

## 16. Democratic Legitimacy, Institutions for Future Generations and the Problem of Constitutional Power

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**Abstract:** *Recognising widely held concerns regarding 'presentist' biases in democratic institutions, this chapter challenges the contention that democratic legitimacy inexorably requires the inclusion of future generations in democratic decisions. According to two requirements of democratic legitimacy – inclusion and constitutional empowerment – people should be empowered to participate in decisions about policy and law, and to determine the rules structuring the political framework. Drawing a distinction between these requirements, this chapter contends that though it may be feasible to 'include' future generations for proxy representation, future generations cannot enjoy 'constitutional power'.*

*This chapter applies two separate understandings of constitutional power to future generations, the 'constituent power' to create constitutional frameworks, and the 'constituted power' to amend such frameworks' norms. It contends that neither is achievable for unborn people and that full intergenerational democratic legitimacy is therefore impossible. Reason for concern with the long-term effects of contemporary policies and political systems still remain, of course. But in attending to them, justice rather than democratic legitimacy should guide our judgments.*

### Introduction

Impending climate change and the apparent incapacity of democratic governments to act with sufficient resolve is a source of pessimism about democratic politics. Though there are many potential explanations for lethargic democratic politics, one of them is that representative systems are at fault by design. Electoral cycles incentivise governments and elected lawmakers to respond primarily to the short-term interests of the electorate. Hence, the lack of concern for future generations – here understood as people yet unborn and, more generally, as non-overlapping future generations<sup>1</sup> – is a predictable outcome of the political *presentism* that is an inherent feature of democratic systems.<sup>2</sup>

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1 On the significance of the distinction between overlapping and non-overlapping generations, see Axel Gosseries, 'Future Generations' Future Rights' (2008) 16(4) *Journal of Political Philosophy* 446.

2 Dennis Thompson, 'Representing Future Generations: Political Presentism and Democratic Trusteeship' (2010) 13(1) *Critical Review of International Social and Political*

A variety of remedies for political presentism have been proposed: the introduction of ombudsmen or special committees in parliaments with powers to propose policies benefiting the future; reform of parliamentary voting procedures that impede decisions affecting the future; stronger constitutional protection of future generations' interests. A more radical idea is to restructure the composition of legislative assemblies to include political representatives for future generations.<sup>3</sup> These representatives would be proxies for future generations as they are empowered to promote the interests of a group that is in fact absent. According to Michael Rose, proxies *represent* future generations if the relevant audience – i.e. the current members of democratic states – accept them as such.<sup>4</sup>

Here, I am not interested in the feasibility of proxy representation or the difficulties of identifying the interests that they should protect. For the sake of the argument, I will simply accept that institutions for the political representation of future generations (IFG) are feasible and that they serve to promote the interests of future generations. The question here is, instead, how to assess IFGs from the point of view of *democratic legitimacy*.

One's initial reaction is arguably to think that the democratic legitimacy of IFGs is debatable. After all, they attenuate the legislative powers of the living generation and reduce their powers to self-determination. Though it may be desirable to protect the interests of future generations, we might object that all peoples should be entitled to democratic self-rule. Even if the living are myopic and selfish, they are still entitled to a democratic process! Hence, as Ivo Walliman-Helmer suggests, there is reason to suspect that

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Philosophy 17; David Runciman, 'Democracy Is the Planet's Biggest Enemy' *Foreign Policy* (Washington, 20 July 2019) <<https://perma.cc/U58K-JB4L>>.

3 For overviews, see: Inigo Gonzalez-Ricoy, 'Intergenerational Justice and Institutions for the Long Term' in Klaus Goetz (ed), *The Oxford Handbook of Time and Politics* (OUP 2020); Andre Santos Campos, 'Representing the Future: The Interests of Future Persons in Representative Democracy' (2021) 51(1) *British Journal of Political Science* 1; Bernice Bovenkerk, 'Public Deliberation and the Inclusion of Future Generations' (2015) 6(3) *Jurisprudence* 496.

4 Michael Rose, 'All-affected, Non-identity and the Political Representation of Future Generations: Linking Intergenerational Justice with Democracy' in Thomas Cottier, Shaheez Lalani and Clarence Siziba (eds), *Intergenerational Equity. Environmental and Cultural Concerns* (Brill 2019).

IFGs that impair the ability of present people to rule themselves by democratic procedures are in ‘conflict with claims about democratic legitimacy’.<sup>5</sup>

However, advocates of IFGs do have a powerful reply to this objection. They point out that the political representation of future generations is not contrary to the democratic process. IFGs improve the democratic qualities of political systems by making public decisions accountable to future interests.<sup>6</sup> This reply is premised on the notion that the democratic legitimacy of political systems should take into consideration the interests of both present and future generations.<sup>7</sup> Public decisions made today should be legitimate to members of present as well as future generations.

