

Temporary Constitutions

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The prevailing conceptions of constitutions ordinarily characterize them as rigid and long-enduring, if not permanent, documents. This Essay challenges that prevailing wisdom on both descriptive and normative grounds by providing the first systematic examination of temporary constitutions, exploring their benefits as well as their costs, and providing prescriptions for their optimal use. A temporary constitution or constitutional provision, as this Essay defines it, limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures. Although underexplored and undertheorized, temporary constitutions have an extensive historical pedigree and neglected benefits for constitutionalism. Temporary constitutions can reduce error costs associated with entrenching a norm in a durable constitution and promote incrementalism and experimentation in constitutional design by allowing constitutional drafters to consider a greater quality and quantity of information about the empirical effects of their constitutional choices. The use of temporary constitutions can also reduce cognitive biases that tend to predominate in constitutional moments and promote consensus building among constitutional designers by lowering the decision costs involved in negotiating and reaching a constitutional bargain. Finally, temporary constitutionalism can respond to the central critique of durable constitutions by easing the “dead hand” problem, which refers to the ability of the constitutional founders to entrench norms that bind future generations. Temporary constitutions, however, can also

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impose their own costs on the polity by undermining constitutional stability and design efficiency, and by injecting different types of cognitive biases into the design process. This Essay analyzes these costs, offers some prescriptions for minimizing them, and studies the advantages and disadvantages of temporary constitutions vis-à-vis other strategies of constitutional design intended to ease constitutional rigidity or permanence, including “by law” clauses, low amendment thresholds, and constitutional vagueness.

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INTRODUCTION

Constitutions are ordinarily characterized as rigid and long-enduring, if not permanent, documents. In describing the utility of durable constitutions and of durable constitutionalism, commentators frequently invoke an analogy to Ulysses and the Sirens in Homer’s *The Odyssey*.¹ To avoid the temptation to succumb to the enchanting, but fatal, songs of the Sirens, Ulysses orders his men to bind him to the ship’s mast with tight chafing ropes and to fill their own ears with beeswax.² Upon hearing the Sirens, Ulysses signals the crew to set him free, but the men, adhering to his earlier instructions, refuse to obey his orders and continue sailing until the ship is out of danger.³ Ulysses is saved by his earlier foresight to constrain himself against his human temptations.

1. See, e.g., JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 195–96 (1989); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 324 (2008).

2. HOMER, *THE ODYSSEY* 276–77 (Robert Fagles trans., Penguin Books 1997).

3. *Id.*

Much like the mast that constrained Ulysses, a durable constitution is thought to constrain political majorities in moments of irrational fear or passion.⁴ A constitution represents a powerful acknowledgement by a society of its own weaknesses and its ability to fall prey to pernicious majoritarian impulses. Constitutions therefore bind the hands of future political majorities to ensure that short-term political passions do not trump society's long-term interests.⁵

The assumption that constitutions should be durable documents also finds strong support from the academic literature.⁶ Many commentators, such as Bruce Ackerman, describe constitution making as a profound, long-enduring

4. See JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 5 (1991). For a criticism of the analogy, see *infra* text accompanying notes 273–75.

5. See FINN, *supra* note 4, at 5 (“Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.”) (quoting Senator John Potter Stockton).

6. See, e.g., BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 3 (1992) (noting that a central task of successful revolutionaries is “to make the most of their opportunities and construct enduring forms of political order”); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 7 (2009) (“We assume that constitutions are bargains among elites that are meant—at least by their authors—to be enduring.”); *id.* at 10 (“As a normative matter, most designers and scholars seem to assume that [constitutions] should endure.”); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 191 (2000) (noting that constitutionalism “is ordinarily considered to bind an enduring political order”); Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 636 (“Constitution-making is usually characterized as an attempt to regulate the future on behalf of the past, an act of ‘temporal imperialism’ in which today’s drafters constrain future citizens.”); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394 (1995) (noting that constitutions are “written for the indefinite future”); Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184, 1191 (2013) (“Constitutions are typically adopted to bind the future on behalf of the present.”); Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 241 (1989) (“Almost all of the framers and ratifiers [of the U.S. Constitution] assumed that constitutions should, by their nature, be permanent.”); Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1250 (2008) (“In most settings, constitutions are understood to be legal instruments that are foundational in terms of defining and allocating legitimate governmental authority, hierarchically supreme over other sources of law, and entrenched—meaning that they are more difficult to change than other forms of law and intended to be more enduring.”); Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 U. PA. J. INT’L L. 239, 248 (2011) (“[T]he dominant position maintains the foundational role and permanent structure that epitomizes traditional constitutions.”); Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in *EDUCATION LAW STORIES* 83, 102 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) (“Constitutional principles typically do not expire with time; their shelf life is timeless.”); Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 500 (2012) (“[C]onstitutional structure should be durable through time and changed circumstances. . . .”); Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1515 (2008) (“A common aspiration includes the achievement of a durable agreement, an arrangement that will not be disregarded or suspended lightly and within a short period.”); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 756 (2012) (“[C]onstitutions are intended to be permanent”). *But see* ELKINS, GINSBURG & MELTON, *supra*, at 2 (noting that, as an empirical matter, the life expectancy of a national constitution is nineteen years).

form of lawmaking that transcends ordinary politics.⁷ According to the prevailing conceptions of constitutionalism, constitutions should be written in Ackermanian “constitutional moments” as durable documents intended to bind future generations.⁸

Many framers and ratifiers of constitutions around the world have acted in accord with the predominant assumption of constitutional permanence. For example, in the post-revolutionary United States, the Federalists and the Anti-Federalists shared the same assumption that a constitution should be a durable document, extending to “ourselves and our Posterity,” in the words of the preamble to the U.S. Constitution.⁹ Chief Justice John Marshall echoed the same sentiment in the seminal decisions he authored in the early years of the American Republic, framing his task as interpreting a constitution “intended to endure for ages to come.”¹⁰ For Marshall, constitutions established “fundamental” principles, and “as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.”¹¹ The framers of many modern-day constitutions share the same assumptions.

This Essay challenges the prevailing wisdom on both descriptive and normative grounds and provides the first systematic examination of temporary constitutions. A temporary constitution or constitutional provision, as this Essay defines it, limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures. The temporal limitation may apply to the entire constitution, as in the case of South Africa¹² and Poland,¹³ or only to a specific constitutional provision, as in the case of the United States¹⁴ and Portugal.¹⁵ Rather than idolizing constitutions as long-enduring, monolithic documents, temporary constitutionalism acknowledges the empirical reality that constitutional designers make costly mistakes with some regularity, and constitutional evolution must often be gradual and incremental.¹⁶ A constitution, after all, is written by humans, yet the prevailing conceptions of constitutional design require those ordinary, error-prone humans

7. See ACKERMAN, *supra* note 6, at 48–54.

8. See *id.*; see also *supra* note 6.

9. U.S. CONST. pmbl.; see also ELKINS, GINSBURG & MELTON, *supra* note 6, at 12–13 (“In general, the participants in Philadelphia in 1787 assumed that constitutions by their nature ought to be permanent, a position rooted in an understanding of the English Constitution as being ancient and immutable.”); Hamburger, *supra* note 6, at 242; David A. J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1857–58 (1987) (“[T]he Founders of the Constitution (in contrast to Jefferson) self-consciously conceived the written constitution as a structure of governance that would endure over long generations.”).

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

12. See *infra* notes 185–92 and accompanying text.

13. See *infra* notes 193–201 and accompanying text.

14. See *infra* notes 245–67 and accompanying text.

15. See *infra* notes 287–301 and accompanying text.

16. See TEITEL, *supra* note 6, at 196.

to do something that is quite superhuman: write a constitution that will govern future generations in perpetuity.¹⁷

Although underexplored and undertheorized, temporary constitutions are not a novel constitutional oddity. To the contrary, they have an extensive historical pedigree. Their use dates back at least to the Athenian Revolution, which produced two constitutions, one for the “immediate present” and the other “for the time to come.”¹⁸ The idea of a temporary constitution was also part of the U.S. Founders’ constitutional vocabulary.¹⁹ Thomas Jefferson famously argued in a letter to James Madison that “[t]he earth belongs always to the living generation” and that every constitution “naturally expires at the end of 19 years,” which Jefferson calculated as the turn of each generation.²⁰

In more recent history, even a casual survey reveals that many nations have used temporary constitutions, including the United States, Germany, Brazil, South Africa, Portugal, and Poland.²¹ Domestically, twelve state constitutions contain expiration dates and require their legislature, at regular intervals, to poll the public through a referendum on whether to convene a constitutional convention.²² Likewise, a provision in the U.S. Constitution expressly limited its own duration and prohibited Congress from banning the slave trade until 1808.²³ A modern-day example includes the first South African Constitution, ratified in 1994, which was self-avowedly temporary until the subsequent adoption of a more permanent constitution.²⁴

Despite the historical pedigree of temporary constitutions, academic commentary has surprisingly failed to provide a systematic and nuanced account of temporary constitutionalism. Although scholars have explored the

17. It is therefore not surprising that constitutional designers tend to be viewed, at least in some countries, as quasi-divine figures. *See generally* Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VANDERBILT J. TRANSNAT’L L. 1239 (2011) (discussing the cult of personality that the constitutional founders of Turkey and the United States have developed).

18. ARISTOTLE, THE ATHENIAN CONSTITUTION, part 31, available at http://classics.mit.edu/Aristotle/athenian_const.2.2.html (last visited Jan. 7, 2014).

19. *See* Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 250–55 (2007).

20. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> (last visited Jan. 7, 2014). Jefferson’s calculation was subsequently validated empirically by Elkins, Ginsburg, and Melton who calculated the average life expectancy of a national constitution at nineteen years. ELKINS, GINSBURG & MELTON, *supra* note 6, at 2.

21. *See infra* notes 185–92 (South Africa), 193–201 (Poland), 230–34 (Germany), 235–37 (Brazil), 245–67 (United States), 295–98 (Portugal), and accompanying text.

22. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited* (Nov. 2013) (unpublished manuscript) (on file with author).

23. *See* U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

24. *See infra* notes 185–92 and accompanying text.

use of sunset clauses in the context of legislation²⁵ and judicial opinions,²⁶ the use of temporary provisions in constitutions remains underexplored. The scant existing scholarship has focused only on a survey of transitional constitutions used in instances of regime change²⁷—a small piece in a complex and multifaceted puzzle—and has neglected to analyze temporary constitutionalism in broader conceptual and theoretical terms.

This Essay fills that scholarly void. It builds a theory for temporary constitutionalism, discusses its costs and benefits, and provides prescriptions for its optimal use. The Essay argues that temporary constitutions can be particularly useful for four purposes: (1) promoting incrementalism and experimentation where error costs are high, (2) reducing cognitive biases where cognitive biases predominate in constitutional design, (3) facilitating consensus building where decision costs are high, and (4) relaxing the “dead hand” problem by easing intertemporal control by the constitutional framers.

First, unlike a temporary constitution, a durable constitution may stifle constitutional incrementalism and experimentation.²⁸ The error costs of entrenching a norm in a durable constitution can be very high, especially where amendment rules make constitutional amendment difficult.²⁹ As a result, a durable constitution may freeze unwise constitutional norms in place. In contrast, the error costs of entrenching a norm in a temporary constitution are relatively low. If a provision in a temporary constitution proves unworkable in practice or produces undesirable consequences, that provision can be permitted to lapse. Temporary constitutionalism also tends to promote incrementalism and experimentation, because it allows constitutional drafters to incorporate a greater quality and quantity of information about the empirical effects of constitutional norms into their subsequent constitutional judgments.³⁰ Temporary constitutionalism further serves as a partial response to the principal-agent problem, which may arise when agents, the constitutional

25. See generally Gersen, *supra* note 19; see also STEPHEN BREYER, REGULATION AND ITS REFORM 365–66 (1982); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59–65 (1982); Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511 (1976); Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981); John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442 (2010); Keith E. Hamm & Roby D. Robertson, *Factors Influencing the Adoption of New Methods of Legislative Oversight in the U.S. States*, 6 LEGIS. STUD. Q. 133, 139–40 (1981); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978).

26. See generally Neal Katyal, *Sunseting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237 (2004).

27. See generally Jackson, *supra* note 6; TEITEL, *supra* note 6.

28. See *infra* Part II.A.

29. See Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006).

30. Cf. Gersen, *supra* note 19, at 248 (discussing the benefits of temporary legislation).

designers, fail to act in the best interest of the principals, the citizens.³¹ The use of temporary constitutions promotes monitoring of the agents by the principals, by informing the citizens about the consequences of the designers' constitutional choices before they are entrenched into a durable document.³²

Second, the Essay applies behavioral research to constitutional design to argue temporary constitutionalism may reduce cognitive biases that tend to predominate in constitutional moments. Under the availability heuristic,³³ durable constitutions drafted in the turbulent moments following a war, revolution, or social crisis may reflect an overarching emphasis on short-term needs. That, in turn, may result in a focus on achieving stability and national unity at the expense of other long-term constitutional goals, such as equality and protection of fundamental rights and freedoms.³⁴ The status quo bias may also create opportunities for powerful groups in nations transitioning from one regime type to another (for example, authoritarianism to democracy) to stack the constitutional deck in their favor and force a rebound to the earlier regime type. If these cognitive biases are entrenched into a durable constitution, they may have adverse effects on the polity after the exceptional circumstance that gave rise to the constitutional moment subsides. To reduce cognitive biases, a temporary constitution may be adopted for an interim period to allow transitional passions to settle and to achieve economic, social, and institutional stability before a more durable constitution is drafted.

Third, temporary constitutions may facilitate consensus building where decision costs—the costs of deliberating, negotiating, and finalizing the written constitution—are high. Because constitutional design is often a delicate exercise in consensus building, it demands collaboration between factions with competing substantive visions for the constitution. The durable nature of a constitution, and the attendant difficulty of amending or repealing an entrenched provision, raise decision costs by increasing incentives to hold out for the opponents of a contested provision who would otherwise bear the burden of repealing the provision. Conflict over contentious constitutional questions may derail the entire design process.³⁵ Temporary constitutionalism may reduce decision costs and promote consensus building by putting a temporal limit on the contested provision and assuaging, at least to some extent, the opponents of the constitutional provision who fear its placement in a durable document may make it prohibitively difficult to amend or repeal. The proponents, in turn, may agree to a temporal limit on the provision under the

31. See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 546–47 (2007) (discussing “timing rules” as a solution to the principal-agent problem in legislation).

32. See *id.* at 547.

33. See *infra* notes 131–38 and accompanying text (discussing the availability heuristic, which suggests that newly recognized threats tend to have a higher salience than earlier ones).

34. See *infra* notes 148–57 and accompanying text.

35. See *infra* note 220 and accompanying text.

assumption, correct or incorrect, that their political powers at the provision's expiration will allow them to reenact it. Finally, the passage of time may also diminish the constitutional conflict due to changes in societal or cultural norms.

Fourth, temporary constitutionalism may ease the "dead hand" problem, which refers to the ability of constitutional founders to draft rules that govern future generations long after the founders' deaths. Evolving societal and cultural norms may render constitutional provisions unwise or obsolete, resulting in a constitution riddled with anachronistic provisions. Temporary constitutionalism may relax the dead hand by allowing the constitutional drafters to set time limits on constitutional provisions where they are uncertain about the long-term consequences of a constitutional policy or where they are responding to social problems that are themselves temporary. Alternatively, the constitutional drafters may choose to place a temporal limit on the constitutional amendment rule and lower the threshold for amendment after a certain period of time, which would in turn ease the constitutional handcuffs placed on future generations.

Despite their significant benefits, temporary constitutions are not the panacea for all constitutional problems. To the contrary, they can impose their own costs on the polity by undermining constitutional stability and design efficiency, and by injecting different types of cognitive biases into the design process. These costs, and some prescriptions for minimizing them, are discussed throughout this Essay, particularly in Part III.

This Essay proceeds in three parts. Part I sets out the basic features and forms of temporary constitutions. Part II examines the functions of temporary constitutions and sets forth a theory for why and in what contexts temporary constitutions may provide an optimal alternative to their more durable counterparts. Part II.A analyzes how temporary constitutions can reduce error costs and promote incrementalism and experimentation in constitutional design; Part II.B studies how temporary constitutions may be effectively deployed to reduce cognitive biases; Part II.C explains how temporary constitutions may reduce decision costs in constitutional design and promote consensus building; and Part II.D examines how temporary constitutions may relax dead-hand control by the constitutional framers. Part III analyzes the potential objections to temporary constitutionalism and discusses the advantages and disadvantages of temporary constitutions vis-à-vis alternative design methods for easing constitutional rigidity or permanence, including "by law" clauses, low amendment thresholds, and constitutional vagueness.

