

THE METAPHYSICS OF CONSTITUTIONAL PRECOMMITMENT

THE CONSTITUTION OF THESEUS:
AN INVESTIGATION INTO THE METAPHYSICS OF CONSTITUTIONAL
PRECOMMITMENT

By CHRISTINA ROTHWELL, B.A.

A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the
Requirements for the Degree Master of Arts

McMaster University © Copyright by Christina Rothwell, 2017

McMaster University MASTER OF ARTS (2017) Hamilton, Ontario (Philosophy)

TITLE: The Constitution of Theseus: An Investigation into the Metaphysics of Constitutional Precommitment

AUTHOR: Christina Rothwell, B.A. (McMaster University)

SUPERVISOR: Professor Wilfrid J Waluchow

NUMBER OF PAGES: v, 80

Abstract

Constitutions and bills of rights have previously been argued to be non-democratic. To justify the entrenched nature of constitutions, some theorists have argued that constitutions represent a type of *rational precommitment*. However, this precommitment understanding of constitutions is not without its own problems. In this work, I will argue the prominent understanding of constitutional precommitment used by its proponents seems to rely upon a definition of commitment to which their arguments do not stay true. However, when I try to amend their arguments and apply a proper example of commitment, it leads to some problems with other tenets of the constitutional debate, especially the fact of constitutional entrenchment. In an attempt to determine just what it would take to save the rational precommitment understanding of constitutions, while maintaining a proper definition of commitment, I turn to metaphysical puzzles about change, persistence, and the possibility of a mereological understanding of our constitution. I conclude that 1) current debates do not have a proper conception of commitment and are thus failing to accomplish their ends, and 2) if proponents of the rational precommitment view do not buy into my analysis, then it is going to prove quite difficult to keep their account afloat once we properly define commitment.

Acknowledgements

I want to thank Wil Waluchow and Mark Johnstone for helping me get through this task. I don't know what I would have done without their eyes.

I want to thank Matt Grellette for knowing what I was talking about even when I didn't.

And I need to thank my deda, who wants nothing more than to have a Dr. Rothwell in the family.

Two degrees down. One to go.

TABLE OF CONTENTS

<u>Chapter 1- Constitutionalism: The Set-Up</u>	<u>1</u>
<u>Chapter 2- Precommitment</u>	<u>13</u>
<u>2.1 Jon Elster's Criteria of Self-Binding</u>	<u>14</u>
<u>2.2 Problems with Constitutional Precommitment</u>	<u>19</u>
<u>2.3 Response to Popularity</u>	<u>20</u>
<u>2.4 Fallout</u>	<u>25</u>
<u>2.5 Commitment: A Basic Account</u>	<u>27</u>
<u>Chapter 3- Constitutional Metaphysics</u>	<u>34</u>
<u>3.1 Terminology</u>	<u>34</u>
<u>3.2 Metaphysical Reflections on Constitutions</u>	<u>39</u>
<u>Chapter 4- The New Frame</u>	<u>50</u>
<u>4.1 The Fundamentals: Review</u>	<u>50</u>
<u>4.2 Keeping Constitutional Precommitment Afloat</u>	<u>61</u>
<u>4.3 Questions and Objections</u>	<u>65</u>
<u>Conclusion</u>	<u>76</u>

1 Constitutionalism: The Set-Up

The subject of study in constitutionalism ought not to be difficult to figure out. Constitutionalism studies constitutions; what they are, why we have them, and what it means to be a constitutional nation.¹ Constitutions, broadly construed, are instruments of written and (perhaps) unwritten law which outline the fundamental structure of society.² They are the highest law of the land, containing the rules determining whether and how to divide the powers of government between the legislative, the judicial, and the executive branch, as well as whether and to what extent each of these branches is limited.³ Many constitutions contain charters or bills of rights, which usually outline some of the protected areas by which governmental powers are subject to limitation. To safeguard against their abuse, many countries' constitutions are entrenched—or, made extremely difficult to change-- and often require elaborate and super-majoritarian consensus to pass a proposed formal amendment.⁴

The reasons for having an entrenched constitution are numerous. Firstly, the entrenched nature of a constitution is intended to promote national stability by limiting to some degree the amount of fundamental legal and political change that a state can undergo and the speed with which the change could be made.⁵ This stability, then, also makes it easier for those subject to the law to know and

¹ Waluchow, Wilfrid J. 2007. *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge: Cambridge University Press.