Democratic legitimacy is not the only potential justification of IFGs. A concern with *intergenerational justice* may also provide grounds for reforms that improve the extent to which political decisions take future interests into account. But reasons of intergenerational justice are arguably distinct from principles of democratic legitimacy. Public decisions that are just are not necessarily legitimate by democratic standards, and public decisions that conform to precepts of democratic legitimacy are not necessarily just.<sup>8</sup> The basis for the distinction between democratic legitimacy and justice is naturally complex and somewhat contentious as it relates to ongoing debates on the place of justified coercion and legitimate authority in accounts of political legitimacy.<sup>9</sup> These questions are bracketed in this paper, however. Democratic legitimacy is here simply understood as equal to the procedural preconditions for democratic rule. Public decisions are considered as legitimate if and only if they are made in accordance with the norms

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5 Ivo Wallimann-Helmer, ‘Can Youth Quotas Help Avoid Future Disasters?’ in Igor Dimitrijoski and others (eds), *Youth Quotas? And other Efficient Forms of Youth Participation* (Springer 2015).

6 Simon Caney, ‘Political Institutions for the Future: A Fivefold Package’ in Axel Gosseries and Iñigo González-Ricoy (eds), *Institutions for Future Generations* (OUP 2018) 135.

7 Axel Gosseries and Iñigo González-Ricoy, ‘Designing Institutions for Future Generations’ in Gosseries and González-Ricoy (n 6) 16.

8 For the distinction between democracy-based and justice-based argument for the political representation of future generations, see Ludvig Beckman, ‘Do Global Climate Change and the Interest of Future Generations have Implications for Democracy?’ (2008) 4 *Environmental Politics* 610, and Iñigo González-Ricoy and Felipe Rey, ‘Enfranchising the Future: Climate Justice and the Representation of Future Generations’ (2019) 10 *WIREs Climate Change* 1, 2.

9 For an overview, see Fabienne Peter, ‘Authority and Legitimacy’ in Fred D’Agostino and Gerald Gaus (eds), *The Routledge Companion to Social and Political Philosophy* (Routledge 2013).

and rules required for them to be democratic. By contrast, justice refers to the moral justifiability of outcomes. Public decisions are on this simplistic view 'just' if and only if they produce results that align with principles of social justice.

Accordingly, the claim that IFGs are required for reasons of intergenerational justice is a claim about the kind of political institutions required to establish just outcomes. This claim has the obvious defect of ignoring the procedural requirements of democratic legitimacy. The more convincing basis for IFGs is consequently that they are required by principles of democratic legitimacy. The claim is that the political representation of future people's interests is necessary for democratic reasons rather than for reasons of justice.

Now, a popular understanding is that democratic legitimacy requires that anyone relevantly affected should be included in the democratic process. Provided that future generations *are* relevantly affected by public decisions, democratic legitimacy inexorably *requires* institutions that include future generations. The principle that all relevantly affected interests should be included in democratic procedures is the central premise for the democratic legitimacy of IFGs.

This paper challenges this specific attempt to defend institutions representing the interests of future generations. The argument advanced is that even if IFGs successfully include future interests in public decisions, they fail to empower future generations in all respects that are relevant for democratic legitimacy to be achieved. The people included in the democratic process should not just be able to partake in decisions of policy but also in decisions on the political framework. Such constitutional power is in other words a fundamental requirement for democratic legitimacy. Where the people included are unable to exercise constitutional power, their inclusion in the political process does not contribute to the realisation of democratic legitimacy. The central claim defended here is then that IFGs are unable to extend constitutional power to future generations. To illustrate this, this paper proceeds in three steps. The first dissects the argument for IFGs in further detail. The second addresses the relationship between democratic legitimacy, democratic inclusion and constitutional power. The final section explains why constitutional power cannot be adequately secured through the political representation of future generations.

### 1. *Future Generations and Democratic Legitimacy*

The argument for the political representation of future generations has the structure of a conclusion (3) that depends on two premises (1 and 2):

- (1) The principle of democratic inclusion requires that the interests of future generations be represented by public institutions (IFGs).
- (2) Principles of democratic inclusion are part of the principles of democratic legitimacy.
- (3) The principle of democratic legitimacy requires that the interests of future generations be represented by public institutions (IFG's).

If these premises are accepted, the conclusion must also be accepted. The conclusion *is* a valid inference from the premises. But the premises themselves are not necessarily true. Let us therefore take a look at the grounds for accepting them.

The first premise is controversial as democratic standards for inclusion are contested. Thus, the very first premise of the argument that the interests of future generations should be represented by public institutions in order for democratic legitimacy to be achieved can be questioned. Yet, that is not the route taken here. In the following, I will proceed on the assumption that the first premise is true though some of the difficulties with this premise are discussed further below. For the sake of argument, I will accept that a plausible conception of democratic inclusion exists such that the interest of future generations should be included by means of political representation. What I want to focus on instead is the second premise.

