials and organizations following party lines were common, until they became prominent, as it is today.\textsuperscript{193} This political competition, and not the one among branches personified as if each had a will of its own, obscured the Madisonian design from the beginning of the Republic.\textsuperscript{194} As Levinson and Pildes argue,

Nevertheless, the bottom line remains that in the broad run of cases – which, is, after all, the relevant perspective for constitutional law – party is likely to be the single best predictor of political agreement and disagreement. It is impossible to grasp how the American system of government works in practice without taking account of how partisan political competition has reshaped the constitutional structure of government in ways the Framers would find unrecognizable.\textsuperscript{195}

\textsuperscript{192} Which amounts to premises 1 (\textit{Intention to limit majoritarian decision-making}) and 2 (\textit{Institutional arrangements}).
\textsuperscript{193} Levinson & Pildes, Pgs. 2319-2320.
\textsuperscript{194} Levinson & Pildes, Pg. 2319.
\textsuperscript{195} Levinson & Pildes, Pgs. 2324-2325.
From the perspective of constitutions as precommitment strategies, this analysis is particularly useful when considering the usefulness of interpreting the Constitution as a precommitment strategy. If courts take the constitutional design at its face value in order to solve legal issues that arise from partisan politics, they could hardly arrive at a meaningful answer, since the strategy imbedded in the Constitution (composed of premises 1, 2 and 3) hardly implies anything about political parties. If, on the other hand, they departed from the precommitment strategy and incorporated analyses regarding political dynamics that resemble reality much more, they would be working outside the framework established in the constitutional strategy. Doing so implies overriding the strategy itself – by stepping outside the strategy, the judges are avoiding the restrain that the Constitution imposes on them (and thus violating premise 1, which is about the importance of limiting government in the first place).

The dilemma suggested by this situation is due to the fact that the precommitment strategy imbedded in the Constitution is unable to relate in a straight-forward manner to contemporary partisan politics. This lack of touch is due, as suggested above, to the Madisonian assumption that political branches have wills of their own, which are independent and more far-reaching than the wills of the individuals that compose them. More important, though, are the consequences this analysis implies. If the American Constitution is interpreted as if it was a precommitment strategy, and the strategy is flawed, than the interpretations that are produced have to be flawed as well. They become interpretations that are out of touch with important aspects of the politics that take stem from the Constitution, which will celebrate or condemn situations that are not fully captured by the approach. As Levinson and Pildes suggest,

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196 *Intention to limit majoritarian decision-making* is premise No. 1, *Institutional arrangements* is No. 2, and *Entrenchment of rights and use of gag rules* is No. 3.
(...) the invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features of the American political system. It has also generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separations of powers.\textsuperscript{197}

A second and more pervasive consequence of this ignorance is that constitutional law is (partially) blind to whatever happens regarding party conformation and dynamics.\textsuperscript{198} If parties, and not branches, are the \textit{dues ex machina} of the system, then such ignorance implies that constitutional law is oblivious to the mechanics that animate the political system. Because it cannot, by itself, articulate partisan politics in the constitutional scheme, the constitution as a precommitment strategy has no standard or perspective from which it can criticize how parties work. It cannot determine if, for example, parties represent all the voting population or only a minority. Perhaps it can determine whether the attempt of a majority to thwart the rights of a minority is unconstitutional, but it cannot criticize or accept how such a majority arrived to power. Because of this flaw, the interpretative approached discussed throughout this paper acquiesces to partisan politics that may be socially inclusive, although I take this not be likely. By not focusing on these issues, and thus leaving them unregulated, this theory – and those who stick to it – tacitly accept the outcome of partisan politics, independently of how fair or unfair they happen to be. The “structuring ideal” of this interpretative approach – the Constitution as a

\textsuperscript{197} Levinson & Pildes, Pg. 2314.
\textsuperscript{198} This critique is inspired by the critiques presented by Richard Parker regarding John Ely’s and Jesse Choper’s representation-reinforcement perspectives of judicial review. See Richard D. Parker. \textit{The Past of Constitutional Theory – And It's Future}. 42 Ohio St. L. J. 223 (1981).
precommitment strategy – may well be legitimizing the unfair political processes that take place, and present them as the natural consequence of following a plan that has been laid down during the foundation of the nation. Practical aspects that are left outside the analysis include, for example, the lack of participation of many citizens, the distributional outcomes of the political process and the disparities of power that take place within the different branches of power, and that produce particular outcomes in determinate directions. All of these problems are related to intra-party politics, and more specifically, with issues regarding inequalities of power, wealth, status and education throughout society. To the extent that how the political balance is achieved in each branch of power depends on the prominent role that parties play, this particular interpretative approach cannot say much of the rights that may be violated in how the dynamics of representation take place.\footnote{See Parker, \textit{supra}, at Pgs. 233 and following.}