I.
DEFINITION AND FORM

Under the default rule, a constitution lasts in perpetuity.³⁶ Intended to be durable and long lasting, if not permanent,³⁷ a constitution or constitutional provision remains in place until its amendment or repeal. The default rule for a temporary constitution is different. A temporary constitution or constitutional provision, as this Essay defines it, limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures.³⁸

The change in the default rule from durable to temporary has a significant burden-shifting effect. In a durable constitution, the opponents of a constitutional provision bear the burden of amendment or repeal. Although amending a durable constitution is possible,³⁹ the opponents must gather the requisite popular and political support to overcome the supermajority requirements on constitutional amendment that most democratic constitutions impose,⁴⁰ which renders the amendment of a constitution significantly more difficult than legislation. In addition, the labeling of a political choice as constitutional, as opposed to purely legislative, ordinarily makes it more costly to propose and ratify amendments.⁴¹ Especially where the political stakes are high, constitutional amendment may be prohibitively difficult: political parties benefit from maintaining a distinct position on contentious constitutional questions, and party defections by individual legislators may be unlikely.⁴² In contrast to durable constitutions, where the opponents must do the heavy lifting, the proponents of a temporary constitution or constitutional provision bear the burden of reenacting it following its sunset. This change in the default

36. Constitutions, in Vicki Jackson's words, are "legal instruments that are foundational in terms of defining and allocating legitimate governmental authority, hierarchically supreme over other sources of law, and entrenched—meaning that they are more difficult to change than other forms of law and intended to be more enduring." Jackson, *supra* note 6, at 1250.

37. See *supra* note 6.

38. Although some nations, most notably Britain, operate under "uncodified" constitutions, this Essay focuses exclusively on codified constitutions.

39. Some constitutions completely prohibit the amendment of one or more of their provisions. See Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225 (2013).

40. See Elster, *supra* note 6, at 366. A notable exception is New Zealand, which permits constitutional amendment through "ordinary legislative efforts." Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 394 n.61.

41. See generally Stephen M. Griffin, *The Nominee Is . . . Article V*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) [hereinafter CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES]. Even in New Zealand, where the constitution may be altered through an ordinary legislative act, documents that enjoy constitutional status tend to be more difficult to amend or repeal. See JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 101 (2000); Eule, *supra* note 40, at 394 n.61 (noting that, even under legislation-like amendment procedures, "there remain moral and political restraints on the legislative alteration of constitutional doctrine").

42. See Dixon & Ginsburg, *supra* note 6, at 656.

rule, and the attendant shift in the burden, generates both benefits and costs for constitutionalism that remain underexplored in the literature.

Temporary constitutions can assume two primary forms.⁴³ First, an entire constitution may declare itself to be temporary, as in the case of South Africa⁴⁴ and Poland.⁴⁵ Constitutions that limit the lifetime of the entire document are ordinarily adopted with an eye toward the later ratification of a more permanent document that will build upon the temporary constitution, retain some of its features, and alter or abandon others.⁴⁶

Alternatively, the sunset date may apply only to specific constitutional provisions, as in the case of the United States⁴⁷ and Portugal.⁴⁸ A temporal limitation on a specific provision may be placed to promote consensus building among the relevant decision makers.⁴⁹ Specific temporal limitations may also be useful where the constitutional designers are uncertain about the practical consequences of a constitutional norm,⁵⁰ where they seek to achieve small-scale incremental change,⁵¹ or where they are responding to a social problem that is itself temporary.⁵² The end goal in the employment of temporary constitutionalism is the creation of a more durable and more optimized constitution that incorporates the benefits generated from the use of a temporary constitution or a constitutional provision for an interim period.

This Essay's definition of a temporary constitution or constitutional provision includes those that declare themselves to be temporary without setting a specific sunset date for their expiration. In contrast to temporary constitutions with express sunset dates, which expire automatically, a temporary constitution without an express sunset remains in effect until it is affirmatively repealed. For example, Germany's post-World War II temporary constitution, labeled the Basic Law, did not set a date for its expiration.⁵³ Nevertheless, the Basic Law also provided that it would "cease to apply on the

43. The term "temporary constitution," as used in this Essay, is much broader than "transitional constitution," a term of limited scope that refers specifically to constitutions employed in moments of regime change (e.g., from autocracy to democracy). *See generally* TEITEL, *supra* note 6. The Essay's aim is to go beyond a limited survey of transitional constitutions and to analyze the use of temporary constitutionalism in all possible contexts and in broader conceptual and theoretical terms, which the literature has neglected to do.

44. *See infra* notes 185–92 and accompanying text.

45. *See infra* notes 193–201 and accompanying text.

46. *See, e.g.*, UNITED ARAB EMIRATES CONST., Dec. 2, 1971 art. 144.

47. *See infra* notes 245–67 and accompanying text.

48. *See infra* notes 287–301 and accompanying text.

49. *See infra* Part II.C (discussing consensus building).

50. *See infra* notes 79–82 and accompanying text (discussing experimentation).

51. *See infra* notes 69–78 and accompanying text (discussing incrementalism).

52. *See infra* Part II.D.

53. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.), *translation available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

day on which a constitution freely adopted by the German people takes effect,”⁵⁴ thereby declaring its temporary nature.

The burden-shifting effect discussed above does not apply to temporary constitutions without a sunset, because the opponents of such constitutions will continue to bear the burden of amending or repealing them. But even without an express sunset, the temporary nature of the constitution may tend to diminish the burden of amendment or repeal by placing the public and the relevant political actors on notice that the constitution is temporary and will be revisited. The promise of future action can mobilize supporters and keep the constitutional issue alive, placing a downstream pressure on the polity to reconsider the temporary constitution.⁵⁵ Despite any downstream pressures, however, if the opponents of the temporary constitution never obtain the popular and political support to effectuate change, the temporary constitution, despite any intentions to the contrary, might not be repealed or amended. Germany’s Basic Law, for example, remains in effect.⁵⁶

Ideally, of course, constitutional designers would draft error-free constitutions capable of governance for generations. The empirical reality, however, rarely matches that constitutional ideal.⁵⁷ Constitutional designers often fail to reach a consensus on contentious constitutional questions, obtain the requisite information to determine the consequences of their constitutional choices, presciently foresee the evolution of societal and cultural norms, and shun cognitive biases inherent in constitutional design in post-conflict situations.

These difficulties and limitations generate significant decision and error costs. Decision costs refer to costs associated with reaching a constitutional decision, and error costs refer to costs associated with the consequences of that constitutional decision.⁵⁸ The prevalence of these costs in constitutional design, and the functions that temporary constitutions may serve in mitigating them, are the subject of Part II. As further explained in that Part, temporal limitations on constitutions or constitutional provisions should be a part of the constitutional-design calculus, especially where decision costs or error costs are high. Decision costs tend to increase where the constitutional stakes or constitutional passions are high and consensus building among the parties to

54. *Id.* art. 146.

55. See Dixon & Ginsburg, *supra* note 6, at 646.

56. See Jackson, *supra* note 6, at 1281. Even where a temporary constitution becomes permanent, however, that does not mean that it failed to perform its functions. The constitution’s temporary nature, for example, may have facilitated the building of a consensus around the document, where a durable constitution could have derailed the design process. See *infra* notes 227–37 and accompanying text (discussing how temporary constitutions can promote consensus building).

57. See ELKINS, GINSBURG & MELLON, *supra* note 6, at 10 (“Establishing an enduring constitutional scheme appears to be quite difficult, particularly in new democracies outside of Western Europe and North America.”).

58. See Samaha, *supra* note 29, at 616.

the constitutional bargain is difficult. Error costs tend to increase where the quality of information about a constitutional provision is low. As decision and error costs increase, the probability of reaching an optimal constitutional outcome decreases. The probability of reaching an optimal outcome may also be low where the policy-making environment is dominated by cognitive biases,⁵⁹ where uncertainty about policy outcomes is high,⁶⁰ and where the framers are responding to social problems that are themselves temporary.⁶¹

A temporary constitution or constitutional provision may mitigate both error and decision costs by increasing the quantity and quality of information available to the constitutional designers,⁶² reducing cognitive biases,⁶³ promoting consensus building,⁶⁴ and allowing the framers to employ temporary solutions to temporary social problems.⁶⁵ Especially where the constitutional judgment at the drafting moment has a significant probability of being inaccurate, temporary constitutional provisions provide a significant advantage over their more durable counterparts.⁶⁶ In contrast, if the constitutional decision at the drafting moment is likely to be optimal, entrenchment via a more durable constitutional provision should be preferred.⁶⁷

Throughout this Essay, I also consider two other questions about temporary constitutions, one about their content and the other about their duration: What types of constitutional provisions are more suitable to temporal limitations, and what is the ideal duration of a temporal limitation? Although the answers to both questions are highly context dependent, which makes precise calibration difficult, the Essay identifies a series of variables relevant to answering these questions and provides some general prescriptions. As to content, temporal limits placed on fundamental structural provisions will tend to have a greater negative impact on constitutional stability if allowed to expire, in contrast to provisions that affect substance or process.⁶⁸ As to duration, the interim period should last long enough to permit major cognitive biases to dissipate and allow meaningful information gathering and conversation to take place. At some point, however, the marginal benefit of keeping a temporary provision in place will be outweighed by its marginal cost. The longer the temporary provision is in place, it becomes less likely that its opponents will consent to its placement into the constitution and more likely that the provision's potential expiration will destabilize the polity. Marginal benefit, in

59. *See infra* Part II.B.

60. *See infra* Part II.A.

61. *See infra* Part II.D.

62. *See infra* Part II.A.

63. *See infra* Part II.B.

64. *See infra* Part II.C.

65. *See infra* Part II.D.

66. *Cf.* Gersen, *supra* note 19, at 261 (discussing the benefits of temporary legislation).

67. *See id.* at 268 n.75.

68. *See infra* Part III.A.

turn, will vary according to the purpose sought to be achieved with the use of a temporary provision. The Essay therefore considers the cost-benefit calculation in detail below within each of the four sections in Part II regarding the various purposes that temporary constitutionalism can serve. In most cases, the optimal duration will be in the magnitude of several years.

II.

FUNCTIONS OF TEMPORARY CONSTITUTIONS

In four sections, this Part analyzes the benefits of temporary constitutions over their more durable counterparts. Section A discusses how temporary constitutions may promote incrementalism and experimentation where error costs are high; Section B studies how they may reduce cognitive biases that may predominate in constitutional design; Section C analyzes how they may facilitate consensus building where decision costs are high; and Section D explains how temporary constitutions may mitigate the “dead hand” problem by easing intertemporal control by constitutional framers.

A. Incrementalism and Experimentation

The seminal exposition of incrementalism appears in Robert Dahl and Charles Lindblom’s *Politics, Economics, and Welfare*.⁶⁹ Dahl and Lindblom define incrementalism as a “process of constantly testing one’s preferences by experience.”⁷⁰ Incrementalism is a form of social action that “takes existing reality as one alternative and compares the probable gains and losses of closely related alternatives” by making adjustments.⁷¹ Incrementalism, according to Dahl and Lindblom, promotes rational decision making in a multitude of ways.⁷² For one, it is difficult to predict the implications of unknown alternatives that are only remotely related to the existing reality.⁷³ People cannot rationally choose between alternatives that are fundamentally different from the existing reality; only after they experiment with alternatives can they determinate whether those alternatives are optimal.⁷⁴ In addition, incrementalism aids in verifying the consequences of an action; isolated alteration of a single variable allows the meaningful comparison of results.⁷⁵ Incrementalism is also reversible; when mistakes inevitably occur, they can be corrected.⁷⁶ Finally, incrementalism permits continual alteration without destroying the operating organization.⁷⁷ Abrupt, large-scale changes to

69. ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, & WELFARE* (1953).

70. *Id.* at 83.

71. *Id.* at 82.

72. *See id.* at 82–83.

73. *Id.* at 82.

74. *Id.* at 82–83.

75. *Id.* at 83.

76. *Id.*

77. *Id.*

entrenched norms and codes may face significant resistance,⁷⁸ derailing the alteration attempt; by contrast, small-scale incremental change may be more palatable.

Experimentation is a related, but slightly different, phenomenon. Constitutional experimentation supplies information about outcomes, which, in turn, facilitates rational change.⁷⁹ It can, but need not, be incremental;⁸⁰ it can occur on a large or small scale. In the United States, for example, states serve as laboratories for policy experiments by producing alternative solutions to societal problems.⁸¹ These experiments, in turn, generate a body of comparative knowledge of the advantages and disadvantages of particular policies.⁸²

How do these theoretical benefits of incrementalism and experimentation apply in the context of temporary constitutionalism and constitutional design? A durable constitution, particularly one with a difficult amendment rule, may impose enormous error costs.⁸³ The consequences of a constitutional choice may be revealed only through the passage of time.⁸⁴ A constitutional provision may prove to be unworkable in practice or produce undesirable substantive outcomes.⁸⁵ Nevertheless, a durable constitution may block any attempts to update or amend these constitutional provisions and freeze unwise constitutional norms in place.

By contrast, temporary constitutions can facilitate constitutional incrementalism and experimentation by reducing the error costs inherent in durable constitutions.⁸⁶ In a temporary constitution that expressly foresees revision, any errors at the drafting moment (“Time 1”) may be rectified more easily at the time of sunset (“Time 2”). Information about the practical consequences of a constitutional norm adopted in the abstract at Time 1 can be integrated into the re-examination process at Time 2, allowing for a more meaningful decision-making process and increasing the probability that an optimal norm will be adopted.⁸⁷ If a provision did not generate an optimal result during the interim period, that provision may be amended or repealed. In addition, if costs were generated by the absence of a provision in a wholly

78. *Id.* at 83–84.

79. *Id.*

80. *Id.* at 84.

81. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

82. *See* DAHL & LINDBLOM, *supra* note 69, at 84.

83. *See* Rosalind Dixon, *Updating Constitutional Rules*, 8 SUP. CT. REV. 319, 321 (2009); Dixon & Ginsburg, *supra* note 6, at 638.

84. *See* Dixon & Ginsburg, *supra* note 6, at 644.

85. *See* Dixon, *supra* note 83, at 321.

86. *See* Gersen, *supra* note 19, at 267.

87. *See id.* at 266. Of course, the mere availability of superior information does not necessarily mean that it will be used in the constitution-design process. *Id.* at 275. Political considerations, for example, may trump the optimal policy outcome dictated by the superior information gathered in the interim period. *Id.* at 276. But this problem is not limited to temporary constitutions. The designers of durable constitutions also may disregard salient information in order to pursue other interests.

temporary constitution, that provision may be included in the subsequent durable constitution.

Incrementalism and experimentation also may mitigate, at least partially, the principal-agent problem that may arise in constitutional design.⁸⁸ That problem refers to the failure of the agent—the constitutional designer—to act in the best interests of the principal—the citizenry.⁸⁹ The use of temporary provisions for the purposes of incrementalism or experimentation can reveal information about the practical consequences of constitutional norms. That, in turn, can allow the citizenry to monitor the consequences of the drafters' constitutional choices before those choices are entrenched into a durable document.⁹⁰ As early as 1765, John Adams wrote that “liberty cannot be preserved without a general knowledge among the people, who have a right . . . and a desire to know . . . the characters and conduct of their rulers.”⁹¹ If the citizenry can observe the consequences of constitutional choices, especially those concerning contentious questions, they can more effectively reward or punish political behavior.⁹² Because a temporary provision is in place for an interim period, the public also has time to mobilize against an undesirable constitutional norm before its entrenchment in a more durable document.⁹³ In contrast, if that norm were instead immediately entrenched into a durable constitution, the public would have to overcome a much higher barrier to obtain the desired reform.⁹⁴

The quantity of the information gathered about a constitutional norm will increase with the duration of the temporal limitation, or the period between Time 1 and Time 2. Nevertheless, at some point, the marginal benefit of gathering additional information will be outweighed by the marginal cost of keeping the temporary provision in place. The longer the duration of the temporal limitation, the less likely that its opponents will consent to its ratification at Time 1, and the more likely that its potential expiration at Time 2 will have a destabilizing effect on the polity.⁹⁵

Even absent any new information about the constitutional provision generated in the interim period, a re-examination at Time 2 may provide a

88. See Gersen & Posner, *supra* note 31, at 546–47.

89. See *id.*

90. See *id.* at 547.

91. See JOHN ADAMS, DISSERTATION ON THE CANON AND FEUDAL LAW (1765), reprinted in 3 THE WORKS OF JOHN ADAMS 447, 456 (Charles Francis Adams ed., 1851).

92. See TIMOTHY BESLEY, PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT 37, 99 (2006); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5, 10 (1986) (“With perfect information the voter is able to extract most of the rents in the transaction. . . . Intuitively, the greater the informational advantage that officials hold, the greater their ability to earn rents from office-holding.”).

93. See Gersen & Posner, *supra* note 31, at 570.

94. See *id.*

95. See *infra* notes 306–13 and accompanying text (discussing constitutional stability).

check against the persistence of unwise constitutional policy⁹⁶ by requiring constitutional framers to reconsider their constitutional choice. For example, Article I, Section 8, Clause 12 of the U.S. Constitution restricts the appropriation of money to raise and support armies to a term of two years.⁹⁷ In *The Federalist* No. 26, Alexander Hamilton supported this provision for its “deliberative benefits,”⁹⁸ as it would require the Congress “to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents.”⁹⁹ Although Hamilton’s discussion centers on the deliberative benefits of temporary legislative appropriations, its logic applies equally to the deliberative benefits of requiring constitutional designers to reconsider temporary constitutional provisions upon their expiration. Temporary provisions inconsistent with public interest may be allowed to expire.