Premise 2 does at first glance appear less controversial. Surely public institutions must be inclusive to be legitimate by democratic standards. This is true of most if not all conceptions of democracy.<sup>10</sup> We shall note though that this premise does not represent a complete account of democratic legitimacy and that democratic inclusion is not a sufficient condition. Of course, the fact that democratic legitimacy includes additional conditions does not automatically undermine the conclusion (3). After all, the conclusion of the argument does not state that the political representation of the interests of future generations is sufficient for democratic legitimacy – only that it is necessary. But the conclusion of the argument does depend on

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10 This is not true for minimalist conceptions according to which the competitive selection of leaders exhausts the necessary and sufficient conditions for democracy. Adam Przeworski, 'Minimalist Conception of Democracy: A Defence' in Ian Schapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (CUP 1999).

the assumption that the political representation of future interests are *pro tanto* improvements in terms of democratic legitimacy. The assumption is in other words that democratic inclusion is a requirement of democratic legitimacy that applies independently of other requirements of democratic legitimacy. The validity of that assumption cannot be taken for granted, however. The alternative is that democratic inclusion is a conditional requirement of democratic legitimacy; that it contributes to democratic legitimacy only if other requirements of democratic legitimacy are also in place.

In sum, it is possible to distinguish between two versions of the claim that democratic legitimacy requires inclusion: (2a) that democratic legitimacy unconditionally requires democratic inclusion and (2b) that democratic legitimacy requires democratic inclusion only on condition that additional conditions apply. The difference between these versions can be illustrated by a simple analogy from a different context. Consider the difference between the claim (1) 'a good dinner requires a good wine' and the claim (2) 'a good dinner requires a good wine, but a good wine contributes to the goodness of the dinner only if the food is decent'. Both claims hold that a good wine is necessary for a good dinner; no dinner is good without a good wine. The difference though is that only (1) holds that a good wine unconditionally contributes to the goodness of a dinner. According to (2) a good wine contributes to make the dinner good only on condition that the dinner is decent.

In the present context, the point is that the second premise in the argument for the political representation of future generations can be read in two distinct ways. Either the claim is that the political representation of future generations contributes to the democratic legitimacy of political institutions even if other requirements of democratic legitimacy cannot be satisfied. Or, the claim is that the political representation of future generations contributes to the democratic legitimacy of political institutions only if other requirements of democratic legitimacy are satisfied. Both readings cannot be correct. If one of them is correct, the other is false, and vice versa. Consequently, the correct reading of premise two cannot be taken for granted.

The argument of this paper is that premise 2 should be read as the claim that the political representation of future generations enhances the democratic legitimacy of political systems only on condition that additional requirements are met. The further claim defended is that these additional requirements of democratic legitimacy cannot be met in relation to future

generations. If correct, the conclusion is that the democratic argument for the political representation of future generations fails and that the conclusion above (3) is invalid. Notably, this refutation does not depend either on rejecting the claim that all 'relevantly affected' should be included, or on rejecting the claim that future generations are relevantly affected in the sense required for principles of democratic inclusion to apply.

## 2. *Democratic Legitimacy*

I take the received view of democratic legitimacy to be that it represents a moral standard such that public institutions are legitimate if and only if they are democratic.<sup>11</sup> The normative implications of legitimacy are nevertheless in dispute. Following what can be termed the justice-based account, the claim that public institutions are legitimate by democratic standards implies that they should be supported by duties of justice.<sup>12</sup> A second view is that democratic legitimacy represents a condition for political obligation. The subject population is not morally required to comply with the law unless public institutions comply with standards of democratic legitimacy. A third alternative is that democratic legitimacy is a necessary condition for permissible coercion. Public institutions are morally permitted to make decisions that are coercive only if they are democratic. Since democratic decisions are permissible, subjects have no right to interfere with or obstruct them.

The normative consequences of democratic legitimacy and failures thereof accordingly varies. If public institutions are not democratically legitimate with respect to future generations, it follows either that we have no reason to support them out of duties of justice, that we are not morally bound to comply with their decisions or that we do not have duties not to interfere with the decisions made.

For the purposes of this paper, we need not adjudicate between these accounts. The one claim that is essential to the argument in favor of IFGs is that democratic inclusion is a requirement for democratic legitimacy. In what follows, I first survey the usual objections against the claim that democratic inclusion applies to future generations. Next, I proceed to establish

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11 Fabienne Peter, *Democratic Legitimacy* (Routledge 2009); Allen Buchanan, 'Political Legitimacy and Democracy' (2002) 112(4) *Ethics* 689.

12 Charles Beitz, *Political Equality* (Princeton 1989).

that democratic inclusion is conditional on the additional requirement for democratic legitimacy – the capacity for constitutional power.