So far, this part of this paper has focused on criticizing an interpretative approach based on viewing constitutions as precommitment strategies, based on the American constitutional experience. I have suggested that by itself it does not provide more answers or constraints judicial interpretation much more than what other theories have suggested or accomplished. But just like other theories of constitutionalism, this particular approach is indeterminate in terms of both finding a distinctive, binding intention in the past, as well as to how to apply the constitutional scheme in present day situations. Furthermore, I have argued that such an approach is flawed in the sense that it is out of touch with a political feature that animates the political scheme embedded in the Constitution – the absence of considerations regarding the emergence of political parties as we see them today. The arguments presented are not new and most of them, if not all, were well known when this approach was crafted and subsequently applied. And yet, the approach is gaining momentum, if not in constitutional law, at least in
public law issues that require interpretation and that are based on background considerations embedded in the Constitution. In the next and final part of this paper, I will suggest why such an approach is tempting and has received attention in contemporary scholarship.

Part V. Rescuing the idea of Constitutions as Precommitment Strategies from Itself

The purpose of this fourth part of the present paper is to advance some conclusions and suggestions regarding the critiques of interpreting the American Constitution as a precommitment strategy. I explore here the possibility that interpreting the American Constitution in such a way can be rescued from the flaws mentioned earlier by adopting a less demanding view of the interpretative approach; a view that does not require identifying a clear intent and that can be complemented rather than displaced by other approaches.

A. Tinkering with the Model: Indeterminacy as Constitutional Minimalism

An obvious response that can be presented to the criticisms suggested in the previous part is that they are too demanding. It supposes that any interpretative approach of the American Constitution has to provide definite answers that are the result of a coherent view of the rules laid down. By suggesting that the framework of federalism, for example, requires a constant balancing approach because it is indeterminate, the critiques presented here imply that the Framers had certain knowledge about the future that they obviously did not. Just as well, that they did not consider seriously the role that political parties were going to have in the future does not mean that the model by itself is flawed, but rather, that the perspective from which the
criticisms come from is just too stringent. In general terms, any political set-up has to be general, and can only be designed with a limited knowledge of what the future will be. To criticize this approach to the Constitution by arguing that it does not give an account of the last detail is simply naïve.

However, a stronger reply can be attempted. To interpret any constitution as a detailed blueprint that provides detailed answers ignores a key element of what constitutions try to achieve. Constitutions like the American are, first and foremost, a blueprint of institutional design, in which some topics are completely decided – the President should not be less than thirty-five years old\textsuperscript{200} –, others are left partially undecided – the scope of presidential powers during wartime\textsuperscript{201} –, or even completely undecided – the right to secession of territories like Puerto Rico. Many of the purposes of having a constitution in the first place, like political self determination, are only possible by leaving certain topics indeterminate. This is consistent with the idea that the benefits of accepting the “dead hand” of the past should not outweigh the costs. I will now mention briefly the general advantages of what can be obtained from a distinctively minimalist perspective of the American Constitution, and suggest how this perspective is coherent with the idea of interpreting the Constitutions as a precommitment strategy.\textsuperscript{202}

A minimalist precommitment strategy seems much preferable than a completely determined one for reasons regarding (i) decision costs of narrowing down the contours of