A legislative analogue, the Ethics in Government Act of 1978,¹⁰⁰ demonstrates the virtues of experimentation and incrementalism. The concept of a “special prosecutor” (later renamed an “independent counsel”)—empowered to prosecute high-ranking officials for federal crimes and removable only for cause by the Attorney General—was a novel notion in our constitutional system.¹⁰¹ Because the notion was unfamiliar and the implications of any errors may have been quite severe, the Act’s drafters built a sunset provision into the law so that it would lapse after five years.¹⁰² Following that interim period, the Act would be reviewed to determine whether any of its provisions should be revised or allowed to lapse.¹⁰³ The Act was revised and reenacted on several occasions in response to its practical successes and failures and eventually allowed to expire in 1999.¹⁰⁴

To be sure, experimentation and incrementalism may occur even in durable constitutions. If a durable constitutional provision generates undesirable results, it may be repealed or amended through a constitutional amendment mechanism. But amendment of a constitutional provision is no

96. See Gersen, *supra* note 19, at 251.

97. U.S. CONST. art. I, § 8, cl. 12.

98. Gersen, *supra* note 19, at 251.

99. THE FEDERALIST NO. 26, at 129 (Alexander Hamilton) (Oxford Univ. Press 2008).

100. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

101. See Katyal, *supra* note 26, at 1242.

102. *Id.*

103. See S. Rep. No. 95-170, at 76–77 (1977). The Senate report for the Act explains why a sunset period of five years was included in the Act:

Five years is a reasonable time period to permit the provisions of this chapter to operate and then to review those provisions to see if too many or too few special prosecutors have been appointed . . . or to determine if there is a need to revise the method of appointment, the method of removal, or any other significant portion of this chapter.

Id. at 77.

104. Benjamin J. Priester, Paul G. Rozelle & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 LAW & CONTEMP. PROBS. 5, 10 (Winter 1999).

easy task. Most democratic constitutions impose supermajority requirements for amendment, and the applicable amendment rule might make it prohibitively difficult to amend or repeal an unwise provision. For example, of the 11,000 attempts to amend the U.S. Constitution since its ratification over 220 years ago, only 27 have succeeded.¹⁰⁵

Even where the applicable amendment rule does not set a bar as high as the U.S. Constitution, the entrenchment of a norm in a document assumed to be durable, if not permanent, ordinarily requires overwhelming momentum to overcome the power of the status quo. Legislative inertia, a well-documented phenomenon,¹⁰⁶ often freezes bad laws in place because, as Neal Katyal put it, “it is so much harder to get legislatures to *do* something than it is to get them *not* to do something.”¹⁰⁷ The legislative inertia phenomenon applies *a fortiori* to constitutions, which ordinarily are significantly more difficult to amend or repeal than ordinary legislation. In addition, the mere labeling of a political issue as constitutional, as opposed to legislative, raises the stakes involved and makes it more difficult to enact a constitutional amendment.¹⁰⁸ Even in the United Kingdom, where the Parliament is not legally constrained by a codified constitutional text, a claim that legislation raises constitutional concerns “may have the effect of raising the temperature of the debate.”¹⁰⁹ Therefore, repeal of even unwise constitutional provisions may be prohibitively difficult, and certainly more difficult than the repeal or revision of a self-avowedly temporary provision.¹¹⁰

The constitutional learning facilitated by temporary constitutionalism can also occur by comparing the implications of constitutional provisions adopted by other nations. The data provided by such comparative examination, however, may be highly context dependent. Constitutional norms appropriate for one context may be inappropriate for another for a multitude of historical, cultural, political, or legal reasons. The most accurate method of determining the propriety of a constitutional norm for a particular context is to implement and test the provision in that context.

Note also that even temporary constitutions may require calculated risk-taking, albeit to a lesser extent than durable constitutional design. The initial adoption of a constitutional provision, even for a temporary period, may

105. Dixon, *supra* note 83, at 342.

106. See, e.g., Gersen & Posner, *supra* note 31, at 560 (“[L]egislative action is more difficult and costly than inaction.”); Katyal, *supra* note 26, at 1237, 1240.

107. Katyal, *supra* note 26, at 1240.

108. See JANET L. HIEBERT, *LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW* (1996); Griffin, *supra* note 41, at 51.

109. ERIC BARENDT, *AN INTRODUCTION TO CONSTITUTIONAL LAW* 30 (1998).

110. The same phenomenon can be observed in the context of product design. Like unwise constitutional norms, suboptimal products, such as the inefficient QWERTY keyboard layout, can persistently dominate the market because of the costs inherent in overcoming the status quo bias. See ELKINS, GINSBURG & MELLON, *supra* note 6, at 15.

produce consequences difficult to forecast at the time of its adoption. Unlike a durable constitution, however, a temporary constitution permits constitutional designers to limit the temporal reach of a provision and terminate or alter it at its expiration. That, in turn, allows constitutional designers to control and minimize the inherent risks of constitutional decision making.

A final benefit of incrementalism arises in the context of constitutional reconstructions. Reconstructions often involve a two-step process: disentanglement or rupture from the former regime followed by reconstitutionalism.¹¹¹ The probability of successfully accomplishing both in one fell swoop is low. As William Partlett has argued, it may often be necessary to temporarily preserve governance structures from the former regime as new institutions are formed during reconstitutionalism.¹¹² In Central and Eastern Europe, for example, communist-era constitutions and institutions “played a major role in the emergence of the new constitutional order” by constraining unilateral exercises of power and encouraging broader deliberation and negotiation.¹¹³ Likewise, as I have argued in previous articles, in certain historical contexts, the military has played a democracy-promoting constitutional or political role in the initial stages of a transition from autocracy to constitutional democracy.¹¹⁴

At the same time, however, the inclusion of the military or institutions from the former regime in a durable constitutional order may sacrifice long-term constitutional legitimacy.¹¹⁵ A better alternative may be to adopt a temporary constitution that preserves, if necessary, former-regime institutions temporarily while new institutions develop and mature.¹¹⁶ Temporary constitutions may offer some substantial reforms over the displaced regime but also might retain some of its elements and institutions with an eye toward further constitutional change.¹¹⁷ In the context of constitutional reconstructions, the adoption of a temporary constitution thus reflects the practical reality that the nation is undergoing an incomplete transition, the new regime has not been consolidated, and the constitutional reconstruction is still in progress.

111. See TEITEL, *supra* note 6, at 200.

112. William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT’L L. 193 (2012) [hereinafter Partlett, *Dangers of Popular Constitution-Making*]; William Partlett, *Is Egypt’s Transition to Democracy Really So Stupid?*, I•CONnect (Nov. 11, 2012), <http://www.iconnectblog.com/2012/11/is-egypts-transition-to-democracy-really-so-stupid> [hereinafter Partlett, *Egypt’s Transition*].

113. Partlett, *Egypt’s Transition*, *supra* note 112.

114. See generally Ozan O. Varol, *The Military as the Guardian of Constitutional Democracy*, 51 COLUM. J. TRANSNAT’L L. 547 (2013) [hereinafter Varol, *Guardian*]; Ozan O. Varol, *The Democratic Coup d’État*, 53 HARV. INT’L L.J. 291 (2012) [hereinafter Varol, *Democratic Coup*].

115. See Varol, *Guardian*, *supra* note 114, at 595.

116. Cf. MARINA OTTAWAY, DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM 179 (2003) (“A new democratic government does not have the benefit of relying on institutions, because the institutions need to be developed and cannot generate power immediately.”).

117. See TEITEL, *supra* note 6, at 200.

The use of a temporary constitution during constitutional reconstruction also permits continued governance while reconstitutionalism is in progress. Most transitional societies view the establishment of a new constitution as a precondition to a return to ordinary politics.¹¹⁸ That highly idealized sequence frequently puts transitional societies in a serious bind. Lawmaking is often necessary to the functioning of a democratic society, but drafting a durable constitution is a frustratingly slow and contentious process. If a durable constitution is to be drafted before a return to ordinary politics, parliamentary business may grind to a halt while the new constitution is being drafted. The use of a temporary constitution that authorizes continued lawmaking allows the drafting of a durable document without destroying any institutions necessary for governance.¹¹⁹

Relatedly, a temporary constitutional provision may also promote incrementalism by serving as a “saving provision.” A temporary saving provision exempts certain preexisting conduct or legal relationships from the application of a new constitutional provision.¹²⁰ That, in turn, allows for the orderly implementation of a new constitutional rule without immediately disrupting existing legal relationships.¹²¹

Although constitutional incrementalism and experimentation have significant benefits, I do not suggest that incrementalism and experimentation should always be preferred. If the constitutional designers are adequately equipped with requisite levels of information and are reasonably confident about their normative preferences and the acceptability of those preferences to the polity, they can rationally take larger constitutional leaps.¹²² Indeed, the failure to take more durable constitutional steps when the moment is ripe may generate significant opportunity costs and may stymie the subsequent adoption of that constitutional norm. Temporary constitutionalism in the context of incrementalism and experimentation can therefore be useful primarily when there is uncertainty about the long-term consequences of a constitutional norm or about the acceptability of that norm to the polity.

B. Reducing Cognitive Biases

Many scholars have argued that a revolution or a transitional moment presents the ideal moment for constitutional change. Bruce Ackerman, for example, has written about the “promise of a revolutionary constitution.”¹²³ To Ackerman, a revolution’s aftermath generates “a political constellation that

118. See Jackson, *supra* note 6, at 1291.

119. See *id.* (“[D]emocratic politics are not possible absent a basic set of rules and units for voting, provisions usually found (at least in general terms) in constitutions.”).

120. See, e.g., TEX. CONST., app’x (Notes on Temporary Provisions for Adopted Amendments).

121. See *id.*

122. See DAHL & LINDBLOM, *supra* note 69, at 84.

123. ACKERMAN, *supra* note 6, at 49.

allows for the mobilization of deep and broad support for a liberal constitution.”¹²⁴ In other words, constitution making is the necessary and final stage of a revolution and post-revolutionary order requires “a systematic effort to state the principles of a new regime.”¹²⁵

Though appealing in principle, these arguments neglect the empirical reality that the same “political constellation” that mobilizes support for a new constitution can also easily derail it. These arguments also presume a sane constitutional moment, ripe for cool and calm reflection, but constitutional moments more often are marked by passionate and destabilizing conflict. In Section 1, I explain why constitutional moments often present less-than-optimal conditions for drafting a durable constitution. Section 2 analyzes how the use of temporary constitutions or constitutional provisions may produce more desirable outcomes in turbulent constitutional moments.

1. The Failed Promise of Constitutional Moments

As Jon Elster has aptly observed, “the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making.”¹²⁶ With some exceptions,¹²⁷ constitutions are ordinarily written in the aftermath of a war, revolution, economic or social crisis, or other exceptional circumstances.¹²⁸ The same turbulent conditions that lead to a call for a new constitution can also foster a constitutional-design environment based on passion rather than calm and calculated reason.¹²⁹ For four primary reasons, constitutional moments, despite their glorification in the literature, can present instances where cognitive biases tend to predominate rational decision making and undermine ideal constitutional-design conditions.¹³⁰

124. *Id.* at 3.

125. *Id.* at 57. James Madison likewise expressed his confidence in constitution drafting in post-conflict moments:

We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

THE FEDERALIST NO. 49, at 251 (James Madison) (Oxford Univ. Press 2008).

126. Elster, *supra* note 6, at 394; *see also* Jackson, *supra* note 6, at 1249.

127. A notable exception includes the constitution-drafting process in Sweden in 1974, which occurred in unexceptional circumstances. *See* Elster, *supra* note 6, at 370.

128. *See* Elster, *supra* note 6, at 370–71.

129. *Id.* at 394.

130. For an overview of cognitive biases that affect decision making, *see generally* BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

First, as the constitutional reconstructions following the 2011 Arab Spring exemplify, constitutional moments are often turbulent occasions, marked by chaos, conflict, economic and social instability, violence, and perhaps a full-blown civil war. A durable constitution drafted in these tumultuous moments (or in their immediate aftermath) will often focus on the short-term societal needs of the post-conflict moment and entrench provisions perceived as necessary in that conflict-laden atmosphere. As Cass Sunstein has observed, under the availability heuristic, earlier events tend to have a smaller impact than more recent ones.¹³¹ If a particular hazard has occurred recently, people will tend to believe that it has a higher probability of reoccurring in the future.¹³² For example, residents of flood plains are less likely to purchase flood insurance if floods have not occurred in recent memory.¹³³ In contrast, the number of people who purchase earthquake insurance increases in the immediate aftermath of a major earthquake.¹³⁴

Similarly, policymakers and citizens may overestimate and overreact to newly recognized threats generated by the chaotic post-conflict moment, however unlikely their recurrence may be.¹³⁵ The availability heuristic is especially pronounced where the risks have a high degree of salience—for instance, where a recent risk has resulted in serious injury or death.¹³⁶ Interested political and private actors, including the media, can easily exploit the availability heuristic for their own goals.¹³⁷ That, in turn, is likely to result in the adoption of constitutional provisions based on information that is preliminary at best and inaccurate at worst.¹³⁸

A conflict-weary population may be all too willing to make short-sighted constitutional compromises in the name of securing social and economic stability.¹³⁹ For example, the drafters may grant the executive branch

131. Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1301 (2003); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (“There are situations in which people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind. . . . This judgmental heuristic is called availability.”).

132. Jolls, Sunstein & Thaler, *supra* note 130, at 1519.

133. *Id.* at 1518–19 (“The same phenomenon may occur in other areas of regulatory law; an example here is the move toward heavy regulation of school bus safety in the wake of media coverage of school bus accidents in which children were killed.”).

134. Sunstein, *supra* note 131, at 1301.

135. See Gersen, *supra* note 19, at 269; Katyal, *supra* note 26, at 1239 (“Congress, faced with the crisis du jour, has a tendency to overreact on the basis of limited information.”).

136. See Jolls, Sunstein & Thaler, *supra* note 130, at 1519; Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 121 (2003) (noting the public’s tendency to “show a disproportionate fear of risks that seem unfamiliar”).

137. See Jolls, Sunstein & Thaler, *supra* note 130, at 1519.

138. See Gersen, *supra* note 19, at 270.

139. See Katyal, *supra* note 26, at 1238 (noting the “all-too-human desire for security to trump abstract ideals like liberty and equality”); Ludsin, *supra* note 6, at 258; Eric A. Posner & Adrian

emergency powers that permit the unilateral curtailment of individual rights in the name of national security or unity.¹⁴⁰ The desire to preserve stability and security may hasten abuses of the emergency power. The first constitution-making process following Egypt's recent promised transition to democracy, for example, produced a document replete with loopholes that allow the government to curtail the protection of individual rights in the name of ensuring national security.¹⁴¹ And as some commentators observed, some Egyptians "voted yes . . . to end the chaos of the transition rather than to endorse the text of the charter."¹⁴² A durable constitution that incorporates policies generated by cognitive biases in the post-conflict moment may therefore become anachronistic and out of sync with societal needs and desires after the turbulence subsides.¹⁴³

In the Federalist Papers, Alexander Hamilton and James Madison treated "temporary" political concerns pejoratively.¹⁴⁴ Speaking of the House of Representatives, Hamilton wrote in *The Federalist No. 27*:

[T]hey will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors or temporary prejudices and propensities, which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.¹⁴⁵

Likewise, writing in *The Federalist No. 10*, Madison argued that a republican form of government was necessary to prevent citizens from sacrificing justice for "temporary or partial considerations."¹⁴⁶

The Indian Constitution's preventive detention provisions illustrate Madison's and Hamilton's concerns. The Indian Constitution was drafted after the end of British colonialism and during a conflict-laden period in Indian history marked by an armed rebellion in Telangana and violence with Pakistan

Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 609 (2003) ("During an emergency, people panic, and when they panic they support policies that are unwise and excessive.")

140. See Ludsin, *supra* note 6, at 258–59; Posner & Vermeule, *supra* note 139, at 627 ("The panic thesis argues that the problem with emergency measures is . . . that they are frequently irrational and thus infringe civil liberties without also creating sufficient national security benefits.")

141. See, e.g., Marc Lynch, *The Battle for Egypt's Constitution*, FOREIGN POL'Y (Jan. 11, 2013), http://lynch.foreignpolicy.com/posts/2013/01/11/the_battle_for_egypts_constitution ("The constitutional drafting process [in Egypt] . . . had been a shambolic mess for over a year and little resembled academic conceptions of how a constitutional process should unfold. There was little high-minded public discourse here, little search for wide national consensus, little attempt to reach beyond political interest to seek a higher dimension of political agreement.")

142. David D. Kirkpatrick & Kareem Fahim, *Egypt Islamists Expect Approval of Constitution*, N.Y. TIMES, Dec. 16, 2012, at A1.