## 2.1. Inclusion

Debates on the political representation of future generations are heavily influenced by the theory according to which democratic inclusion is required for anyone relevantly affected by public decisions. This is reflected in the claim that future people's interests should be represented because they are affected.<sup>13</sup> Public decisions with significant impact on future generations 'cannot be regarded as legitimate' absent adequate representation of their interests.<sup>14</sup>

Even if democratic inclusion applies to all relevantly affected, it is not self-evident that future generations ought to be included. If future people are *not* relevantly affected by current decisions, it follows that they either need not or should not be included. The hypothesis that future people are not affected may of course seem preposterous at first glance – surely future people are affected by decisions made by current political systems! Yet, to be 'affected' is to be worse off *compared* to otherwise. A person is for this reason not 'affected' by actions that are preconditions for her existence – assuming that she is better off by existing than by not existing. Decisions that are conditions for the existence of a person does not make her worse off compared to what she would otherwise have been. Consequently, decisions with consequences for future generations do not 'affect' future generations if these decisions are also preconditions for their existence.<sup>15</sup>

A distinct objection is that 'relevantly affected' is not the correct criterion of democratic inclusion. Rather, the correct view is that the decision must only include the people that are 'subject' to decisions. A person is subject to decisions either if the decision claims the legitimate authority to regulate her behavior or if the decision subjects her to coercion. These are distinct

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13 Jörg Tremmel, 'Parliaments and Future Generations – The Four-Power-Model' in Dieter Birmacher and May Thorseth (eds), *The Politics of Sustainability: Philosophical Perspectives* (Routledge 2015).

14 Kristian Ekeli, 'Constitutional Experiments: Representing Future Generations Through Submajority Rules' (2009) 17(4) *Journal of Political Philosophy* 440, 445.

15 Clare Heyward, 'Can the All-Affected Principle Include Future Persons? Green Deliberative Democracy and the Non-identity Problem' (2008) 17(4) *Environmental Politics* 625.



readings of the criteria for a person being subject to a decision but it is unclear that future generations are subject to decisions taken by political institutions today on either account. The decisions made by contemporary governments may not claim the legitimate authority to regulate the conduct of future people. And the decisions made by contemporary governments are unlikely to subject future people to coercion.<sup>16</sup> Of course, further reflection is required to demonstrate if future generations are subject to decisions in either of these senses.

The point here is not that these objections are conclusive but to demonstrate the current focus in debates on the political representation of future generations. Inadvertently, little attention is given to the basic premise that democratic legitimacy requires the inclusion of anyone to whom principles of democratic inclusion apply. But this is the premise that turns out to be less than convincing. To show this, we shall have to ignore the two objections just mentioned. The relevant question is not whether requirements of democratic inclusion apply to future people but whether these requirements apply to future generations independently of other requirements of democratic legitimacy.

## 2.2. Constitutional Power

Inclusion is but one criteria of a democratic process. Accordingly, democratic inclusion is a necessary but insufficient precondition for democratic legitimacy. In the following I focus on a particular important requirement that is often overlooked but that figures clearly in the account of the democratic process influentially presented by Robert Dahl. As Dahl makes clear, a democratic association is one where the people control the rules that both regulate and constitute the process of decision-making. The democratic idea is that the people should be empowered to decide not just the policies and rules that apply to them but also the rules that apply to the institutional framework of decision-making.<sup>17</sup> In state-like political units the institutional framework is regulated by 'higher laws that are usually (though not neces-

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16 Ludvig Beckman, 'Power and Future People's Freedom: Intergenerational Domination, Climate Change, and Constitutionalism' (2016) 9(2) *Journal of Political Power* 289.

17 Robert Dahl, *Democracy and Its Critics* (Yale University Press 1989).

sarily) part of the constitution. Accordingly, a democratic process is one where *constitutional power* is vested, directly or indirectly, in the people.<sup>18</sup>

The significance of constitutional power can be explained by what David Miller has called the ‘scope’ issue. The scope of an association is equal to the ‘range of issues’<sup>19</sup> on which it can make decisions. The range of issues on which an association is able to make decisions depends importantly on the content of the rules that regulate the process of decision-making. The rules that regulate the decision-making process are constitutional rules. Hence, the scope of the association depends importantly on the content of the constitution. The democratic control of the constitution is consequently of immense importance. Only by the power to decide the content of the constitution are the members of associations able to decide the range of issues on which they can make democratic decisions.

If constitutional power is a precondition of a democratic process and a democratic process is a prerequisite for democratic legitimacy, it follows that democratic legitimacy requires that the power to determine the constitution belongs to the people. A political unit that is legitimate by democratic standards should not merely be inclusive; it should also be an association where constitutional power is subject to popular control.