\begin{itemize}
\item Art. 2, Section 1, Num. 4, of the American Constitution.
\item The discussion of the extent of the President’s powers is based on the frame created by the Youngstown decision (\textit{Youngstown Sheet and Tube Co. et.al} v. Sawyer 343 U.S. 579 (1952)) For a discussion of the categories suggested in this decision, see Samuel Issacharoff, and Richard H Pildes, \textit{Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime} Theoretical Inquiries in Law: Vol. 5 : No. 1, Article 1. (2004) Available at: \texttt{http://www.bepress.com/til/default/vol5/iss1/art1} (Visited on March 12, 2008)
\item On this discussion, I am grounding my arguments on the supposition that constitutional assemblies have similar problems like the ones that courts face when determining the scope and breadth of their decisions. Because of this, I suggest that the advantages for courts of leaving things undecided are also available to constitutional assemblies. The arguments for allowing courts to leave things undecided are taken from: Cass R Sunstein. \textit{Foreword: Leaving Things Undecided}, 110 Harv. L. Rev. 5 (1996-1997). (From now on, Sunstein, \textit{Leaving Things Undecided}). See also Cass R. Sunstein, \textit{Incompletely Theorized Agreements}, 108 Harv. L. Rev. 1733 (1995)
\end{itemize}
institutional arrangements, (ii) the costs of errors of malfunctioning of these arrangements, and (iii) democratic self-rule.

(i) Taking decisions is, by itself, an activity that implies assuming certain costs. Some decisions imply fewer costs than others; in the domain of constitutional-making, it is pretty sure that the costs can be pretty high given two factors. The first one is the lack of information of what the future may bring, and how to respond to it. A present majority that wants to bind itself as well as future majorities may know the kind of situations it faces now, but can hardly know how those situations will evolve in the future, or ignore new situations that can arise in the future. Because the costs of what the future will bring are, literally, infinite, it makes sense for the present majority to leave certain topics indeterminate.203 The second source of decision costs is the disagreement present when discussing what sort of decision to take. Since reaching an agreement regarding highly abstract ideals – like, for example, the true source of human rights and the reasons for protecting them – can be very difficult, it makes sense to avoid those costs by not grounding such outcomes on a deep theoretical account. Because reaching agreements in these topics can be quite difficult, it makes much more sense to agree on the outcome without discussing the reasons for supporting it. In this sense, Constitutions like the American may very well represent “incompletely theorized agreements”, which have been characterized like this:

[Incompletely theorized agreements] may involve either particulars or abstractions. Participants in public life may thus unite behind a particular outcome when they disagree on abstractions, or they may accept an abstraction when they disagree on particular outcomes. The latter strategy is dominant in constitution-making, as

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203 Sunstein, Leaving Things Undecided. Pgs 16-17. (Discussing costs for courts that stem from lack of information, changing circumstances and future developments.) This is an argument in favor of premises 1, 2 and 3. (Intention to limit majoritarian decision-making, Institutional arrangements and entrenchment of rights and use of gag rules).
people accept the principles of “freedom of speech” or “equality” despite their uncertainty or disagreements about what these principles specifically entail.²⁰⁴

ii. Just as a constitutional assembly faces costs regarding the decisions it makes, it may also acknowledge that its decisions can produce error costs. These are the consequence of errors that result from mistaken arrangements that affect the entire legal system.²⁰⁵ This argument stems from two considerations. First, since a proper evaluation of institutional design is, to a large extent content-dependent, it makes sense to define institutional arrangements in a case-by-case basis. Second, the source of error costs can derive from a lack of knowledge of future conditions and lack of relevant information regarding a particular context. If a detailed institutional arrangement may produce consequences so negative that it may thwart the entire scheme, it makes more sense to present some broad institutional arrangements that can be complemented by future developments than to implement a detailed, and mistaken, arrangement. In other words, by making institutional arrangements broad rather than narrow, a constitutional assembly is (arguably) dodging to some extent the costs that derive from a faulty design.²⁰⁶

iii. Democratic self-rule is one of the major topics that inspire the American Constitution. Leaving things undecided in the present allows future generations to exercise their choice and take their self-rule themselves within certain boundaries. The indeterminacy criticized can actually be seen as an opportunity for present and future developments which allow majorities to establish rules that are more in touch with their social and political context. This invites

²⁰⁴ Sunstein, Leaving Things Undecided. Pg. 20.
²⁰⁵ Sunstein, Leaving Things Undecided. Pgs 17-18. (Discussing error costs for courts.)
²⁰⁶ This is an argument for premise 4 (flexibility).
developments that are consistent with the common law approach. Therefore, by leaving certain issues indeterminate, further precision and legitimacy can be achieved, and the precommitment strategy is maximized. An example of this line of reasoning is the ample powers granted to Congress. From the perspective of the Framers, this political institution was designed to isolate representatives from factionist pressures in order to allow them a space for public-oriented deliberation. Having such intent in the background, it is consistent with the ideas discussed so far to hone Congress with wide regulatory powers on Federal matters, and thus to make it the most prominent branch of Government. If all the other branches of power have a limited scope of action, this enables the Congress to assume a central role in national politics, because by doing so it is expected that the resulting laws are really in the interest of all citizens. Broad limits for Congress and much narrower limits for the other branches of power can be a democratic-reinforcing arrangement consistent with a precommitment strategy that values democratic rule.