143. See Ludsin, *supra* note 6, at 271.

144. See Gersen, *supra* note 19, at 250.

145. THE FEDERALIST NO. 27, at 132 (Alexander Hamilton) (Oxford Univ. Press 2008).

146. THE FEDERALIST NO. 10, at 53 (James Madison) (Oxford Univ. Press 2008).

over contested territories.¹⁴⁷ That tumultuous moment produced a cognitive bias in the drafting of the Indian Constitution. Although fully aware of the use of preventive detention as a tool for tyranny by the British, the Constituent Assembly rejected due process protections for detainees and allowed the use of preventive detention.¹⁴⁸ The Constitution permitted extrajudicial detention without charges to prevent a future crime as a legitimate law enforcement tool.¹⁴⁹ Preventive detention was perceived as a necessary evil to safeguard the new state at its conflict-laden transitional moment, but its preservation in a durable constitution allowed later government officials to use the provision to suppress opposition, long after the security threats that necessitated preventive detention dissipated.¹⁵⁰ The placement of a temporal limit on the preventive-detention provision would likely have generated a more optimal outcome.

Second, constitutions should ordinarily protect the rights of minorities against majoritarian impulses.¹⁵¹ Perversely, a constitution drafted in a chaotic post-conflict moment may force underrepresented societal groups to subordinate their demands for equality to the perceived need to achieve the more pressing goals of preserving stability or national unity.¹⁵² For example, women had little influence in the drafting of Palestine's Constitution and had to set aside their aspirations for legal equality in the name of national unity.¹⁵³ Women's demands for equality were also bargained away in the drafting of Egypt's first post-Mubarak Constitution to mollify the concerns of the ultraconservative Salafists, whose support was needed for the ratification of the Constitution by the Constituent Assembly.¹⁵⁴ The Constitution was then rammed through under a swift timetable on the basis that its adoption was necessary to end the post-revolutionary conflict, ensure political and economic stability, and complete the transition from Mubarak's autocratic rule.¹⁵⁵ The 1791 constitution-making process in France likewise generated a constitution that eschews, among other things, judicial review and contains few restrictions on majoritarian impulses.¹⁵⁶ These examples illustrate another product of the availability heuristic, which can lead to *under*-regulation where the polity

147. See Ludsin, *supra* note 6, at 259.

148. See INDIA CONST. art. 22, § 3(b); Ludsin, *supra* note 6, at 259.

149. See INDIA CONST. art. 22, § 3(b); Ludsin, *supra* note 6, at 259.

150. See Ludsin, *supra* note 6, at 260.

151. See Cass R. Sunstein, *Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe*, 2 CONST. POL. ECON. 371, 385 (1991) ("Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes.").

152. See Ludsin, *supra* note 6, at 272.

153. See *id.* at 273.

154. See generally *Salafist Nour Party Rejects Gender Equality in Egyptian Constitution*, ALBABA NEWS (Nov. 5, 2013), <http://www.albawaba.com/news/egypt-constitution-531423>.

155. See *Egypt Crisis: Rival Rallies as Referendum Looms*, BBC NEWS (Dec. 14, 2012), <http://www.bbc.co.uk/news/world-middle-east-20726474>.

156. See Elster, *supra* note 6, at 383.

underestimates the importance of certain issues, such as equality, because seemingly more salient threats, such as those of violence and persistent protests, predominate on the polity's radar screen.¹⁵⁷

Third, constitutional moments are also often affected by the status quo bias, which refers to an irrational preference for the current state of affairs.¹⁵⁸ Revolutions tend to produce outbreaks of nostalgia,¹⁵⁹ and the power of the status quo is undeniable. In the political and social turmoil that a democratic transition produces, many wistfully harken back to the socially and economically stable days of the former regime.¹⁶⁰ Change may be costly, difficult to comprehend, and questionable.¹⁶¹ As revolution fatigue sweeps over the nation,¹⁶² inherited autocratic institutional structures may appear normatively superior to theoretical alternatives.¹⁶³ For example, according to a May 2012 nationwide survey of Egyptians by the Pew Research Center's Global Attitudes Project, 52 percent of those surveyed believed that the country was either worse off or neither better nor worse since Hosni Mubarak was deposed.¹⁶⁴ Only 44 percent believed Egypt was better off after Mubarak.¹⁶⁵ In August 2013, 80 percent of Egyptians believed that the country was worse off

157. See Jolls, Sunstein & Thaler, *supra* note 130, at 1519; Ludsin, *supra* note 6, at 270.

158. See Dixon & Ginsburg, *supra* note 6, at 656.

159. See generally SVETLANA BOYM, *THE FUTURE OF NOSTALGIA* (2001).

160. See GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 4 (1986) ("Compared to periods of 'order' which characterize the high point of authoritarian rule, the uncertainty and indirection implied in movements away from such a state create the impression of 'disorder.' This impression some compare nostalgically with the past, while overlooking or regretting the transition's revival of precisely those qualities which the previous regime has suppressed: creativity, hope, self-expression, solidarity, and freedom.").

161. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 691 (2011); *id.* at 708 ("Maintaining coordination around the existing, and therefore focal, order will always be much easier than attempting to recoordinate around some alternative constitutional regime."); Adam Przeworski, *Democracy as a Contingent Outcome of Conflicts*, in *CONSTITUTIONALISM AND DEMOCRACY* 59, 75 (Jon Elster & Rune Slagstad eds., 1988) ("[T]he authoritarian power apparatus may resist the transition to democracy even when the forces within the civil society upon which the regime rests are willing to try their chances under democratic conditions.").

162. See Michael Slackman, *When a Punch Line Is No Longer a Lifeline for Egyptians*, N.Y. TIMES, Apr. 6, 2011, at A11.

163. See Levinson, *supra* note 161, at 691.

164. *Egyptians Remain Optimistic, Embrace Democracy and Religion in Political Life*, PEW RES. CENTER (May 8, 2012), <http://www.pewglobal.org/2012/05/08/chapter-1-national-conditions-and-views-about-the-future> [hereinafter *Egyptians Remain Optimistic*]; see also Steven A. Cook, *It's Still Mubarak's Egypt*, FOREIGN POL'Y (June 13, 2012), http://www.foreignpolicy.com/articles/2012/06/13/it_s_still_mubarak_s_egypt ("Consider Egypt strictly by the numbers, and the Mubarak era may have begun to look better to Egyptians—and not just to the *felool*, or remnants of the previous power structure.").

165. *Egyptians Remain Optimistic*, *supra* note 164.

following Mubarak's ouster.¹⁶⁶ A constitution drafted in this environment may be prone to entrenching provisions that are unsuitable for democratic progress.

Like the public, political actors that have inherited the reins from an autocrat may be tempted to reform and recreate—in other words, produce a new autocracy in the process of reforming an autocratic regime. Post-authoritarian societies tend to lack a culture of political pluralism and institutions necessary to provide effective democratic governance. That is because authoritarian regimes ensure their survival by stifling political opposition, as well as economic and social pluralism. In a post-authoritarian society, therefore, many of the existing institutions may not have the stability to immediately serve as the external enforcer of the constitutional bargain and support a competitive democracy. Many in the polity, deprived of credible sources of information during the authoritarian regime, may also be unable to form an opinion on where they stand on many issues.

Without effective political pluralism and opposition, the opportunity is ripe for powerful groups to capture the constitution-design process and stack the constitutional deck in their favor. In Venezuela, for example, President Hugo Chavez was able to seize unilateral control over the constitution-design process, producing a constitution that marginalizes opposition groups and creates a competitive authoritarian regime.¹⁶⁷ The constitution-making processes in Russia, Belarus, and Kazakhstan produced similar results.¹⁶⁸

Fourth, constitution making is a frustratingly long process that often must be condensed to a short time frame,¹⁶⁹ which exacerbates cognitive biases. The establishment of a new constitution is often painfully slow, and a well-functioning political marketplace does not emerge in one day¹⁷⁰—a fact often overlooked in this technological era of Twitter and Facebook revolutions. Constitutions are not written in succinct 140-character Twitter posts, and decades of repression, instability, and inexperience in pluralistic politics cannot be resolved immediately. And most emerging democracies remain unable to cope with the mounting pressure to swiftly democratize—create effective political institutions, stop sectarian infighting, join international alliances, and get the military out of politics.¹⁷¹ The polity's perceived need to reach a rapid constitutional resolution of immediate concerns may lead to the imposition of

166. Mohamed Younis, *Egyptians See Life Worse Now than Before Mubarak's Fall*, GALLUP WORLD (Aug. 16, 2013), <http://www.gallup.com/poll/164015/egyptians-life-worse-mubarak-fall.aspx>.

167. See generally David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013).

168. See generally Partlett, *Dangers of Popular Constitution-Making*, *supra* note 112, at 209–23.

169. See Dixon & Ginsburg, *supra* note 6, at 642–43.

170. See Samuel P. Huntington, *Political Development and Political Decay*, 17 WORLD POL. 386, 395 (1965); see also NARCÍS SERRA, *THE MILITARY TRANSITION: DEMOCRATIC REFORM OF THE ARMED FORCES* 239 (Peter Bush trans., 2010).

171. See REBECCA L. SCHIFF, *THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS* 4 (2009).

internal time restraints on constitutional drafters. Political agreements may stipulate a time limit for the constitutional-design process in order to establish a basic framework for governance, as was the case in Kenya, Nepal, and most recently, Egypt.¹⁷²

Foreign occupiers, anxious to terminate their involvement in a constitutional reconstruction, may also impose external time restraints on the design process.¹⁷³ For example, international actors, including the United States and the United Nations, required the constitution-design process in Afghanistan to be completed within two years—a formidable challenge in a society emerging from twenty-five years of civil war.¹⁷⁴ Similarly, United Nations officials required the constitutional drafting in East Timor to take place within ninety days.¹⁷⁵ The United States occupation in Iraq likewise forced a rushed constitutional-design process, which was completed in less than six months through a process that excluded Sunni factions.¹⁷⁶ The quick production of the Iraqi Constitution did little to assuage sectarian conflict in Iraq and may have hastened Iraq's descent into civil war.¹⁷⁷ These temporal restraints on the constitutional-design process often do not permit sufficient deliberation over contentious questions about constitutional procedure and substance, and invite short-term cognitive biases to infect a durable document.

2. *Temporary Constitutions in Constitutional Moments*

The cognitive biases summarized in the previous Section may dominate constitutional moments and result in the entrenchment of less than optimal constitutional norms into a durable document. The prevailing approach, which suffers from an unyielding focus on the founding moment and the desire to draft a durable constitution at that moment, may therefore impose enormous costs on the polity. Constitutions, after all, are a means to an end and not the end themselves. They should promote positive political transformation, not undermine it.¹⁷⁸

172. See Dixon & Ginsburg, *supra* note 6, at 643.

173. See *id.* at 642–43.

174. J. Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 535, 558 (Laurel E. Miller ed., 2010) [hereinafter FRAMING THE STATE IN TIMES OF TRANSITION].

175. See Louis Aucoin & Michele Brandt, *East Timor's Constitutional Passage to Independence*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 174, at 245, 254.

176. See Jackson, *supra* note 6, at 1273 & n.61, 1275.

177. See Dixon & Ginsburg, *supra* note 6, at 643; Mona Iman, *Draft Constitution Gained, but an Important Opportunity Was Lost*, U.S. INST. OF PEACE (Oct. 11, 2005), <http://www.usip.org/publications/draft-constitution-gained-important-opportunity-was-lost> (“With more time, the [Iraqi Constitution] could arguably have commanded greater Sunni Arab support, with consequent gains for governmental legitimacy and peace in Iraq.”).

178. See TEITEL, *supra* note 6, at 200.

A temporary constitution may alleviate the transient passions that dominate some constitutional moments.¹⁷⁹ To reduce cognitive biases, a temporary constitution may be adopted for an interim period to allow transitional passions to settle and to achieve economic, social, and institutional stability before a more durable constitution is drafted. Stability is often necessary to build trust between the conflicting parties and promote consensus on contentious constitutional questions.¹⁸⁰ A durable constitution drafted some time after the initial turbulent transition period may allow at least some short-term cognitive biases to diminish and generate a more rational decision-making process.¹⁸¹ Temporary constitutions can thus provide the opportunity for a “sober second thought”¹⁸² on the constitutional choices adopted in the temporary document.¹⁸³ In addition, a temporary constitution can serve as a stopgap measure by establishing some ground rules for governance on a short-term basis. The adoption of those ground rules, with basic principles for political governance and discourse, may serve to “civilize the political conflicts” that might otherwise turn into violent confrontations.¹⁸⁴

For example, the constitutional drafters in South Africa and Poland successfully used temporary constitutions to negotiate the constitutional challenges presented by their transitions to more pluralistic and representative democracies. In effect from 1994 until 1997, the temporary South African Constitution was a self-proclaimed “historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”¹⁸⁵ In the words of its preamble, South Africa’s temporary constitution reflected the practical need to promote “national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.”¹⁸⁶

179. See Gersen, *supra* note 19, at 250.

180. See Ludsin, *supra* note 6, at 268.

181. See Gersen, *supra* note 19, at 266.

182. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2d ed. 1986) (quoting Justice Harlan F. Stone).

183. For example, in explaining why sunset clauses were included for certain provisions in the USA PATRIOT Act, Senator Levin stated, “We added sunset provisions so we could review the law we wrote with the benefit of greater thought, in an atmosphere more conducive to protecting our liberties than understandably was the situation immediately after a horrific, wrenching, deadly attack.” 152 CONG. REC. S1616 (2006).

184. See Heinz Klug, *Constitution-Making, Democracy, and the “Civilizing” of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 24 WISC. INT’L L.J. 269, 291 (2007).

185. S. AFR. (INTERIM) CONST., 1993, ch. 15.

186. S. AFR. (INTERIM) CONST., 1993, pmb.; see also Jackson, *supra* note 6, at 1268–69 (“The Interim Constitution was a substantial governance instrument and included over 250 articles dealing with executive, legislative, and judicial power, as well as local, provincial, and national

South Africa's temporary constitution paved the way for the establishment of a pluralistic, representative democracy, despite its ratification by the apartheid-era Parliament.¹⁸⁷ The temporary constitution was palatable, even though it had its origins in the apartheid regime, precisely because it was expressly provisional and foresaw the establishment of a more permanent constitution by a representative constituent assembly.¹⁸⁸ A democratically elected legislature began drafting a constitution in 1994 in a process that involved extensive public outreach, resulting in the education of more than 70 percent of the public about the constitutional process.¹⁸⁹ The constitution was then submitted to the South African Constitutional Court, which relied on the prohibitions on racial and ethnic discrimination in the temporary constitution to invalidate the subsequent constitution.¹⁹⁰ The constitution was then redrafted to comply with the principles in the temporary constitution and thereafter approved by the Constitutional Court.¹⁹¹ The adoption of the temporary constitution, which made available legitimate rules for governance and discourse, along with international condemnation of the apartheid government, helped avert the significant potential for violence in post-apartheid South Africa.¹⁹²

Likewise, in its transition from communism to democracy, Poland employed a temporary constitution.¹⁹³ After communism fell in 1989, there was consensus in Poland on the need for a new constitution, but little agreement on its substance, including the structure of the new government and the nature of rights.¹⁹⁴ Political actors also sharply disagreed on the process for the adoption and ratification of the new constitution.¹⁹⁵ The diverse composition of the Parliament also made consensus on an entirely new document difficult to achieve: at its apex, the parliamentary body comprised thirty-eight different political parties ranging in ideology from post-communism to pro-business and pro-reform.¹⁹⁶

authority. It provided, inter alia, for the establishment of a Constitutional Court and set forth basic rights to be enforced by that court. It not only specified the procedures to be followed for adopting a constitution, but it also specified thirty-four basic principles with which the new constitution would need to comply.”).

187. See TEITEL, *supra* note 6, at 198.

188. *Id.*

189. See Jackson, *supra* note 6, at 1269.

190. See *id.*; TEITEL, *supra* note 6, at 198 nn.20 & 22.

191. See Jackson, *supra* note 6, at 1269.

192. See *id.* at 1269–70; see Klug, *supra* note 184, at 291.

193. See David H. Cole, *Poland's 1997 Constitution in Its Historical Context*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1. See generally MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1998).

194. Cole, *supra* note 193, at 28.

195. *Id.*

196. *Id.* at 28–29.