Consider the following example to illustrate the significance of constitutional power to democratic legitimacy. Imagine an association (A) that is fully inclusive. Because it is fully inclusive, everyone that should be included can participate in decisions on the issues that are within the scope of the association. Now, the range of issues that can be decided by A is regulated by a rule (P) that limits the powers of A to decisions on X, Y, and Z. Imagine now that P is not subject to control by the members of the association. As a consequence, the members of A lack control over the range of issues they can decide. Instead, they are subjected to the powers of whomever is able to decide P. This is the basis for the contention that A does not fully qualify as ruled by a democratic process despite the fact

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18 Dahl speaks of ‘control of the agenda’ and not ‘constitutional power’ though I take these expressions to be extensionally equivalent. Dahl explains control of the agenda in terms of the powers of ‘sovereignty’ (ibid., 107). Moreover, records on the terminology used in Ancient Greece confirms that ‘control of the agenda’ referred to *demoi* as ‘*kurios tes politeias*’ (‘in control of the constitution’). Matthew Landauer, ‘*Demos (a) kurios? Agenda Power and Democratic Control in Ancient Greece*’ (2021) *European Journal of Political Theory* 375.

19 David Miller, ‘Reconceiving the Democratic Boundary Problem’ (2020) 15(11) *Philosophy Compass* 1.

that A is fully inclusive. Thus, inclusion is not sufficient for a democratic process and since we have already accepted that a democratic process is both necessary and sufficient for democratic legitimacy, it follows that that inclusion is insufficient for democratic legitimacy. An association that is inclusive may still fail to be legitimate by democratic standards.

This observation is relevant to the argument that IFGs are necessary for democratic legitimacy. As already made clear, institutions for the political representation of future generations are justified by appeal to principles of democratic inclusion. But since inclusion is not sufficient for democratic legitimacy, it is unclear that IFGs are sufficient for democratic legitimacy. Public decisions are legitimate with respect to future generations only if future generations are both included and empowered to control the constitution.

### 3. *The Importance of Constitutional Power*

As explained earlier, the claim that democratic legitimacy requires democratic inclusion is either conditionally or unconditionally valid. The claim is conditionally valid if it is premised on additional requirements of democratic legitimacy. The claim is unconditionally valid if it is not premised on additional requirements of democratic legitimacy. In what follows, I venture to explain why democratic inclusion is a conditional requirement of democratic legitimacy. Inclusion contributes to the democratic legitimacy of an association only if the members included share in constitutional power. Hence, inclusion without constitutional power is pointless from the point of view of democratic legitimacy.

The reason why this should be so is not immediately obvious, of course. Even if an inclusive demos is not sufficient for democratic legitimacy, it seems natural to think that an association with an inclusive demos is necessarily more legitimate than an association with a less inclusive demos.<sup>20</sup> That judgment is premised on an *additive* understanding of the criteria for democratic legitimacy. If the criteria are additive, more is always better. Assuming that the criteria for democratic legitimacy are additive, it follows that an association that is fully inclusive but where members lack

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20 Peter Lawrence, 'Global Guardians for Future Generations: Remediating a Blind Spot of Democracy?' in Nejma Tamoudi, Simon Faets and Michael Reder (eds), *Politik der Zukunft* (Transcript Verlag 2020) 197.

constitutional power is more legitimate by democratic standards than an association that is not inclusive and where members lack constitutional power.

The alternative is to assume that the criteria for democratic legitimacy are *multiplicative*. A multiplicative index is an equation where the total sum is zero if any factor in the equation is zero. If the criteria for democratic legitimacy are multiplicative, it follows that an association that scores zero on some criteria of democratic legitimacy is without democratic legitimacy even if it scores positively on some other criteria of democratic legitimacy.

It seems that at least some democratic criteria are multiplicative rather than additive. Consider two criteria of a democratic process: effective opportunities to political participation and informed understanding of the political alternatives. According to Dahl, both are fundamental requirements of a democratic process.<sup>21</sup> If these criteria are additive, we should be able to say that an association where members *either* enjoy effective opportunities to participation, *or* enjoy an informed understanding of political alternatives is more democratic than an association where neither condition is satisfied. However, that seems implausible. An association where members are unable to participate just does not seem democratic at all. The fact that they are informed about the political alternatives does not contribute to making it more democratic. Similarly, an association where members lack information and knowledge about the political alternatives would not be democratic in any sense at all, even if they do enjoy opportunities for political participation. Blindfolded participation is not democratic participation. There is consequently reason to conclude that at least some criteria for democratic legitimacy are multiplicative rather than additive. The question though is whether democratic inclusion and constitutional power also are.

The starting point is that the requirement of democratic inclusion applies to future generations and that this requirement can be satisfied by IFGs. If democratic inclusion and constitutional power are additive, it follows that IFGs do make a positive contribution to the democratic legitimacy even if future generations would lack constitutional power. The conclusion is different if the criteria are multiplicative. In that case, IFGs do make a positive contribution to democratic legitimacy only if they enable future generations to share in constitutional power.