A particular development of this line of thought is the following: by creating institutional arrangements rather than determining how those institutions should solve particular legal disputes, it is implied that legal indeterminacy can be cabined institutionally, not theoretically. This is a mayor topic in contemporary American jurisprudence. The arguments related with costs and democratic decision-making suggest that particular legal issues should be decided from the vantage perspective of determined institutions according to the costs and knowledge

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207 See David A Strauss. Common Law Constitutional Interpretation 63 U. Chi. L. Rev. 877 (1996). Of course, one of the arguments in favor of a common law approach is its flexibility (premise 4).


209 Sunstein, Leaving Things Undecided. Pgs 19-20. (Discussing minimalism as a democratic reinforcing approach for courts.) Overall, this argument supports, in general terms, all the 4 premises advances so far: Intention to limit majoritarian decision-making, institutional arrangements, entrenchment of rights and use of gag rules, and finally, flexibility.

they have in particular situations. By suggesting that interpretation depends on institutional arrangements, this minimalist precommitment strategy argues in favor of decision-making to particular institutions that are, in paper, well suited to solve those issues.\textsuperscript{211}

So far, the perspective of having a minimalist precommitment strategy seems a plausible one, under which one may rescue the American Constitutional practice. From this perspective, the precommitment strategy embedded in the American Constitution is a minimalist one. In it the Framers determined a broad set of institutional arrangement and determined only those which they could do so without incurring into mayor costs. Particular institutional arrangements, like federalism, were left indeterminate on purpose, in order to avoid mayor costs and to allow future generations to reach their own summary judgments on how to determine how those arrangements should work. Indeterminacy is therefore not a problem, but rather an opportunity for future generations (from the perspective of the Framers) to decide for themselves issues that are not clearly determinable now. As Richard H. Fallon Jr. suggests, “it is possible that the Framers and ratifiers shared substantive understandings of the Constitutions meanings, but did not contemplate that subsequent interpreters would be bound by their substantive understandings”.\textsuperscript{212}

I believe this defense is flawed as well, and for several reasons which I will mention briefly. First, the embracement of “minimalism” seems like a rationalization, with a positive spin, of the indeterminacy of legal rules. It appears to make something positive of a series of circumstances that are not, because they fail to meet a standard determined by the Rule of Law. Second, although it is true that a legal system can not be as determinate as to provide particular

\textsuperscript{211} Consider, for example, this quote: “As we shall urge, debates over legal interpretation cannot be sensibly resolved without attention to those [institutional] capacities. The central question is not ‘how, in principle, should a text be interpreted?’ The question instead is ‘how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?’” In: Adrian Vermeule and Cass R. Sunstein, \textit{Interpretation and Institutions}. 101 Mich. L Rev. 885 (2002-2003). Pg. 886.

\textsuperscript{212} Richard H. Fallon Jr. “\textit{The Rule of Law” as a Concept in Constitutional Discourse}. 97 Col. L. Rev. 1 (1997) Pg. 26. (Citation omitted).
answers on every legal issue, big or small, the approach presented here does not provide any answers beyond a general level that suggests deference to institutional arrangements. That is, the strategy behind federalism can be to promote the general welfare or protect individual rights, but does not suggest a strategy on how to do so and reach a middle ground between a “race to the bottom” and a nominal decentralization. Arguing that the costs related with making such a judgment in the present regarding the future are too high, or that to do so would be undemocratic, and then deferring to how particular institutions have decided the issue is not very comforting; the reason why this is so is because even the most able and best informed institution can commit mistakes, or can change its views. It allows inconsistency and arbitrariness, which in turn violates the ideals comprehended under the Rule of Law. The result well be, looking from the present to the past, a line of decisions that are incoherent. Even more, minimalist arrangements can also imply a transfer of decision costs from the present to the future, because a minimum arrangement may well imply that future actors will invest considerable resources elucidating and expanding a particular possibility contained in a minimalist arrangement. Just as well, a minimalist arrangement does not limit the chance of error in the future, because it does not insure that future actors will arrive to a “right” solution given the little information laid down for them by the minimal arrangement. Under a minimalist arrangement, future actors can produce as much wrong arrangements as the original minimalist one. Thus, minimalist arrangements may reduce both sorts of costs, but, from an abstract perspective, it is not fail-proof.