In this polarized environment, the adoption of a temporary constitution, labeled the “Small Constitution” of 1992, proved to be the best solution.¹⁹⁷ Aimed at providing a temporary solution to the existing political paralysis, the Small Constitution focused exclusively on changes to the state structure and left for a future document revisions to the other aspects of the Constitution, including individual liberties.¹⁹⁸ The adoption of the temporary constitution also allowed the deferral of contentious religion-state issues, including the regulation of abortion, which may have derailed the constitution-design process.¹⁹⁹ The interim period during which the Small Constitution remained in effect allowed further dialogue on contentious questions and the inclusion of interested actors. A more durable constitution was adopted five years later in 1997 and remains in effect today.²⁰⁰ Many of the structural provisions of the Small Constitution were included in the 1997 Constitution, after proving their value during the interim period.²⁰¹

The use of a temporary constitution may also allow time for the formation of organized political parties and an effective political marketplace, which are both essential mechanisms in constraining unilateral exercises of power during constitution drafting.²⁰² With an effective opposition and informed polity, drafters may be less likely and able to stack the constitutional deck in their favor. A more durable design may be preferred, however, where there is no substantial danger of unilateral exercise of power during the drafting process and no attendant ability of any dominant group to capture the constitution-making process. In such circumstances, the polity may be operating under a Rawlsian veil of ignorance, where the relevant parties face uncertainty about their political prospects and the distribution of burdens and benefits that will result from the adoption of a particular constitutional norm.²⁰³ If the polity opts for a temporary constitution in such cases, a political group may become

197. *Id.* at 31.

198. *Id.*

199. *See* Jackson, *supra* note 6, at 1267 n.45; JON ELSTER, CLAUD OFFE & ULRICH K. PREUSS, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 64 (1998).

200. *See* Jackson, *supra* note 6, at 1265–66.

201. The structural elements retained in the 1997 Constitution include a strong parliamentary system, the requirement that certain presidential acts be countersigned by the Prime Minister, the authorization provided to the Sejm (the lower house of the Parliament) to override a presidential veto by a two-thirds majority and an “entirely novel” procedure for nominating and approving a Prime Minister, whereby the burden of naming a Prime Minister begins with the President, but shifts to the Sejm if the nominee’s cabinet fails to receive a vote of confidence from an absolute majority of the Sejm within fourteen days. *See* BRZEZINSKI, *supra* note 193, at 101–02, 120–26.

202. *See* Landau, *supra* note 167, at 923 (arguing that “the central challenge of constitution-making is . . . to constrain unilateral exercises of power”).

203. *See* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (“A veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers; it does so by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision.”).

dominant in the interim period and thereafter capture and unilaterally control the drafting process for a durable constitution. That, in turn, would produce a less desirable outcome than the drafting of a durable constitution in the earlier period of effective political opposition.

To be sure, the passage of time will not eliminate all cognitive biases and may potentially introduce new ones.²⁰⁴ For example, affected by the status quo bias, the polity may favor the preservation of the temporary provision despite any information about its undesirable effects. The salience of the status quo bias will also depend on the length of the temporal limitation. The bias will tend to be more pronounced where the temporary provision remains in place for a relatively long duration, which might make it difficult to revisit constitutional judgments, even those that were considered contentious at the time of ratification.²⁰⁵ The status quo bias, however, is unlikely to be as effective where, as here, the constitutional provision gives advance notice of its expiration and puts the polity on notice that the provision may be amended, replaced, or repealed.²⁰⁶ The salience of the status quo bias diminishes even more significantly for those provisions with express sunset dates, since they automatically expire on a specified date and put the burden on their proponents to gather sufficient popular and political support to reenact them. In addition, the operation of the status quo bias as a result of a temporary provision will not always be undesirable. If a previously contested provision achieves general acceptance due to the passive operation of the status quo bias during the interim period, that may generate important benefits in terms of consensus building and constitutional stability.

It is also possible that newly recognized risks or threats will arise when the temporary constitution or constitutional provision sunsets, which may trigger the availability heuristic for a new set of low-probability, but recent, threats. If the length of the temporal limitation exceeds the duration of the post-conflict situation, however, those newly recognized risks in many cases are unlikely to be as salient as those threats present in the immediate post-conflict moment, which is often marked by deep conflict, persistent protests, and violence. Ongoing violence may, among other things, stymie information gathering and limit public participation in the constitutional-design process.²⁰⁷ The recent tumultuous constitutional reconstructions taking place following the 2011 Arab Spring are good examples of the turbulent conditions often present in post-conflict moments and of the formidable challenges they present to constitution drafting. A constitution drafted after the revolutionary violence has

204. See also *infra* note 241 and accompanying text (discussing the confirmation bias).

205. See Dixon & Ginsburg, *supra* note 6, at 657.

206. There are some examples to the contrary. For example, Germany's Basic Law, intended to be a temporary constitution, remains in effect. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] (Ger.); PETER E. QUINT, THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION 52–55 (1997).

207. See Ludsin, *supra* note 6, at 255.

subsided may not be affected by cognitive biases to the same extent as a constitution drafted in the immediate aftermath of the post-conflict moment. The terms of the interim constitutions used during the Arab Spring, such as the interim constitution in Egypt, were too short to allow the post-conflict turmoil to subside and did not permit a meaningful opportunity to reap the benefits of temporary constitutionalism.²⁰⁸

Hedonic adaptation, which refers to the human capacity to adapt to unpleasant circumstances,²⁰⁹ may also play an important role in reducing cognitive biases. The newly recognized risks in the immediate post-conflict moment may decrease in salience as the public adapts to them during the interim period when a temporary constitution is in place. A durable constitution drafted after hedonic adaptation has occurred may reorient the polity's focus toward longer-term constitutional goals.

C. Consensus Building

Constitutional design is often a delicate exercise in consensus building. The design process ordinarily brings together representatives from major facets of the polity to draft an enduring document that will be acceptable to most citizens and respond to their needs. Negotiation and consensus building, however, are daunting and costly tasks. Informational asymmetries, hold-out incentives, and constitutional passions can make "decision costs" prohibitively high.²¹⁰ Decision costs, which are different from the error costs discussed *supra* Part II.A, refer to the burden associated with reaching a decision, including "time, money, and emotional distress from uncertainty, conflict, worry, and the like."²¹¹

Constitutional design often takes place between groups with competing visions for the document who will disagree, and do so vehemently, over its content. The framers of the U.S. Constitution, for example, passionately disagreed, among other things, about the constitutional role of the federal government vis-à-vis the states, the necessity of a Bill of Rights, and the question of slavery. Recent efforts at constitution drafting across the Arab World have also revealed deep conflicts about state-religion relations, judicial review, the constitutional rights of women and minorities, and the freedom of speech and assembly.²¹²

208. See, e.g., *Constitution Net, Constitutional History of Egypt*, <http://www.constitution.net.org/country/constitutional-history-egypt> (last visited Feb. 2, 2014).

209. See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1527–28 (2008).

210. See Elster, *supra* note 6, at 364; Dixon & Ginsburg, *supra* note 6, at 638, 642.

211. Samaha, *supra* note 29, at 616.

212. See generally, John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. COMP. & INT'L L. REV. 219 (2013).

Constitutional passions are another significant source of trouble for any constitutional-design process.²¹³ Although some constitutional choices are relatively uncontroversial, constitutional design ordinarily requires agreement on many other questions that carry significant historical weight.²¹⁴ For example, constitutional design may force a society divided across ethnic, religious, or social lines to openly confront its differences and perhaps its history of conflict. Another society may be forced to resolve its history of ethnic or religious discrimination or its checkered record of protecting freedoms of speech and assembly. These issues are likely to excite passions among groups who may bring very different perspectives to the constitutional bargaining table. Although some passion is necessary to jump start the constitutional-design process and provide the requisite motivation to take action, excessive passion can make consensus building, especially on controversial provisions, prohibitively difficult.²¹⁵ When the stakes are high, the parties to the constitutional bargain may be more reluctant to yield and more likely to hold out for a better bargain.²¹⁶

The durable nature of the constitution adds even more pressure to the design process. Once a provision is entrenched in a durable constitution, its opponents will ordinarily bear the heavy burden of overcoming supermajority requirements to alter the provision. Faced with the possibility of such a burden, the opponents may hold out during the constitutional-design process, undermining the prospects of a constitutional bargain. The hold-out incentives of minority groups will increase especially where they believe that holding out will provide them greater influence at a later time—due, for example, to birth rates, immigration patterns, or possible intervention by a foreign power²¹⁷ or the domestic military on their behalf.

As the costs of decision making increase, the possibility of consensus over the foundational document will decrease. This, in turn, can disable political institutions from performing basic government functions, imposing enormous costs on the polity.²¹⁸ As Christopher Eisgruber put it, “[i]f a polity is consumed with endless debates about how to structure its basic political institutions, it will be unable to formulate policy about foreign affairs, the economy, the environment, zoning, and so on.”²¹⁹

At times, conflict over constitutional choices may also derail the entire constitutional-design enterprise. A critical minority of drafters or ratifiers may

213. See Elster, *supra* note 6, at 376–77, 382–86.

214. See Dixon & Ginsburg, *supra* note 6, at 642.

215. See *id.*

216. See *id.* at 639.

217. See Jackson, *supra* note 6, at 1252.

218. To be sure, the derailment of the constitution-design process will not inevitably have the disastrous consequences described here. At least in some cases, the status quo might be good enough for the polity.

219. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 13 (2001).

threaten to abandon the process if the substance of a provision does not conform to their desires. The recent constitutional-design process in Egypt, for example, prompted mass resignations by non-Islamist members from the Islamist-dominated Constituent Assembly.²²⁰ The 2010 constitution-making process in Kenya likewise came dangerously close to derailment. Sharp divisions on whether and how to regulate abortion in the constitution were almost sufficient to defeat the entire constitution-making process.²²¹

And even if ratification is possible without the support of a critical faction, as was the case in Egypt, Iraq, and Kenya, a constitution that is not a consensus document may create significant political problems in the long term.²²² There is an inverse correlation between popular support for a constitution and the likelihood of its wholesale replacement.²²³ In other words, as the level of popular support for a constitution decreases, the likelihood that it will be subject to wholesale replacement increases.²²⁴ In Egypt, for example, the Islamist-dominated constitution-making process served to further polarize the nation,²²⁵ galvanizing millions to rally against the Muslim Brotherhood, and prompting a military intervention against the Morsi presidency in early July 2013.²²⁶ The military intervention essentially restarted the democratic-transition process, with a brand new constitution to be drafted, followed by new parliamentary and presidential elections.

To ensure a constitutional consensus, it therefore may be necessary to resort to a second-best solution: include one formulation of the contested provision but make it temporary. This serves a number of purposes. The temporary nature of the contested provision may mollify, at least to some

220. See Lynch, *supra* note 141.

221. See Dixon & Ginsburg, *supra* note 6, at 659.

222. See, e.g., Andrew Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 535, 555 (2006–07) (“[The Iraqi] Constitution, and constitution-making, instead of becoming tools of crisis management, and symbols of future political stability and identity, have become instead sources of special grievance for the excluded, a significant part of the fuel for the fires of a civil war.”); Nathan J. Brown, *Still Hope for Egypt’s Constitution*, FOREIGN POL’Y (Oct. 8, 2012), http://mideastafrica.foreignpolicy.com/posts/2012/10/01/egypt_s_constitutional_racers_stagger_toward_the_final_lap (“[T]o shove a constitution through over the protestations of a vocal minority would set the new political system forward on the wrong foot, with the resulting atmosphere likely marred by bitter division and extreme suspicion, hardly one conducive to filling in the details of a new political system.”); see also Ludsin, *supra* note 6, at 268 (“Lebanon’s experience exemplifies how constitutional negotiations that fail to achieve a national identity not only fail to create lasting peace but also exacerbate community divisions and undermine the goals of constitutional governance.”).

223. See Dixon & Ginsburg, *supra* note 6, at 645.

224. *Id.*

225. See Zaid Al-Ali, *Another Egyptian Constitutional Declaration*, FOREIGN POL’Y (July 15, 2013), http://mideastafrica.foreignpolicy.com/posts/2013/07/09/another_egyptian_constitutional_declaration (“The final decision by the Muslim Brotherhood’s Freedom and Justice Party (FJP) to finalize the draft constitution in November 2012 despite the fact that all non-Islamists had withdrawn from the process was a fatal blow to the constitution’s and to the party’s own credibility.”).

226. See *id.*; *Egypt’s Army Ousts Morsi, Who Calls it a “Coup,”* CBS NEWS (July 3, 2013), <http://www.cbsnews.com/news/egypts-army-ousts-morsi-who-calls-it-a-coup>.

extent, the opponents of the provision who fear that its placement in a durable document would make it impossible to remove thereafter.²²⁷ In addition, if the provision contains an express sunset, the burden will shift to the proponents to gather sufficient popular and political support to reenact it following its automatic expiration.²²⁸ The proponents, in turn, may believe, correctly or incorrectly, that their political power will allow them to direct outcomes on the constitutional question when the sunset date arrives.²²⁹ The opponents may also believe, correctly or incorrectly, that they will have the political power to achieve in the future, when the temporary provision expires, what they cannot achieve now. The use of a temporary provision may thus motivate both the opponents and the proponents of the provision to come to a second-best constitutional bargain and prevent endless and destructive political conflict over the constitutional question. If, however, the current majority has reason to believe that its political power will decrease in the future, then it will have a significant incentive to entrench its preferences into a durable document, instead of adopting a temporary provision that may lapse at a future point in time when its opponents may direct political outcomes.

The regulation of abortion during the German unification illustrates the consensus-generating power of temporary constitutionalism. Before unification, the abortion laws in the Federal Republic of Germany (West Germany) were considerably more restrictive than those in the German Democratic Republic (East Germany).²³⁰ The drafting of a common abortion rule proved to be particularly divisive during the negotiation of the Unification Treaty.²³¹ The adoption of a clear, durable abortion rule may have imperiled unification primarily because of the strongly held belief, across a wide spectrum of East Germans, that access to abortion was a fundamental characteristic of their social fabric.²³² To achieve consensus, the drafters included a temporary provision in the German Basic Law that allowed East Germany to deviate from the Basic Law and retain its abortion rule until December 31, 1992 (for about

227. See Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law* 7 (Coase-Sandor Inst. for Law & Econ. Working Paper No. 645, 2013), available at <http://ssrn.com/abstract=2278992> (“[T]emporary law is a form of political compromise that might decrease the costs of political struggles. Proponents of regulation will accomplish their goal . . . but by accepting an expiration date [will] bear the costs of extension. Opponents of regulation will be less opposed to temporary rules than permanent ones.”). The stakes involved in drafting a temporary constitution may be higher, however, where the constitution also specifies principles to which a future, more durable constitution must adhere, as in the case of South Africa. See Jackson, *supra* note 6, at 128–83; *supra* text accompanying notes 185–92 (discussing the South African Constitution).

228. See *supra* Part I.

229. See Dixon & Ginsburg, *supra* note 6, at 650–51.

230. See QUINT, *supra* note 206, at 155 (“In contrast with the West German duty of the government to prohibit abortion (with noted exceptions), the [East Germany government] in 1972 adopted a statute that ordinarily allowed abortions during the first three months of pregnancy.”).

231. See *id.* at 156.

232. *Id.* at 156.

two years).²³³ In June 1992, before the expiration of the temporary constitutional provision, the German Bundestag adopted a compromise group proposal that allowed abortion within the first twelve weeks of pregnancy following mandatory counseling.²³⁴

The 1988 Brazilian Constitution is another case in point. One of the central debates in the constitutional-design process concerned the adoption of a presidential system of government.²³⁵ To reduce the constitutional stakes for the opponents, the proponents of presidentialism agreed to the mandatory review of the presidentialism provisions five years after their adoption.²³⁶ The promise of review following a five-year interim experiment with presidentialism significantly facilitated constitutional consensus building.²³⁷

To be sure, a temporary provision may do no more than shift decision costs from Time 1 to Time 2, as the political conflicts present when the temporary constitution was ratified at Time 1 may still be intact at Time 2. That is especially likely to be the case when the time period between Time 1 and Time 2 is relatively short and insufficient for the political conflict to resolve.²³⁸ For example, the U.S. Constitution's temporary prohibition on Congress's authority to prohibit the slave trade did not resolve the divisive conflict over the question of slavery.²³⁹ It merely postponed the conflict until a disastrous civil war and the adoption of the Reconstruction Amendments finally resolved it.²⁴⁰ In addition, the confirmation bias, which refers to the tendency to interpret information in the way most consistent with prior beliefs,²⁴¹ may also provide an incubation period for disagreement to fester in the interim period. The confirmation bias may lead both the proponents and the opponents of the temporary provision to interpret the data generated in the interim period to confirm their preconceptions about the desirability of the provision, resulting in continued inflexibility at Time 2.

In at least some instances, however, the passage of time will tend to promote consensus building. During the interim period, the opponents of a

233. *Id.* at 157; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] (Ger.) art. 143(1) ("The law . . . may deviate from provisions of this Basic Law for a period extending no later than 31 December 1992 insofar and so long as disparate circumstances make full compliance impossible.").

234. QUINT, *supra* note 206, at 159.

235. *See* Dixon & Ginsburg, *supra* note 6, at 651.

236. *Id.*

237. *Id.* The mandatory review in 1993 failed to produce the requisite majority for the alteration of the presidential system.

238. *Id.* at 657; *see also* Jackson, *supra* note 6, at 1292 ("Experience elsewhere—in Eastern Europe, South Africa, and Northern Ireland, for example—may suggest that the kinds of bargaining that constitutional compromises typically entail are better achieved through more limited forms of agreement over a longer period of time.").