The claim defended here is that inclusion without constitutional power does not contribute to democratic legitimacy at all. To see why, recall that

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21 Dahl (n 17) 109–112.

constitutional power is the capacity to determine the scope of power of the association. Hence, members that lack constitutional power are unable to determine the range of issues on which the association can make decisions – they are powerless with respect to ‘scope’ of the association. In fact, absent constitutional power, the members are powerless in a dual sense: they lack the power to exclude issues from the scope of democratic control and they lack the power to include issues within the scope of democratic control.

Issues are excluded from the scope of democratic control if the constitution denies the association the power to make certain decisions. Sometimes, the members have strong interests in thus limiting the powers of their association. Imagine, for example, that there are good reasons to limit the powers of the government to enact policies that encourage the use of fossil sources of energy. One way to achieve this is by constitutionally disempowering the government in relevant respects. Constitutional constraints that limit the powers of the government restrict the scope of issues that can be decided by citizens through democratic procedures. Arguably, however, such constraints are legitimate by democratic standards only if they are subject to democratic control by the citizenry, either directly or indirectly. Hence, democratic constitutional power is a precondition not just for the ability to limit the scope of the association but also for the democratic legitimacy of such limits.

The effectiveness of democratic control is expanded when constitutional constraints are lifted. Evidently, the members of an association may have strong interests in expanding ‘democratic control’ over issues previously excluded by the constitutional framework. Imagine that a majority of the citizens of a European country want to leave the EU. A decision to that effect is likely to require amendments to the constitutional framework and is therefore beyond the scope of both the parliament and the government to take through ordinary legislative procedures. Under these circumstances, the decision to leave the EU is premised on democratic exercises of constitutional power. Hence, democratic constitutional power is a precondition not just for the ability to expand the scope of the association but also for the democratic legitimacy of decisions to that effect.

These examples lend support to the claim that an inclusive demos risks ending up virtually powerless unless they are empowered to control constitutional norms. Citing Dahl, members that lack the power to control the rules that regulate the scope of the association may in the end be

disenfranchised on all issues ‘other than those the rulers had allowed to remain on the pitifully shrunken agenda’.<sup>22</sup>

The situation described is not unusual in political and historical contexts. It is manifested in cases of colonial domination, foreign occupation, and military tutelage. No matter how free and inclusive the elections are in such regimes, they fall short of democratic legitimacy as constitutional power remains vested in bodies that are unaccountable to the people. The lack of popular constitutional power is reflected in the labels that figure among scholars of democratisation: ‘tutelary democracy’<sup>23</sup> or ‘protected democracy’<sup>24</sup>. Indeed, the epithet ‘democratic’ should arguably be avoided for such regimes.<sup>25</sup>

#### 4. Future Generations and Constitutional Power

The argument so far is that constitutional power is necessary for democratic legitimacy and that it represents a precondition for democratic inclusion. Unless the population subjected to or affected by public decisions can influence the scope of the decisions that they can make, the extent of democratic inclusion is of no avail. It should now be clear why this point is relevant to the argument that democratic legitimacy requires political representation of future generations. The political representation of future generations is a requirement of democratic legitimacy only on condition that constitutional power can be attributed to future generations.

The final and crucial question then, is whether it can. Answering this question is confounded by the fact that the institutional requirements for democratic constitutional power are both unclear and controversial even in intra-generational settings. Hence, we need to begin by reflecting on the very notion of democratic constitutional power.

Constitutional power is the capacity to introduce, revise or abolish rules that regulate the powers of political institutions. The claim that the people should control the constitution is equivalent to the claim that the people

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22 Dahl (n 17) 113.

23 Adam Przeworski, ‘Democracy as a Contingent Outcome of Conflicts’ in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP 1988).

24 Brian Loveman, ‘“Protected Democracies” and Military Guardianship: Political Transitions in Latin America, 1978–1993’ (1994) 36 *Journal of Interamerican Studies and World Affairs* 105.

25 David Collier and Steven Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’ (1997) 49(3) *World Politics* 430.

should be able to participate, directly or indirectly, in decisions on constitutional norms.

A body with constitutional power is able to regulate the scope of its own power – the powers it possesses are limited only by rules of its own making. A body thus empowered is in effect ‘the sovereign’ within the domain. In the context of the state, the requirement that constitutional power is vested in the people is in other words equivalent to the requirement that sovereignty belongs to the people. That idea is familiar from the constitutional provisions to the effect that public power ‘derives from’ or ‘belongs to’ the people, epitomised in the principle of popular sovereignty.<sup>26</sup> Although popular sovereignty is a familiar constitutional principle, its meaning is far from clear. The democratic tradition is split between two rival perspectives on what it means for the people to partake in constitutional decision-making.