213 Richard Fallon, in the article cited above, suggests that there are at least four different concepts or ideals of the “Rule of Law”.
214 Sunstein, Leaving Things Undecided. Pg. 17 (Discussing how a minimalist decision may imply an “export” of costs into future courts and actors.)
215 Sunstein, Leaving Things Undecided. Pg.18 (Discussing how a minimalist decision can increment future error costs and highlighting the relevance of contextual considerations.)
Even more problematic is the artificial division between interpreting institutions and legal rules. After all, the institutional arrangements created by the Constitution are, as the expression goes in private law, a “bundle of sticks”, rather solid and robust edifices.216 Because of this, the idea that institutional arrangements precede interpretation supposes that the interpreting agent is static, when a large piece of cases in constitutional law is, on the contrary, about institutions that change through time. The present day Supreme Court is quite different today than in the days of the Warren era; not to acknowledge the changes of the institutional arrangements of the interpreter is a mistake. The process of interpretation requires not only acknowledging institutional capacities, but also a heightened awareness of the changes produced by time. Institutional arrangements and the interpretations they produce are part of a single continuum rather than separate activities.217

What the criticisms do not refute, are the premises that the American Constitution represents a strategy to limit abusive exercises of power by state agencies and majorities while at the same time enjoying the benefits of democratic government – premises 1 (Intention to limit majoritarian decision-making) and 2 (Institutional arrangements). This implies that this perspective may well remain among the leading accounts of constitutionalism, in spite of its flaws. And although the contours of the limits are fuzzy, the Constitution gives ample ground for different interpretations intended to enable democratic rule within certain boundaries. Even more, the Constitution has been used in that sense by different and rivaling postures through time; the *Lochner*218 era and the democratic-reinforcement decisions, like the famous *Carolene*

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216 The discussion surrounding the powers of the President during war reveal how instable the institutional arrangements established in the Constitution can be. For an interesting discussion, see Isacharoff & Pildes, *supra*, ftnt. 201.
217 See also H.L.A Hart, *supra*, ftnt. 26, at Pg. 214 and following.
218 *Lochner v. New York*, 198 U.S. 45 (1908)
Products\textsuperscript{219} decision, are reminders of this. In this sense, what the criticisms can not defuse from this interpretative approach is precisely that the Constitution represents a legitimate strategy to control political power.

The defense of the Constitution as a minimalist precommitment strategy may be rescued, overall, simply by pointing out that, although it is by itself incomplete, it gives a foundational basis for other, different interpretative approaches. That is, to view the Constitution as a minimalist precommitment strategy is not enough to interpret it successfully, but it may help other interpretative approaches that lack an account of legitimacy - the ultimate reason for considering a constitution authoritative - but are more successful at giving coherence to the constitutional rules and practices at a rather practical level of analysis. In other words, this interpretative approach may none the less be retained if is combined successfully with other theories of constitutional interpretation.

My argument here is simply that one can think of interpretative approaches to the Constitution that seem quite accurate but that lack a precise account of when to follow and when not to follow the Framers’ intent or original understanding. By complementing any of those approaches with this minimalist precommitment strategy approach, these other accounts gain legitimacy and do not need to develop abstract justifications for following the Constitution. In this sense, this approach may well ease the development of future incompletely theorized agreements. If we all accept that the Constitution should be interpreted as a minimalist precommitment strategy, then it becomes much easier to discuss practical elements of the strategy rather than the existence of a strategy in the first place. So, for example, non-originalist and non-textualist interpretative approaches to the Constitution give some weight to the Framers’ original understanding (supposing such understanding can be discernible) or the plain meaning

\textsuperscript{219} United States v. Carolene Products Company 304 U.S. 144 (1938)
of the text (when such meaning can be construed), but are often criticized for not having clear parameters that justify when not to defer to these approaches. These criticisms can be overcome by both approaches with different arguments, suggesting that it is permissible to depart from the original understanding or the plain meaning of the constitutional text when not doing so limits the enforcement of the Constitution as a precommitment strategy. The debate then has been narrowed down towards a level much more practical, in which the discussion evolves towards the particular traits of the precommitment strategy given a particular context. This suggestion may not be too comforting, but surely is a good place to begin with.