239. *See infra* notes 245–67 and accompanying text.

240. *See infra* notes 245–67 and accompanying text.

241. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1495 (1999).

contested provision may come to view the temporary provision as harmless, or at least not as undesirable as they believed at Time 1. On the flip side, if the temporary provision causes undesirable consequences, the resulting public reaction may motivate the proponents of the provision to view the provision as too costly to support or reenact.²⁴² The proponents may also be more motivated to collaborate with the opponents and collect and share information about the use and implementation of the temporary provision in order to make a better “sell” to the relevant actors at Time 2,²⁴³ which can also promote consensus building. Both the opponents and proponents thus may tend to be more willing to adjust or revise the constitutional provision at issue than they would have been before appreciating its practical consequences and the resulting public reaction.

The passage of time and the attendant changes in prevailing societal norms may also contribute to consensus building. A constitutional provision that proved to be divisive at Time 1 may no longer be divisive at Time 2 because of changes to societal and cultural norms. Ideally, therefore, the duration of the temporal limitation would be long enough for political tensions over the provision to cool, at least to some extent, but not so long that the adoption of the provision becomes unacceptable to its opponents. The operation of the status quo bias may also yield some positive benefits in this context. Depending on the length of its temporal duration, a previously contested provision may achieve general acceptance due to the passive operation of the status quo bias, alter the existing equilibrium, and trigger a new path dependency.²⁴⁴ That, in turn, may tend to diminish constitutional conflict over the contested provision at Time 2.

Even in those cases where the passage of time does not mitigate constitutional conflict, the primary consequence would be the postponement of conflict and the shifting of the decision costs from Time 1 to Time 2. Nevertheless, taking into account the significant possibility of conflict reduction in the interim period, the benefits of imposing a temporal limitation on a contentious provision may, at least in some cases, exceed the potential costs. Among other things, the temporary limitation may enable the ratification of a founding document, which may not have been possible if the divisive issue had remained on the bargaining table.

As noted above, the U.S. Constitution contains a provision with an express temporal limitation that was included specifically for the purpose of building a consensus. Article I, Section 9 of the Constitution prohibited

242. Cf. Gersen & Posner, *supra* note 31, at 571 (“[T]he threat of electoral sanctions seems to have some effect on legislative behavior.”).

243. See Finn, *supra* note 25, at 469, 486. For example, the sunset provisions in the USA PATRIOT Act motivated the proponents of the Act to supply more information to the Congress about the use and implementation of the provisions subject to a sunset. *Id.* at 469.

244. See generally Ginsburg, Masur & McAdams, *supra* note 227.

Congress from banning the slave trade for twenty years.²⁴⁵ How that provision came to appear in the U.S. Constitution is a paradigmatic example of the virtues, and the vices, of using a temporary constitutional provision to promote consensus.

One of the most significant powers granted to the federal government in the U.S. Constitution is the power to regulate commerce. The lack of a federal commerce power under the Articles of Confederation had threatened to disrupt economic and political unity and at least partially provided the impetus for devising a new governing document.²⁴⁶ For the slave-holding South, however, a federal commerce power presented a major risk. Southern states were concerned that the power extended to the Congress could also permit Congress to regulate the domestic and foreign slave trade.²⁴⁷

The proponents of the slave trade therefore rose in staunch opposition to the possible use of the commerce power to regulate the institution of slavery.²⁴⁸ Unless restrained by the Constitution, the pro-slave trade states knew, in George Mason's words, that the Congress "would immediately suppress the importation of slaves."²⁴⁹ Georgia, North Carolina, and South Carolina expressly declared that they would not ratify the Constitution if Congress would have the authority to prohibit the importation of slaves.²⁵⁰ In accordance with their desires, a draft provision produced by the Committee of Detail prohibited any federal interference with the "migration or importation" of slaves.²⁵¹ According to Madison, a compromise thus had to be found between those who demanded a constitutional provision providing "an immediate and absolute stop to the [slave] trade" and those who "were not only averse to any interference on the subject" but also declared "that their constituents would never accede to a constitution containing such an article."²⁵²

245. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

246. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 44–46, 107–08 (2005).

247. Walter Berns, *The Constitution and the Migration of Slaves*, 78 *YALE L.J.* 198, 198 (1968).

248. *Id.* at 198, 200.

249. Thomas Jefferson, Notes of a Conversation with George Mason (Sept. 30, 1792), available at <http://founders.archives.gov/documents/Jefferson/01-24-02-0387>.

250. See LAWRENCE GOLDSTONE, *DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION* 169 (2005); Berns, *supra* note 247, at 200.

251. GOLDSTONE, *supra* note 250, at 162–63. The provision stated in full: "No tax or duty shall be laid by the Legislature on articles exported from any State, . . . nor on the migration or importation of such persons as the several States shall think it proper to admit; nor shall such migration or importation be prohibited." *Id.*

252. Letter from James Madison to Robert Walsh (Nov. 27, 1819), reprinted in 9 *THE WRITINGS OF JAMES MADISON* 1, 2 (Gaillard Hunt ed., 1910).

If there were to be a Union, this rift between the proponents and opponents of the slave trade had to be accommodated. The solution was the use of a temporary constitutional provision. The Committee of Eleven, composed of one member from each state present, recommended a provision forbidding Congress from regulating the migration and importation of slaves,²⁵³ but only until 1800 (which was later extended to 1808).²⁵⁴ In exchange, the Southern states agreed to omit a provision that would have required a two-thirds majority in Congress to enact a law regulating commerce.²⁵⁵

The bargain mollified both the proponents and the opponents of the slave trade. The proponents would enjoy the temporary liberty to continue the slave trade during the twenty-year period ending in 1808.²⁵⁶ The opponents, in turn, were assured that the temporary permission to continue the slave trade would be limited only to the original states and that Congress would be eventually permitted to prohibit the slave trade through a simple majority, not a two-thirds majority.²⁵⁷ As Benjamin Rush explained in a letter to Jeremy Belknap in 1788, the “abolition of slavery in our country must be gradual in order to be effectual, and . . . the section of the Constitution which will put it in the power of Congress twenty years hence to restrain it altogether was a great point obtained from the Southern States.”²⁵⁸

253. Although the provision itself did not include the word “slaves,” the phrase “such persons” was understood to be a euphemism for slaves. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 413 (2013).

254. Berns, *supra* note 247, at 200. The extension was adopted by the Committee of Detail over the objection of Madison, who argued that “[t]wenty years will produce all the mischief that can be apprehended from the liberty to import slaves.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 415 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

255. GOLDSTONE, *supra* note 250, at 162, 171.

256. According to some accounts, the proponents agreed to this compromise because they believed that the population growth in the South would grant them dominant political power in the federal government by the time the temporary prohibition expired. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 72–73 (1996).

257. Berns, *supra* note 247, at 203. Luther Martin, a member of the Committee of Eleven, described the deliberations over the clause as follows: “I found the *eastern* States, notwithstanding their *aversion to slavery*, were very willing to indulge the southern States, at least with a temporary liberty to prosecute the *slave-trade*, provided the southern States would, in their turn, gratify them, by laying *no restriction on navigation acts*.” 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 254, at 210–11. As Robert Walsh also explained:

The whole text . . . bespeaks a compromise in which, on the one hand, the privilege of multiplying the race of slaves within their limits, either by importations from abroad or domestic migration is reluctantly yielded for a term to those southern states who made this compliance a *sine qua non* of their accession to the union; while, on the other hand, the power is conceded, by implication, to the federal government, of preventing at once the extension of slavery beyond the limits of the old states—of keeping the territory of the union, and the new states, free from the pestilence; and ultimately, of suppressing altogether the diabolical trade in human flesh, whether *internal* or external.

ROBERT WALSH, FREE REMARKS ON THE SPIRIT OF THE FEDERAL CONSTITUTION, THE PRACTICE OF THE FEDERAL GOVERNMENT, AND THE OBLIGATIONS OF THE UNION, RESPECTING THE EXCLUSION OF SLAVERY FROM THE TERRITORIES AND NEW STATES 17–18 (1819).

258. Letter from Benjamin Rush to Jeremy Belknap (Feb. 28, 1788), *reprinted in* 3 BELKNAP PAPERS 397 (Mass. Historical Society ed., 1891).

A number of commentators have criticized this temporary provision as a “dark bargain”²⁵⁹ or a “rotten compromise.”²⁶⁰ With their temporary acquiescence, the opponents of slavery permitted, albeit reluctantly, the slave trade to persist. Neither did the temporary nature of the provision put a decisive end to the institution of slavery; it took a disastrous civil war and a bitter reconstruction more than fifty years after the provision’s expiration to rid the nation of slavery once and for all. At the same time, however, some of the Southern States may not have entered into the Union without the temporary permission of the slave trade.²⁶¹ The failure to reach a compromise on the slave trade may therefore have preserved the Articles of Confederation—which required unanimous agreement by all state legislatures to alter any of its provisions²⁶²—and permitted the indefinite continuation of the trade.²⁶³ The preservation of the Articles would have also exacerbated the growing problem of state restraints on commerce, leading to economic and political conflict.²⁶⁴ Madison therefore observed that “great as the evil [of slave trade] is, a dismemberment of the union would be worse.”²⁶⁵ The temporary provision, at least on Madison’s account, was thus an improvement over the Articles of Confederation because it would allow Congress to prohibit the slave trade after 1808.²⁶⁶ After the temporary provision expired, Congress prohibited the international slave trade by enacting in 1807 an Act “[t]o prohibit the

259. GOLDSTONE, *supra* note 250, at 161.

260. SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 44 (2012).

261. *Speeches in the Virginia Convention: Importation of Slaves* (June 17, 1788), reprinted in 5 *THE WRITINGS OF JAMES MADISON: 1787–1790*, at 208 (Gaillard Hunt ed., 1904) [hereinafter *Speeches in the Virginia Convention*].

262. ARTICLES OF CONFEDERATION of 1781, art. XIII.

263. See *Speeches in the Virginia Convention*, *supra* note 261, at 209; see also Julian P. Boyd, *Editorial Note*, in 6 *THE PAPERS OF THOMAS JEFFERSON* 588 (Julian P. Boyd ed., 1952) (“[T]here was nothing in the Articles of Confederation to warrant the abolition of slavery.”); John Paul Stevens, *Should We Have a New Constitutional Convention?*, N.Y. REV. BOOKS, Oct. 11, 2012, available at <http://www.nybooks.com/articles/archives/2012/oct/11/should-we-have-new-constitutional-convention>. But see Berns, *supra* note 247, at 224–25 (arguing that, under the “compact theory,” the Congress would have the authority to prohibit slavery in the *new* states even under the Articles of Confederation).

264. See Stevens, *supra* note 263.

265. *Speeches in the Virginia Convention*, *supra* note 261, at 210.

266. *Id.* Madison further explained in *The Federalist No. 42*:

It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic in the prohibitory example which has been given by so great a majority of the Union.

THE FEDERALIST NO. 42, at 209–10 (James Madison) (Oxford Univ. Press 2008).

importation of Slaves into any port or place within the jurisdiction of the United States, from and after the first day of January” in 1808.²⁶⁷

D. Relaxing the Dead Hand

One of the major critiques of a durable constitution has been termed “dead hand” control or “temporal imperialism.”²⁶⁸ By etching their normative preferences into a durable constitution, constitutional framers continue to rule their unborn posterity long after their death. On Noah Webster’s account, “the very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”²⁶⁹ Depending on the difficulty of amendment, a durable constitution’s attempt to impose intertemporal control may undermine the future generations’ right to govern themselves based on their own preferences. In addition, exogenous social, political, and economic changes may erode the underpinnings of constitutional provisions or institutional configurations, or otherwise make their continued use undesirable, resulting in a constitution riddled with anachronistic provisions.²⁷⁰

One of the most prominent examples of evolving political norms in the United States is the vast expansion of the administrative state. The critics of originalism, for example, point out that the Framers could not have foreseen the administrative state that dominates much of lawmaking today. When Congress crafted contemporary solutions to cabin administrative delegation, such as the one-house legislative veto—which would have allowed either the House or the Senate to override the exercise of delegated discretion by an administrative agency—the Supreme Court struck them down as inconsistent with the Framers’ original design.²⁷¹ The Founders, the Court concluded, crafted a delicate set of procedures for lawmaking. The one-house legislative veto, drafted by contemporary politicians, would upend those procedures.²⁷²

267. Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426.

268. ANNE NORTON, *REPUBLIC OF SIGNS: LIBERAL THEORY AND AMERICAN POPULAR CULTURE* 124 (1993) (“As the author of the national constitution, [the framers] can speak, and they can dictate, even when their bodies are silent in death.”).

269. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 379 (1998) (quoting Noah Webster); see also Declaration of the Rights of Man and Citizen, art. 28 (Fr. 1789) (“A people has always the right to review, to reform, and to alter its Constitution. One generation cannot subject to its law the future generations.”); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997) (arguing that it is “antidemocratic for a contemporary majority to be governed by values enshrined in the Constitution over two hundred years ago”); Pettys, *supra* note 1, at 320 (“What gave men in the late eighteenth century, who lived in a world vastly different from our own, the right to impose their preferences on all future generations of Americans, unless those later generations could meet the supermajority requirements that the founding generation prescribed for constitutional amendments in Article V?” (footnotes omitted)).

270. See Dixon, *supra* note 83, at 321.

271. See *INS v. Chadha*, 462 U.S. 919 (1983).

272. See *id.*

On this account, the analogy of constitutions to the ropes that bound Ulysses to the mast of his ship is flawed.²⁷³ As Professor Elster, who first proposed the analogy, acknowledges, Ulysses instructed his crew to tie his own hands to the mast; constitutional framers, however, tie not only their hands, but also the hands of future generations.²⁷⁴ Especially since those future generations were not parties to the framers' deliberations, commentators have argued that Ulysses' act of self-binding is quite different from the constitutional framers' attempt to bind others.²⁷⁵

Temporary constitutionalism serves as a partial response to this central criticism of written constitutions. By allowing certain provisions to lapse after time, constitutional framers may express their uncertainty about the long-term effects of their decisions²⁷⁶ and allow future generations to revisit them. If constitutional designers have doubts about the propriety of provisions for their posterity, those doubts can be reflected through the use of temporary provisions.²⁷⁷ Temporary constitutions can also be used where the framers are responding to social or political problems that are themselves temporary.

The Electoral College, for example, may have been a good candidate for the use of a sunset provision. The result of bitter debate and uneasy compromise, the Electoral College has outlived its usefulness, a consequence the founders did not foresee. Akhil Amar has observed that the original reasons for establishing the Electoral College do not apply today.²⁷⁸ Modern

273. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 268 (1999) ("I cannot restrain myself from saying that anyone who thinks a narrative [about constitutional choice] is appropriately modelled [sic] by the story of Ulysses and the sirens is an idiot."); Pettys, *supra* note 1, at 325–26.

274. ELSTER, *supra* note 41, at 92 (noting that "constitutions may bind others rather than being acts of self-binding"); see also Pettys, *supra* note 1, at 325.

275. See ELSTER, *supra* note 41, at 92; Pettys, *supra* note 1, at 325; see also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 637 (1999) ("Unlike a contract, however, a constitution purports to govern even those who did *not* consent to it at the founding—women, children, former slaves, resident aliens, disenfranchised prisoners, future generations, etc. . . . For it has never been satisfactorily explained how a majority or minority calling themselves 'the People,' by exercising their will, can bind anyone but themselves."); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 225 (1980) ("Even if the adopters freely consented to the Constitution, . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.").

276. See Katyal, *supra* note 26, at 1246.

277. An objection to the use of temporary provisions in this context might be that the framers' expression of doubts about the propriety of certain constitutional provisions might diminish the public's respect for the Constitution. See *id.* at 1249. Nevertheless, a durable constitution with undesirable, unworkable, or anachronistic provisions is likely to command less respect than a temporary constitution that candidly and transparently acknowledges the possible shortcomings of certain provisions and permits their alteration at a later date.

278. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 41, at 15 (arguing that the Electoral College "was a brilliant eighteenth-century innovation that makes no sense today" and branding it the "Most Mistaken Part of the Current Constitution"); see also Mark Graber, *Unnecessary and Unintelligible*, in

presidential candidates enjoy national reputations, and a national election would no longer upset the balance of power among the states, given the diminished role that states play in defining the electorate.²⁷⁹ What is more, according to public opinion polls, a majority of Americans have favored abolishing the Electoral College for decades: 58 percent in 1967; 81 percent in 1968; 75 percent in 1981;²⁸⁰ and 62 percent in 2011.²⁸¹ Reflecting contemporary dissatisfaction with the Electoral College, there have been more proposals for altering or abolishing it than any other provision in the U.S. Constitution.²⁸² Nevertheless, due in large part to the difficult Article V amendment process, none of these proposals has been successful despite popular and political support.