Some believe that sovereignty resides in the people to the extent that they have the political power to replace the constitutional framework. The people show themselves as the ‘sovereign’ in extra-legal moments of action. Constitutional power is ‘constituent power’, a capacity that is not subject to legal limitations. Sovereignty accordingly belongs to the people only if the people are able to overturn the constitutional order by means of force.

Others insist that constitutional power necessarily depends on legal power. For the people to determine the constitution, they must possess the legal power to participate in the process of constitutional decision-making. The people control the constitution only if a rule exists such that the people are legally authorised to revise, create or abolish constitutional norms.

We are now in a better position to grasp what is involved in the question whether constitutional power can be attributed to future generations. Future generations share in constitutional power only if it is true either that future generations share in ‘constituent power’, or that future generations are legally authorised to partake in the process of constitutional decision-making.<sup>27</sup>

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26 Denis Galligan, ‘The People, the Constitution, and the Idea of Representation’ in Denis Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013).

27 Note that this question is distinct from traditional concerns with ‘generational sovereignty’ made famous by Thomas Paine’s and Thomas Jefferson’s assertion that ‘the earth belongs to the living’. Whereas they worried that rigid constitutions would subjugate future peoples to the ‘tyranny of the past’, the question we are interested in is the possibility of extending constitutional power to future peoples. On generational sovereignty, see Maior Felt, ‘For the Living: Thomas Paine’s Generational

#### 4.1. Future Generations as ‘Constituent Power’

The idea of ‘constituent power’ has a long pedigree and is not uniquely attributable to democratic states.<sup>28</sup> According to the democratic interpretation, constituent power serves as the basis for the claim that democratic legitimacy must extend to the legal system in its entirety.<sup>29</sup> Democratic legitimacy requires that constituent power is vested in the people such that the people assume ‘supreme authority of the state’.<sup>30</sup>

Accordingly, democratic legitimacy with respect to future generations is premised on the possibility of constituent power being shared with future people. The constitutional framework through which public bodies are empowered to make decisions today is democratic with respect to future interests only if future generations can be part of ‘constituent power’.

How constituent power is exercised is disputed in the literature. For some writers, constituent power is exercised when the people enact a constitution ‘by revolutionary means or otherwise’.<sup>31</sup> The extension of constituent power to future generations is clearly unattainable if constituent power is exercised only through political revolutions. Revolutionary action is evidently undertaken only by the living. However, others envisage the exercise of constituent power through constitutional referendums and constituent assemblies.<sup>32</sup> That alternative seems more hospitable to future generations. Though future generations do not yet exist, their interests can be rendered politically present in referendums and constituent assemblies through various forms of proxy representation.

Yet, the claim of democratic constituent power is that the people should have unlimited authority to make or amend the constitution. Since all legal

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Democracy’ (2016) 48(1) *Polity* 59, and Axel Gosseries, ‘Generational Sovereignty’ in Gosseries and Gonzalez-Ricoy (n 6).

28 Joel Colón-Ríos, ‘Five Conceptions of Constituent Power’ (2014) 130 *Law Quarterly Review* 306.

29 Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12(2) *Constellations* 223; Joel Colón-Ríos, ‘The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform’ (2010) 48 *Osgoode Hall Law Journal* 199.

30 Paulina Ochoa Espejo, ‘Popular Sovereignty’ in Michael T. Gibbons (ed), *The Encyclopedia of Political Thought* (Wiley-Blackwell 2015).

31 Hans K Lindahl, ‘Constituent Power and the Constitution’ in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016).

32 Andreea Ana-Maria Alexe, ‘Constituent Power – the Essence of Democracy’ (2015) 47 *Revista de Științe Politice. Revue des Sciences Politiques* 316.



powers are limited by the legal framework that define them, the exercise of constituent power requires recourse to non-legal powers. But proxy representation through institutions for future generations are legal constructs that depend for their existence on legal rules. IFGs are legally defined instruments of power that are therefore limited. Hence, the powers of IFGs do not permit the attribution of constituent power to future generations. The upshot is that we are at pains to imagine the circumstances that allow for the extension of constituent power to future generations.

#### 4.2. Future Generations as the Legal Sovereign

The alternative is to deny that constitutional power depends on the exercise of non-legal powers. The power to partake in constitutional decision-making is a legal power that is attributed to legal institutions and offices – the legislature, the electorate, etc. *The people* hold the power to determine the constitution only if they are included in legally constituted institutions to which the constitutional framework has conferred the requisite legal powers.

Indeed, following predominant theories of legal positivism, the power to revise or create law is necessarily a legal power. The power to make constitutional decisions is an ‘office’ or ‘institution’ within the legal system. No agent that is not already empowered *by* the legal system can be a source of power *of* the legal system. That was the insight that in various stages developed from Kelsen to Hart.<sup>33</sup> The only conceivable meaning of ‘popular sovereignty’ is that the people are empowered by the legal system to participate in constitutional decision-making.