Perhaps a small thought experiment can tell us to what extent this approach may be useful. Imagine that there is an agreement, among academics and interpreters, that in fact the Constitution represents a legitimate precommitment strategy, which was intended to allow majoritarian decision-making, while at the same time preventing these majorities from stripping down present day minorities or future majorities from their rights. The discussion, hence, has been narrowed down to determining the particular details of the strategy, not the strategy or its legitimacy. Two judges who happen to sit in the Supreme Court, Justices Hercules and Ulysses,\textsuperscript{220} find themselves deciding an issue related with the powers of Congress regarding the Commerce Clause.\textsuperscript{221} Both interpreters would agree on the strategic rationale behind the Constitution, that is, they would agree on all the four premises presented so far, but would disagree on the degree of flexibility (premise 4) required to make premises 2 (\textit{Institutional arrangements}) and 3 (\textit{Entrenchment of rights and use of gag rules}) work. Justice Hercules considers that the flexibility of the constitutional structure should be understood in terms of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} I think the references here are pretty obvious; Justice Hercules refers to Ronald Dworkin’s famous legal hero, while Justice Ulysses refers here to Jon Elster’s, and to some extent Richard Posner’s favorite Greek hero. Both justices, however, have dramatically different approaches to interpretation. The first one would be an idealist, liberal coherence-searching interpreter, while the second would be a pragmatist, down to earth interpreter.
\item \textsuperscript{221} Article 1, Section 8 of the American Constitution.
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best account of the coherence of the system, since the leading principles should be harmonized in such a way that they fit and justify as many rules as possible. Justice Ulysses, on the other hand, considers that coherence is important but not enough to sacrifice the flexibility that the legal system ought to incorporate. For him, it is important to diminish those transaction costs that limit interstate commerce, and to allow the different participants some room for maneuverability. This may imply that the system may no be presented in its best light according to Justice Hercules, but as a pragmatist, he should display “(…) a disposition to ground judgments on facts and consequences rather than on conceptualisms”.

What this example shows is the remaining level of indeterminacy and disagreement that appears once it is accepted that the Constitution is a legitimate precommitment strategy. The remaining level of indeterminacy – how much flexibility is required to make the strategy work – shows that a more fundamental level of indeterminacy – that of the legitimacy and role of the Constitution - has been cabined. The discrepancy between these two judges is, arguably, not one of principle, but rather one of practical matter. Both judges disagree how to make the strategy work, not if there is a strategy in the first place. By cabining down a fundamental of indeterminacy, both judges agree on the legitimacy of their endeavor and come one step closer to working within the demands presented by the Rule of Law. Their agreement suggests that the precommitment strategy arranges the constitutional provisions into an open, general and stable set of rules with a set of purposes that are beyond discussion. Their disagreement then becomes about the exercise of such strategy, in terms of which of all the possible legal rules that can be enacted given this framework are preferable. However, this move to cabin the indeterminacy at

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the level of the framework also shows to what extent the indeterminacy of legal rules remains present at the different levels that are suggested by attempting to make the Constitution work.\textsuperscript{224}

Part VI. Conclusions

In this fifth and last part, I will argue two things related with all the arguments presented so far. My first arguments is about the level of determinacy expected by the Rule of Law, and more specially, note that such an important topic as received less scholarly attention than what it deserves. Second, I argue that the American experience suggests that although to interpret the Constitution as a precommitment strategy is problematic, it doesn’t, by itself, disqualify this approach for other jurisdictions. Particularly, this interpretative approach may be useful in countries in which some of its problematic issues are absent. In this sense, I will address here the issue of constitutions as a \textit{universal} precommitment strategy.