The Electoral College example highlights a related critique of certain durable constitutions, which is their difficulty of amendment. Returning to the Ulysses analogy, not only can constitutional framers tie future generations to a ship mast, they can choose to do so with tight, chafing ropes, which leave little room for flexibility. As a number of commentators have argued, constitutional framers enjoy much greater legitimacy to place tight constraints on themselves than on future generations.²⁸³ In addition, a difficult amendment process may invite the judiciary to “update” outdated constitutional provisions,²⁸⁴ which raises serious democratic legitimacy problems stemming from delegating contentious constitutional questions to an unelected judiciary.²⁸⁵ To grant more constitutional flexibility to future generations without undermining democratic legitimacy, the framers may choose to place a temporal limit on the constitutional amendment rule itself and lower the threshold for amendment after a certain period of time. For example, the 1976 Portuguese Constitution, discussed in detail below, prohibited the amendment of the Constitution for six

CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 41, at 43 (noting that the Electoral College “quickly outlived [its] original purpose”).

279. Amar, *supra* note 278, at 16.

280. *Id.*

281. Lydia Saad, *Americans Would Swap Electoral College for Popular Vote*, GALLUP POLITICS (Oct. 24, 2011), <http://www.gallup.com/poll/150245/Americans-Swap-Electoral-College-Popular-Vote.aspx>.

282. *FAQs, U.S. Electoral College*, U.S. ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/faq.html#whyec> (last visited Jan. 15, 2014).

283. See Pettys, *supra* note 1, at 325 (“That is not to say that *X* can never bind *Y*—it is only to say that the legitimacy of *X*’s attempt to bind *Y* is not nearly as self-evident as the legitimacy of *X*’s attempt to bind itself.”).

284. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267–68 (2001) (noting that resolution of contentious constitutional questions by the U.S. Supreme Court “has proven easier for our system than the bulky process of formal constitutional amendment entailed by Article V”).

285. See *infra* notes 341–47 and accompanying text (discussing constitutional vagueness and democratic legitimacy).

years following its ratification, after which time amendment was allowed by a two-thirds parliamentary majority.²⁸⁶

To be sure, the dead-hand problem is inescapable in a universe of written constitutions amendable only by a supermajority. Even a durable constitution ratified following a temporary one will still bind future citizens. Temporary constitutionalism, however, may mitigate the dead-hand problem—at least to some extent. It can allow constitutional framers to craft temporary solutions to temporary problems. It can further permit the framers to relax the amendment rule from, for example, a heightened super-majority requirement—as in the case of Article V of the U.S. Constitution or the 1976 Portuguese Constitution, which completely prohibited amendment—to a simple super-majority requirement.

The 1976 Portuguese Constitution, which imposed a temporal limit on its amendment rule, illustrates the use of a temporary provision to create a temporary solution to a temporary problem.²⁸⁷ The Constitution was drafted in the aftermath of a 1974 military coup d'état.²⁸⁸ The coup overthrew the nearly five-decades-old *Estado Novo* (New State) regime, Western Europe's oldest dictatorship, in order to abolish the authoritarian regime and establish a democracy.²⁸⁹ That was a formidable task, given the long authoritarian legacy of the *Estado Novo*, the revolutionary turbulence, and the ongoing global economic recession.²⁹⁰ The military leadership played a significant stabilizing role during the transition process by promoting political pluralism and averting an attempted coup by an anti-democratic faction.²⁹¹

Given the role that the military played during the transition, many democratic parties recognized the “impracticability, even the undesirability” of completely excluding the military from Portuguese politics.²⁹² They viewed the military as “indispensable for providing all actors with guarantees that the constitutional truce would not be violated.”²⁹³ It was decided, therefore, that the military would retain an initial constitutional role to safeguard its function as the guarantor of Portugal's newly established democracy.²⁹⁴

The political actors were also cognizant of the need, however, to eventually abolish the military's constitutional role after the ongoing threats to democracy dissipated.²⁹⁵ A temporal limit was therefore placed on the

286. Varol, *Democratic Coup*, *supra* note 114, at 338.

287. *Id.*

288. Varol, *Guardian*, *supra* note 114, at 61.

289. *Id.*

290. *Id.*

291. *Id.*

292. VASCO FERNANDO FERREIRA RATO, RELUCTANT DEPARTURE: THE POLITICS OF MILITARY EXTRICATION IN PORTUGAL, 1974–1982, at 302 (2002); *see also* Varol, *Guardian*, *supra* note 114, at 63–66.

293. RATO, *supra* note 292, at 341; *see also* Varol, *Guardian*, *supra* note 114, at 63–66.

294. RATO, *supra* note 292, at 295–96; *see also* Varol, *Guardian*, *supra* note 114, at 63–66.

295. *See* Varol, *Guardian*, *supra* note 114, at 69.

constitutional amendment rule, which completely prohibited the amendment of the constitution for six years following its ratification in 1976.²⁹⁶ After the six-year mark, revision was possible with a two-thirds majority of the Parliament.²⁹⁷ By consenting to a temporal limit for its constitutional authorities, the Portuguese military signaled that its term might be temporary and its exodus from politics permanent.²⁹⁸

This temporary provision proved effective when, after the 1982 amendment rule expired and constitutional revision became possible, a coalition of the existing political parties garnered the requisite two-thirds majority to amend the constitution.²⁹⁹ The amendments also established a legal framework for democratic civilian control of the military.³⁰⁰ Following the amendments, Portugal has remained “not simply a democracy, but a relatively high-quality democracy.”³⁰¹ The temporal limitation on the amendment rule allowed the constitutional framers to respond to a social problem that was itself temporary—the threats to the democratic-transition process, which, at the time, only the military was fully capable of averting—without etching the military’s role into a durable constitution. It also relaxed the handcuffs placed on future political actors and allowed them to consolidate the democratic regime by abolishing the military’s constitutional role after evolving societal conditions obviated the need for the military to play a stabilizing role.

Another example of a constitutional arrangement that deployed a temporary provision to address fleeting societal problems is the power-sharing agreement in South Africa’s Interim Constitution. Responding to fears of single-party dominance following the end of apartheid, the Interim Constitution enshrined an executive power-sharing arrangement for a period of five years following the first democratic elections.³⁰² Under the arrangement, every party that obtained at least 20 percent of the seats in the National Assembly was entitled to a number of seats in the cabinet proportional to its representation in the Assembly.³⁰³ This arrangement produced a cabinet composed of the three major parties in South Africa.³⁰⁴ Were it not for this interim constitutional arrangement, minority parties may have boycotted, or worse, violently opposed

296. See Varol, *Democratic Coup*, *supra* note 114, at 338.

297. *Id.*

298. See Varol, *Guardian*, *supra* note 114, at 69.

299. See Varol, *Democratic Coup*, *supra* note 114, at 339.

300. *Id.*

301. Nancy Bermeo, *War and Democratization: Lessons from the Portuguese Experience*, 14 DEMOCRATIZATION 388, 391 (2007).

302. See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 104 (2000); Lisa M. González, *The Importance of Political Parties in South Africa*, 20 FLETCHER F. WORLD. AFF. 147, 149 (1996).

303. See González, *supra* note 302, at 149.

304. *Id.*

the democratic elections,³⁰⁵ placing in jeopardy the future of post-apartheid South Africa.

III.

CONSTITUTIONAL STABILITY, DESIGN EFFICIENCY, MORAL HAZARD, AND ALTERNATIVE DESIGN STRATEGIES

This Part examines the primary objections that can be raised against the use of temporary constitutions. Although the costs associated with temporary constitutionalism have been discussed throughout the Essay, Section A analyzes the overarching concerns associated with temporary constitutionalism regarding stability, design efficiency, and moral hazard. Section B studies alternative strategies of constitutional design intended to ease constitutional rigidity or permanence and explains the advantages and disadvantages of temporary constitutions vis-à-vis these alternative design methods.

A. Constitutional Stability, Design Efficiency, and Moral Hazard

One of the virtues of durable constitutional design, which may be sacrificed by temporary constitutionalism, is constitutional stability.³⁰⁶ Madison, for example, famously resisted Jefferson's suggestion that "the earth belongs always to the living generation" and that the constitution should thus be rewritten by each successive generation.³⁰⁷ Madison argued that negotiation and lobbying in the drafting of each successive constitution may lead to factionalism and undermine continuity and stability.³⁰⁸ In addition, citizens organize their conduct around a constitution, and the presence of temporary constitutional provisions and frequent constitutional change can shake those expectations and threaten constitutional stability.³⁰⁹

But the uncertainty attendant to temporary constitutionalism is dissipated by durable constitutions at a significant cost—the possible etching into stone of

305. See Marisa Traniello, *Power-Sharing: Lessons from South Africa and Rwanda*, 3 INT'L PUB. POL'Y REV. 28, 37 (2008).

306. See David Hume, *Of the Original Contract*, in DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 465, 476 (Eugene F. Miller ed., Liberty Fund rev. ed. 1987) ("[A]s human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary, in order to preserve stability in government, that the new brood should conform themselves to the established constitution.").

307. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>.

308. See Gersen, *supra* note 19, at 254–55; Richards, *supra* note 9, at 1840 ("Madison argued that the reflective values institutionalized in a properly designed republic are least compromised by oppressive democratic factions if the written constitution is understood on all sides as an enduring charter of just government subject to amendment only by extraordinary procedures.").

309. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 471 (1991) ("The constitution will lose many of its desirable properties—notably that of inspiring confidence and creating a climate in which investors are willing to make long-term investments—if everyone expects that it will be continually revised.").

undesirable constitutional provisions.³¹⁰ A constitution that is ridden with errors or that does not enjoy popular support will be vulnerable to early wholesale replacement,³¹¹ which also can undermine stability. By reducing decision and error costs and promoting information quality and consensus building, a temporary constitution may promote long-term constitutional endurance and stability. Temporary constitutions also give advance notice of their lapse, putting those concerned on notice that the temporary provision may be amended, replaced, or repealed. In other words, expectations may not necessarily settle for those provisions that are temporary.

The sparing use of temporary constitutions would also minimize their impact on constitutional stability. As noted above, the temporal limit may be placed on an entire constitution or only a specific constitutional provision. The expiration of an entire constitution is likely to be more destabilizing than the expiration of a single provision. As such, one would expect the former to be used only as a one-shot solution in constitutional reconstructions dominated by cognitive biases. A temporary constitution may be adopted in a post-conflict moment, later to be replaced with a more durable document intended to last indefinitely. Ideally, the constitutional drafters would benefit from the increased quantity and quality of information in drafting the durable document. In addition, the design process would take place in an atmosphere with lower decision costs, error costs, and cognitive biases associated with post-conflict moments. That, in turn, should tend to enhance the longevity of the durable document, and provide more constitutional stability in the long run.

Similarly, any temporal limitations placed on specific constitutional provisions, as opposed to the entire document, should also be used sparingly. Specifically, they should be employed primarily where the constitutional framers are uncertain about the long-term consequences of a specific provision or are responding to social problems that are themselves temporary. The longer that the temporary constitution or constitutional provision is in place, the greater its destabilizing effect will be on the polity upon its expiration, which should also be factored into the constitutional designers' calculation of an optimal temporal duration.

These qualifications highlight another important point concerning the *type* of constitutional provisions ideally suited for temporal limitations. Although this inquiry is highly context dependent, in general, temporal limitations placed on fundamental structural provisions will tend to have a greater negative impact on constitutional stability.³¹² For example, a temporal limitation placed on the structure of the judiciary may undermine stability by eliminating the judiciary at the time of sunset. In contrast, a temporal limitation placed on a substantive

310. See Katyal, *supra* note 26, at 1249.

311. See Dixon & Ginsburg, *supra* note 6, at 645.

312. See Pettys, *supra* note 1, at 330.

provision is unlikely to have the same destabilizing effect.³¹³ For example, a temporary provision granting emergency powers to the government for use in a post-conflict moment will have little impact on stability if allowed to expire after the societal needs that prompted the adoption of that power have dissipated.

Temporary constitutional provisions may also be objectionable from an efficiency perspective. Unlike a durable provision, a temporary provision will require multiple periods of action by the constitutional drafters—one at the initial ratification and one at the sunset.³¹⁴ Nevertheless, the initial enactment costs for a temporary constitutional provision are almost certainly less than a durable provision.³¹⁵ A durable provision concentrates all enactment costs in the ratification period, by requiring a durable judgment at ratification.³¹⁶ In contrast, a temporary provision allocates most enactment costs to the sunset period.³¹⁷ The enactment cost of a temporary provision at the sunset period must be discounted by the benefit to be obtained from consensus building and information gathering in the interim period, which allows for more informed decision making at the sunset period. In addition, as discussed above, durable constitutional provisions may impose significant error costs of their own, especially with a difficult amendment mechanism in place, if the constitutional judgment at ratification is incorrect or unworkable.

A final objection to the use of temporary constitutions may be one of moral hazard. Because temporary constitutions promote consensus building, they may require less intensive review and deliberation compared to durable constitutions.³¹⁸ The drafters of temporary constitutions may also engage in sloppy drafting where they anticipate that any errors in their work will be corrected in the future.³¹⁹ That, in turn, may generate constitutional norms that contradict the public interest.³²⁰ If the provision contradicts the public interest, however, the proponents may be unable to bear the heavy burden of reenacting the provision following its sunset, especially where the public is informed about the practical consequences of the provision. Further, the benefits of temporarily including an undesirable constitutional norm may exceed the costs

313. Cf. Andrei Marmor, *Are Constitutions Legitimate?*, 20 CAN. J.L. & JURISPRUDENCE 69, 79 (2007) (noting that for the “domain of rights and moral principles,” “it is mostly truth that we value, not stability”).

314. See Gersen, *supra* note 19, at 263.

315. See *id.* at 264.

316. See *id.*

317. See *id.*

318. See *id.* at 252.

319. See Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 482 (2007).

320. See Gersen, *supra* note 19 at 252. As Senator Russ Feingold put it during deliberations on whether to include a legislative sunset provision in the USA PATRIOT Act, “My view is that if we say something is so bad we’re only going to do it for two years, maybe we shouldn’t be doing it at all.” Katyal, *supra* note 26, at 1248 n.36.

of derailing the entire design enterprise, which may in turn generate, as discussed above, enormous consequences for the polity.

B. Constitutional Design Alternatives

This Section analyzes alternative constitutional-design methods that, like temporary constitutions, are intended to decrease constitutional rigidity or permanence: “by law” clauses, constitutional vagueness, and low amendment thresholds. Although these alternatives serve important purposes as well, temporary constitutions tend to have a greater capacity for reducing decision and error costs, as well as cognitive biases, without sacrificing long-term constitutional stability or democratic legitimacy.

1. “By Law” Clauses

“By law” clauses increase constitutional flexibility by explicitly delegating constitutional questions to the legislature by authorizing or requiring them to address the question via lawmaking.³²¹ Temporary constitutions offer three distinct advantages over “by law” clauses. First, “by law” clauses, through overdelegation of important constitutional issues, may overburden the legislature so as to undermine legislative decision making in other key areas.³²² Second, deferral through “by law” clauses may also leave troubling gaps in the constitution, since “by law” clauses ordinarily eschew interim regulatory measures and delegate the regulation of the entire subject matter to the legislature.³²³ Due to legislative gridlock or other obstacles, the legislature may fail or refuse to exercise the authority delegated to it through the “by law” clause, leaving significant gaps in regulatory coverage.

The Iraqi, Afghan, and Brazilian Constitutions illustrate the gridlock that may be generated as a result of “by law” clauses. Unable to agree on many contentious constitutional questions, such as the scheme for the sharing of oil revenues, the drafters of the Iraqi Constitution delegated those questions to the legislature through “by law” clauses.³²⁴ Nevertheless, due in large part to deep divisions within the polity and resulting parliamentary gridlock, the Iraqi legislature failed to address many of these delegated questions.³²⁵ For example, it took the Iraqi parliament five years to pass a basic election law, and at the

321. See Dixon & Ginsburg, *supra* note 6, at 637.

322. *Id.* at 639.

323. *Id.* at 664 (“[I]f a constitution does not settle, even temporarily, the most controversial and divisive political controversies, legislatures and executive bodies may be unable to perform even the most basic government functions.”).

324. *Id.* at 664–65.

325. *Id.*

time of this writing, a national scheme for oil revenue sharing has yet to be enacted.³²⁶

Likewise, the 1964 Afghan Constitution authorized the creation of political parties, but the legislature failed to pass the necessary implementing legislation.³²⁷ That failure deprived the polity of a crucial mechanism for democratization and created a power vacuum leading to a coup nine years later.³²⁸

The failure to agree on many contentious constitutional questions also prompted the drafters of the 1988 Brazilian Constitution to delegate them to the legislature through the use of numerous “by law” clauses.³²⁹ To be implemented, the Constitution required the legislature to pass 314 new laws and 56 pieces of complementary legislation.³³⁰ That, in turn, placed significant downstream pressure on the legislature, left many contentious questions permanently undecided, and allowed others to be resolved by other institutions in a manner contrary to the intentions of the constitutional drafters.³³¹

Third, in addition to generating regulatory gaps, “by law” clauses may also undermine support for the existing constitutional system, with negative implications for constitutional endurance.³³² Legislative gridlock that leaves important constitutional questions undecided may hasten extraconstitutional methods for governance or private forms of regulation.³³³ For example, the Iraqi legislature’s failure to pass a national oil revenue sharing scheme allowed the Kurdish region of Iraq to assert its own regulatory control over oil production and revenue.³³⁴ That, in turn, led to a loss of popular authority for the national government and the constitutional system.³³⁵

The legislative gridlock problem with “by law” clauses raises a political question: When there is a real risk of downstream legislative gridlock, is it politically plausible to enact a substantive temporary provision in its place? The answer is yes, for two reasons. First, constitutional drafters might recognize that the adoption of a “by law” clause may leave an important constitutional question unanswered. In some cases, they may be better off with a temporary regulatory decision that they can revisit at a later date rather than with no

326. *Id.* at 665; *see also* Omar al-Shaher, *Iraqi MP: Maliki, Barzani Close to Solving Oil Dispute*, AL-MONITOR (July 18, 2013), <http://www.al-monitor.com/pulse/originals/2013/07/maliki-barzani-rapprochement-oil-law-iraq.html>.