The objection that future generations are ‘absent’ loses its force if one accepts that the powers required for democratic legitimacy are legal powers. The fact that the political representation of future generations is limited by the extent of the legal powers vested in IFGs is no different from how contemporaries are empowered. Hence, we are perfectly entitled to imagine legal institutions designed to represent present and future interests that are empowered to partake in the process of constitutional decision-making.

But here is the catch. The powers vested in legally empowered institutions are not unlimited. They unavoidably depend on mechanisms for legal

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33 Pavlos Eleftheriadis, ‘Law and Sovereignty’ (2010) 29 *Law and Philosophy* 535; David Dyzenhaus, ‘Constitutionalism in an Old Key: Legality and Constituent Power’ (2012) 1 *Global Constitutionalism* 229.

validation. For ordinary decisions, the nature of this mechanism is not difficult to understand. The legal validity of a decision made by a legal authority is conditioned by the possibility that the decision can be validated as consistent with the hierarchy of norms in the relevant legal system. For example, a decision taken by an administrative body is valid on condition that it can be validated by appeal to the legal provisions that apply to that body. These legal provisions are in turn valid to the extent that they are enacted by bodies with the proper legal authorisation in the legal system, and so on.

But the chain of validation by appeal to *higher* laws inevitably comes to an end at some point. The question then is how to validate the highest norms of the legal system? Unless they are valid by virtue of *something*, it appears that the chain of validation is without foundation. The influential reply to this question given by HLA Hart is that the ‘rule of recognition’ serves as the ultimate standard of legal validity. The rule of recognition confers legal validity to the highest legal norms and to the legal system as a whole.<sup>34</sup>

The rule of recognition is not a rule enacted by the lawmaker. Indeed, it could not be that since any rule enacted by the lawmaker is subject to the need for validation. Rather, the rule of recognition is embedded in the judgments of higher legal officials. These social practices reproduce the rule of recognition, and because they are social practices – not explicit rules of the system – the rule of recognition neither is, nor can be, determined by the law maker. The ultimate standard of legal validity consequently remains beyond democratic control. Whatever is meant by ‘the people’ or ‘the people’s will’, it is ‘not part of the ultimate rule of recognition for the legal order’.<sup>35</sup>

The relevant point in this context is that the judgments of legal validity are independent from the legal powers of law-making. This is relevant because it means that mechanisms for legal validity occupy a space in the legal system that is not accessible to institutions for the political representation of future generations. The rule of recognition is a social practice that remains divorced from the legal powers attributed to institutions for political representation.

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34 Herbert L A Hart, *The Concept of Law* (Clarendon Press 1962) 255; Gerald Postema, *A Treatise of Legal Philosophy and General Jurisprudence* (Springer 2011) 311; John Gardner, *Law as a Leap of Faith* (OUP 2012) 107.

35 Kent Greenawalt, ‘The Rule of Recognition and the Constitution’ (1987) 85 Michigan Law Review 621.

It is not really clear what follows from this observation. One possibility is that it is irrelevant due to the distinction between the legal power to make decisions and the validation of legal decisions. What matters for democratic legitimacy is that future generations are made present in some legally constituted body empowered to decide on the constitutional framework – not if they are made present in the process of validation of such decisions. Properly empowered IFGs that include future generations are sufficient to establish a democratic process that renders public decisions legitimate with respect to future people. There is in other words no ‘catch’.

The alternative conclusion is that ‘presentism’ in a different key remains a feature of legally constituted political systems. All decisions that are made by political bodies depend on mechanisms for legal validation that exclude future generations. However strongly the interests of future generations are included in the process of law-making, the ultimate power to control the constitution depends on a process of legal validation that belongs to the living.

## 5. *Conclusions*

An influential argument for institutions for future generations is that they are necessary for democratic legitimacy. Future generations should be included because future people are significantly affected by the decisions made by governments today. In the first part of this paper I argued that democratic inclusion is conditioned by access to constitutional power – a distinct requirement of democratic legitimacy. For future people to be included in the demos we must also be able to recognise future people as equally entitled to participate in constitutional decision-making. The second part of the paper argues that this requirement is a serious limitation on the argument that institutions representing future generations are required by democratic legitimacy. Whether constitutional power is understood in terms of constituent power or in terms of legal power, there is reason to doubt that future generations can be acknowledged as democratic co-authors of the constitutional framework. If constitutional power cannot include future generations, the argument that their political representation is required by principles of democratic legitimacy ultimately fails.

The wider implication of this conclusion is that democratic legitimacy may not be a relevant standard for intergenerational relationships. If democratic legitimacy cannot be achieved with respect to people yet unborn,

there is no longer reason to worry about the democratic status of our political systems in relation to future people. This is, of course, no reason to conclude that there are no moral concerns raised by the long-term effects of current policies and political systems, only that democracy is not one of them.