The question of how much determinacy is expected from the Rule of Law is a fascinating question that has some received some attention, although not all that it deserves.\textsuperscript{225} As was mentioned in part II, the Rule of Law demands that a set of open, general and relatively stable rules, determine the different particular and narrow legal rules that can be enacted. The alteration of both types of rules may represent a threat to an individual’s dignity, although the alteration of the narrow and particular type is much less pervasive than the alteration of the second set of rules. However, the question remains, how much determinacy, openness and relative stability should the first type of rules have? I can hardly think of an answer to this question that can overcome the arguments of flexibility and room for change, on one hand, and stability,

\textsuperscript{225} See Richard H. Fallon Jr. \textit{supra}, fnnt. 5, for a summary of the different accounts.
determinacy and generality, on the other. My only suggestion is a substantive, minimalist answer: the balance between these two set of considerations depends on the context in which an issue arises, and on the concept of human dignity that is being considered. In a particular context, an individual may face a situation in which his dignity is seriously threatened, but to act would imply changing, or interpreting radically, several constitutional provisions. To give this individual a remedy and protect his dignity may well represent a flagrant violation of the Rule of Law, since it may trump the expectation and investments of other individuals, who may have a right of equal consideration under the law. To do so would seem unfair and perhaps treacherous. However, depending on what may be at stake in this concrete situation, it may be desirable to sacrifice the degree to which the legal system in question adheres to the Rule of Law, and protect this person’s dignity at the cost of all the other people who might be affected. An argument for doing so could be that by protecting this individual’s right now, the other members of society can claim in the future similar protection if they find themselves in similar circumstances. By allowing such change to be available to everybody, the Rule of Law requirements would have been met as long as people acknowledge the advantages of the change and can plan ahead. Still, to change the rules in a dramatic fashion definitely represents a breakdown of the Rule of Law (according to the views presented so far), but perhaps it also offers an opportunity for reconstructing this concept following a more substantive approach.\textsuperscript{226}

So far, the criticisms and counterarguments presented suggest that the idea of viewing constitutions as precommitment strategies depends largely on issues related with context. The American experience reveals, I have argued so far, substantial although not definitive difficulties of why it is not an adequate interpretative approach. However, this does not have to be

\textsuperscript{226} For an example of this, see Frank I. Michelman, \textit{Law’s Republic}, 97 Yale. L. J. 1493 (1988).
necessarily the case for other countries, and specially, for countries that have relatively recent constitutions.

To a large extent, the difficulties that viewing the American Constitution as a precommitment strategy are due to the historical context in which this Constitution was drafted and approved. For example, the discussion related with the Framers’ intention to bind future generation, and the different degrees in which such binding can actually take place reveals so much. From this perspective, more recent constitutions like the ones that were drafted and ratified after the fall of the Iron Curtain 1989 offer less resistance to finding an intention that is understandable to us today. If some of those constitutions were indeed drafted or intended to work as precommitment strategies then it is more plausible to interpret them in such a way given the assumption that because they are more recent, the questions regarding intentions can be answered on more definite grounds. Documents regarding this process are much more available today, and if one wanted to explore the approach seriously it is possible to ask the Framers of these constitutions how they say the constitutional project, an advantage that no interpreter of the American Constitution has today.

Just as well, constitutions that have been drafted in the last two decades have also more detailed provisions regarding issues like federalism, the powers of each branch of power and the procedures for amending each constitution. This does not imply necessarily that these constitutional provisions are more determinate; however, it does suggest that the constitutional assemblies that drafted them had a more profound understanding on how to address those issues. Of course, this consideration has to be mediated by a detailed analysis of each constitution; however, the fact that contemporary constitution tend to be lengthier than the American Constitution does create a refutable presumption in favor of a higher level of agreement and
better information regarding how a constitution works as the reasons that explain this phenomenon.

As my final remark, I want to point that it seems incredibly ironic that the American Constitution, which was to a large extent the model that authors like Elster and Sunstein had in mind when suggesting the usefulness of interpreting constitutions as precommitment strategies presents so much difficulties for implementing such approach. In spite of this, it is remarkable the influence that American Constitutionalism has had on the constitutional experience of many other countries around the world. Particular institutional arrangements of the American constitutional experience, like judicial review, have had a world wide reception, due in part to the view that it is an adequate means to control the constitutional boundaries. And although different countries have developed their views of judicial review in quite a different and contrasting ways, its practice remains influential world wide. To a certain extent, the international prominence of judicial review suggests that the main purpose for constitutionalism is to control how different state agencies and bodies exercise their power. It may well be that there is no true constitutionalism without the capacity to enforce the constitutional blueprint. And this insight is perhaps the best justification for considering that the purposes of constitutions can be best understood as precommitment strategies, now as well as in the past. But beyond this insight, there is plenty of constitutionalism that remains unjustified.