327. *See* Dixon & Ginsburg, *supra* note 6, at 664.

328. *Id.*

329. *Id.* at 666; Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 778–79 (1990).

330. *See* JAVIER MARTÍNEZ-LARA, *BUILDING DEMOCRACY IN BRAZIL: THE POLITICS OF CONSTITUTIONAL CHANGE, 1985–95*, at 120 (1996).

331. *See* Dixon & Ginsburg, *supra* note 6, at 666.

332. *Id.*

333. *Id.*

334. *See id.*

335. *Id.* at 666 n.115.

regulatory decision at all. Second, the parties to the constitutional bargain may be motivated to reject a “by law” clause in favor of a temporary provision for reasons of political self-interest. This, in turn, may have the attendant, albeit unintended, benefit of avoiding a possible downstream gridlock that would have resulted from the use of a “by law” clause. If the constitution drafting occurs before elections, one or more of the parties to the constitutional discussions may believe that the legislature will be dominated by an opponent. If that is the case, they may be more willing to use a temporary provision that allows them to revisit the constitutional question at a later date (when their political power may be greater), as opposed to immediately delegating that question to a legislature that they believe is likely to be captured by their opponent. That is especially likely to be the case if the issue is one that will have immediate and potentially long-lasting political repercussions (e.g., the adoption of an election law).

In contrast to “by law” clauses, which may leave significant gaps in regulatory coverage, temporary constitutional provisions embody a regulatory decision at the ratification of the constitution. In the case of a temporary provision without an express sunset, that decision remains in place until the polity decides to revisit it. In the case of a temporary provision with an express sunset, the regulatory decision remains in place until the sunset date. At least during the interim period, therefore, no gap exists in the regulated subject matter. And even if the temporary provision is allowed to lapse, a regulatory gap will not necessarily occur. For example, the expiration of the temporary provision in the U.S. Constitution prohibiting Congress from regulating the slave trade for twenty years had the effect of *authorizing* Congress to regulate the slave trade using its commerce power. Congress immediately exercised that regulatory authority by prohibiting the international slave trade.³³⁶

Only if the expiration of the temporary provision *withdraws* regulatory authority on a specific sunset date may a gap in regulatory coverage arise. Even in such cases, however, the parties may be more likely to reach a consensus on the constitutional question because changes in societal or cultural norms may diminish the divisiveness of the constitutional question during the interim period. Moreover, having observed the practical consequences of a regulatory decision, the parties may be more flexible in their constitutional negotiations at the time of sunset, as discussed above. Even if the passage of time does not make consensus building any easier and the temporary provision is permitted to lapse, the polity will have benefited from at least some regulatory coverage during the period the temporary provision remained in effect. And in many cases, it will be no worse off than had the question been delegated to a hopelessly gridlocked parliament.

336. Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426.

If the constitutional issue remains controversial at the sunset moment, a “by law” clause will have one major advantage over a temporary constitutional provision. Under a “by law” clause, a simple legislative majority would suffice to overcome the gridlock over the contentious question, whereas constitution making would ordinarily require a supermajority. If the constitutional drafters expect decision costs to remain prohibitively high even with the passage of time, the use of a “by law” clause may therefore lead to a more desirable result than the use of a temporary constitutional provision with an express sunset date.

The drafters of “by law” clauses can also attempt to avoid the formation of a regulatory gap by adopting a default constitutional rule to remain in place until legislative action.³³⁷ In at least some cases, this strategy would adequately fill the regulatory gap. It may be difficult, however, for the drafters to reach a consensus on an interim arrangement if they fear downstream legislative gridlock and the attendant risk that the interim arrangement will remain in place indefinitely.

Even if consensus on an interim arrangement is achieved, “by law” clauses, through their delegation of constitutional choices to the legislature, relegate to the vagaries of majoritarian politics what the framers have decided should be constitutional questions. The same objections lodged against constitutional instability apply with equal force here. In a “by law” universe, a constitutional question is answered by a bare legislative majority, which over time may provide different and conflicting answers to the same constitutional question, undermining stability.

In addition, “by law” clauses may run the risk of legislative misuse. In the first post-Mubarak Egyptian Constitution, for example, the frequent delegation via “by law” clauses of important constitutional questions to the Islamist-dominated legislature raised concerns among many that the legislature would abuse the “by law” clauses and employ them to further the Islamists’ political hegemony.³³⁸ “By law” clauses further increase the risk that the legislature may treat the question as less worthy of the type of deliberation that a constitutional question ordinarily merits. Perhaps the issue is one that should be addressed through legislation, not the constitution. If that is the case, however, a “by law” clause in the constitution is ordinarily unnecessary.³³⁹ The constitution can remain silent on the matter, leaving the regulatory field open for lawmaking.

337. See Dixon & Ginsburg, *supra* note 6, at 665 (“If constitution-makers decide to defer truly high stakes constitutional issues it may be desirable for them to combine this strategy with the adoption of certain interim constitutional arrangements, which govern unless and until subsequent legislation is actually passed.”).

338. See Nathan J. Brown, *Egypt’s State Constitutes Itself*, FOREIGN POL’Y (Nov. 27, 2012), http://mideast.foreignpolicy.com/posts/2012/11/19/egypts_state_constitutes_itself.

339. The only exception is where the legislature would not have the constitutional authority to legislate on the question absent authority conferred by a “by law” clause. A case in point is the Madisonian Compromise, which authorized, but did not require, Congress to create inferior federal

Finally, a “by law” clause may also be preferable to temporary provisions with express sunset dates in the context of structural provisions whose automatic expiration may cause instability. The Madisonian Compromise provides a good illustration. The Compromise, through the use of a “by law” clause, authorized Congress to create lower federal courts.³⁴⁰ The use of a temporary provision with an automatic sunset may have destabilized the polity by allowing the lower federal courts to expire, but a “by law” clause granted more flexibility to the Congress to create the lower federal courts via lawmaking without a similar destabilizing effect.

2. *Vagueness*

Another mechanism for increasing constitutional flexibility is vagueness. Some degree of vagueness is unavoidable in drafting durable constitutions, but the term constitutional vagueness, as used here, refers to the intentional use of vague provisions in order to postpone a final decision on contentious constitutional questions.³⁴¹ Where parties are unable to agree on clear constitutional norms, constitutional drafters can promote consensus by drafting vague provisions that leave divisive questions unsettled. Parties may agree to the adoption of a vague constitutional norm even where they disagree on its meaning and expected application.³⁴² Vagueness also increases interpretive flexibility by allowing courts and legislatures to “update” unwise or outdated constitutional provisions via judicial interpretation. In common law systems, although the political branches play a role in interpreting and implementing vague constitutional provisions, the primary burden of interpretation will ordinarily fall on the judiciary.³⁴³

This wholesale delegation of controversial constitutional questions to the judiciary, however, raises serious democratic legitimacy problems. Vague constitutional provisions task the unelected judicial branch with interpreting and updating contentious constitutional provisions.³⁴⁴ That, in turn, can force

courts. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PENN. L. REV. 45, 52–56 (1975).

340. *Id.*; U.S. CONST. art. III, § 1.

341. See Dixon & Ginsburg, *supra* note 6, at 650.

342. See CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 56–61 (2001).

343. See Dixon & Ginsburg, *supra* note 6, at 655. In a civil law system, where vagueness in most cases would be resolved by the legislature, a vague provision resembles a “by law” clause in that a vague provision serves as a de facto delegation to the legislature to resolve the vagueness and implement the provision. See *supra* note 321 and accompanying text (analyzing “by law” clauses).

344. See Marmor, *supra* note 313, at 76–77 (“[T]he more flexible the culture of constitutional interpretation is taken to be, the more power it grants to the courts in determining its content. In a clear sense, then, the more flexible the culture of constitutional interpretation, the more anti-democratic it is . . . [and thus] the more reason you have to worry about the anti-democratic role of the courts in determining matters of moral political importance in the constitutional domain.”).

the judiciary to take sides on divisive political questions, inflaming political divisions and diminishing the public's respect for the judiciary. In addition, from an institutional competence perspective, courts are poorly positioned, relative to institutions such as the legislature, to consider all relevant information and make an informed policy judgment.³⁴⁵

Constitutional vagueness presents other problems as well. The error costs of delegating constitutional questions to the judiciary may also be quite high. If the judiciary gets it wrong on a constitutional question, the amendment of the constitution will ordinarily be necessary to override the judiciary's judgment. Like "by law" clauses, constitutional vagueness can also create troubling gaps in regulatory coverage if the judiciary avoids answering core constitutional questions.³⁴⁶ What is more, not all constitutional norms are amenable to flexibility through vagueness. Constitutional drafters may want to adopt constitutional norms that require specificity—for example, the establishment of an electoral system—that nonetheless may benefit from experimentation for an interim time period. Setting aside democratic legitimacy problems, the judiciary may be unable to update these constitutional norms absent brazen disregard for the constitutional language.³⁴⁷ For those norms, the adoption of a temporary provision would free the judiciary to engage in more faithful constitutional interpretation without the fear of perpetuating perverse social anachronisms.

3. *Low Amendment Thresholds*

Finally, low amendment thresholds—which allow constitutional amendment through, for example, a simple legislative majority—can also relax constitutional permanence. Constitutional drafters can apply the low amendment threshold generally to the entire constitution or specifically to an individual provision. For example, Stephen Holmes and Cass Sunstein have favored the use of relatively easy constitutional amendment rules, as well as a constitutional amendment process monopolized by the legislature, for the emerging democracies in Eastern Europe.³⁴⁸ To Holmes and Sunstein, the constitutions in Eastern Europe were works-in-progress that should be changeable relatively easily in an incremental fashion through a process of trial

345. See Dixon & Ginsburg, *supra* note 6, at 650 n.48.

346. See *id.* at 664 n.97.

347. See Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 275 (2002) ("If the nation is to continue with a written constitution that contains the specificity of some of the provisions of the existing document, there will be times when, absent flagrant disregard for constitutional language, some amendments will be required as defects become apparent, or changes are desired.")

348. Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275 (Sanford Levinson ed., 1995).

and error.³⁴⁹ Easy amendment rules were also needed, on Holmes and Sunstein's account, to prevent ex-Communists from entrenching their privileges and policy preferences into the constitution.³⁵⁰

Although lower amendment thresholds may be appropriate in certain circumstances, this design alternative suffers from significant drawbacks. As Jon Elster has argued, the "stabilizing effect of requiring supermajorities for amending the constitution is arguably the most important aspect of constitutional precommitment."³⁵¹ Lowering the amendment threshold to a simple majority permits major structural changes on a legislative whim. Amendment by simple majority allows different legislatures to provide different answers to the same constitutional question, with the potential for significant instability and the frequent disruption of settled expectations. This potential is more pronounced for low amendment thresholds than a carefully limited temporary provision designed to be replaced later by a more durable provision. A low amendment threshold also blurs the line between ordinary and fundamental law required by a commitment to constitutionalism³⁵² and may cause "the collapse of constitutional politics into ordinary politics."³⁵³ What is more, low amendment thresholds can undermine the purposes of judicial review, which requires some constitutional rigidity to be effective.³⁵⁴

Low amendment thresholds can also have significant antidemocratic consequences. As Holmes and Sunstein recognize, in a universe of easy amendability, fundamental constitutional rights are at the mercy of shifting legislative winds and interest group politics.³⁵⁵ For example, the Fidesz government in Hungary, which came to power with 53 percent of the vote in 2010, was able to utilize easy amendment rules to stack the constitutional deck

349. *Id.*

350. *Id.*

351. ELSTER, *supra* note 41, at 155; *see also* Elster, *supra* note 309, at 471 ("The constitution will lose many of its desirable properties—notably that of inspiring confidence and creating a climate in which investors are willing to make long-term investments—if everyone expects that it will be continually revised."); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 259 (Anders Wedberg trans., 1945) ("Since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the constitution is made more difficult than the enactment or amendment of ordinary laws."); Wil Waluchow, *Constitutionalism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Sept. 11, 2012), <http://plato.stanford.edu/archives/win2012/entries/constitutionalism> ("Entrenchment not only facilitates a degree of stability over time (a characteristic aspiration of constitutional regimes), it is arguably a requirement of *the very possibility* of constitutionally limited government. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would, in reality, be any such limitations.").

352. *See* Pettys, *supra* note 1, at 317.

353. Holmes & Sunstein, *supra* note 348, at 295.

354. *See* Arend Lijphart, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 218–19 (2d ed. 2010) ("[C]ompletely flexible constitutions and the absence of judicial review permit unrestricted majority rule. . . . [J]udicial review can work effectively only if it is backed up by constitutional rigidity and vice versa.").

355. Holmes & Sunstein, *supra* note 348, at 278.

in its favor and swiftly create a competitive authoritarian state.³⁵⁶ Likewise, in several Latin American nations, easy amendment rules have permitted “abusive constitutionalism,” a term that David Landau has coined to describe how would-be autocrats use lax constitutional amendment and replacement procedures to undermine democracy.³⁵⁷

To be sure, temporary constitutions will not inevitably offer a superior alternative to other design strategies discussed above. Depending on their goals, constitutional designers may find it appropriate to use a mix of design tools to reach an optimal result. It may be necessary, for example, to use “by law” clauses for structural provisions, where the use of temporary provisions with express sunset dates may have a destabilizing effect. “By law” clauses may also be useful in authorizing the legislature to implement the specifics of a generally applicable constitutional norm via lawmaking. Likewise, constitutional vagueness may be a useful tool for crafting constitutional provisions that will apply in situations unforeseeable at the time of the drafting. Where the goal, however, is to reduce decision and error costs, as well as cognitive biases, without sacrificing democratic legitimacy, temporary constitutions offer some distinct advantages over other design alternatives.

CONCLUSION

The concept of temporary constitutionalism may, at first blush, appear to be a paradoxical construct. After all, a fundamental and desirable characteristic of constitutions is widely assumed to be durable entrenchment. That assumption, as this Essay argued, is inaccurate as a descriptive and a normative matter. Descriptively, even a casual survey reveals the use of temporary constitutions or constitutional provisions across many nations situated in different historical, political, and social contexts. Normatively, the use of temporary constitutions or constitutional provisions may be more desirable in certain contexts than their more durable counterparts, as well as other design alternatives intended to decrease constitutional rigidity.

To paraphrase Madison, if prescient and benevolent angels were to write constitutions, temporary constitutionalism may not be necessary.³⁵⁸ Constitutional designers would ideally reach consensus on contentious constitutional questions without derailing the design process, foresee the evolution of societal and cultural norms, obtain the requisite information to determine the consequences of their constitutional choices, shun constitutional

356. See Kim Lane Scheppele, *Not Your Father's Authoritarianism: The Creation of the "Frankenstate,"* EPS NEWSLETTER (Am. Political Sci. Ass'n, European Politics & Soc'y Section), Winter 2013, at 5, available at http://www.academia.edu/2773381/Reflections_on_Democracy_in_Eastern_Europe_5_author_forum_.

357. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS. L. REV. 189 (2013).

358. See THE FEDERALIST NO. 51, at 257 (James Madison) (Oxford Univ. Press 2008) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

passions that inject cognitive biases into the design process, and “get it right” the first time around. But constitutions are not drafted by angels, and the constitutional-design process is riddled with limitations that often make durable constitutional design difficult and error-prone. Employed in the appropriate context, temporary constitutions may alleviate some of the limitations of durable constitutional design by promoting incrementalism and experimentation where error costs are high, reducing cognitive biases where cognitive biases dominate the constitutional moment, facilitating consensus building where decision costs are high, and easing intertemporal control by the constitutional framers. Despite their significant benefits, temporary constitutions, as this Essay recognized, may impose their own costs on the polity, especially if they are used poorly. This Essay analyzed these costs and included prescriptions for minimizing them.

Constitutional design continues to evolve in ways that challenge existing theories and aspirations. Instead of demanding perfection from inherently imperfect design processes, we would be better served by theories of constitutionalism that candidly acknowledge the limitations of both the human designers and the design process. Temporary constitutionalism is an important part of that emerging conception of constitutional design.