² Waluchow 2007, 1; 47

³ Waluchow 2007, 19

⁴ Waluchow 2007, 41-42

⁵ Waluchow 2007, 41-42

guide their behaviour by the law than if the core legal structures were in constant flux.

The second benefit to having an entrenched constitution is their superordinate standing. Constitutions are the highest law of the land. They represent the foundation of the executive, legislative, and judicial structures, and the legal core of the community. This status, coupled with the common inclusion of a charter or bill of rights, can also serve to insulate minority interests against the whims of a prejudiced or ignorant majority. If, for example, the legislature of a democratic country passes a law that has the unanticipated side effect of infringing on a minority group's right to mobility, that group has a route through which to bring a legal case against the legislature and have the conflicting law changed or nullified, to the extent of the conflict, without needing to pass a majority vote.⁶

Constitutions are often aggrandized and explained through the classical Greek myth of Ulysses⁷ and the Sirens. Sirens are mythological creatures whose intoxicating voices were known to drive sailors mad and force them to run their ships aground and drown themselves. Ulysses was a captain of a ship who, while at sea, wished to hear the song of the sirens. He knew that hearing the sirens sing would immediately launch the hearers into a suicidal frenzy, but he had an idea. Ulysses had his crew plug their ears with wax and tie him securely to the mast of the ship. The wax would permit the crew to steer the ship through the sirens'

⁶ Waluchow 2007, 75

⁷ Waluchow 2007, 153

rocky abode without becoming frenzied while allowing the bound Ulysses to listen to the enchanting song while remaining safely on board. Once the threat of jumping ship has passed and Ulysses comes to his senses, he may be untied, thus accomplishing his goal while remaining safe.

The point of the Ulysses allusion is to demonstrate the notion of *rational precommitment* and how it works in the realm of constitutional law. The constitution and its included charter or bill of rights is the mast to which we tie ourselves to protect against our darker natures. Constitutions are valuable for their ability to prevent us from becoming enchanted by vices of fear, hatred, and majoritarian tyranny, committing us *ex ante* to a fundamental set of moral and legal principles. With the entrenched constitution set in place, we are precluded from abusing certain populations in times of war, or from subordinating a class of peoples on the whim of a prejudiced majority.

Given the apparent benefits of the entrenched constitution, it is a wonder why anyone would suggest its undesirability. However, naturally, constitutionalism has its critics, many of whom point to a substantial problem: the long-lasting nature of the entrenched constitution subjects future generations of legislators and citizens to what is called the ‘dead hand of the past.’ To phrase it according to the Ulysses allusion, where Ulysses himself makes the choice to be bound to the mast, we the people do not make such a choice. Instead, the constitution is imposed on one generation by the generation preceding it. Once upon a time a group of officials sat down together and decided to create a

constitution and since then, every future generation of citizens and every future government is forced to comply with the constitution's dictates. As such, the argument goes, the future legislator's pen is held by the dead hand of the past.⁸

A similar normative argument points to the non-democratic nature of entrenched constitutions. In a democratic society, citizens are ultimately responsible for determining the laws and regulations by which they are governed, often by voting for the individuals by whom they would like to be represented in the houses of parliament.⁹ These few individuals then inherit the power to shape the legal and political landscape of their country and derive their legitimacy from the fact that they were *personally* voted for by the majority of citizens. However, despite their democratic legitimacy, these legislators cannot supersede the authority of the constitution. Thus, the adoption of the constitution seems to be somewhat incompatible with the 'proper' democratic self-government of the people.¹⁰ Further, in countries like Canada and the United States, the responsibility of ensuring that the elected officials toe the line belongs to none other than the unelected members of the judiciary.¹¹

Some critics of constitutions can accept the fact that, while their amendment formulas might be an extremely high barrier to change, amendable constitutions are not *impossible* to change. If we agree that there is a substantially pressing issue with the constitution, then we are more than able to change the

⁸ Waluchow 2007, 135

⁹ Waluchow 2007, 15,

¹⁰ Waluchow 2007, 17-18

¹¹ Waluchow 2007, 145

constitution through formal amendment.¹² If the constitution is formally amended, then it *will* reflect our political commitments, and if we do not attempt to amend the constitution, then perhaps we could be said to agree tacitly with the commitments already contained therein.¹³ Further, it is not unheard of to have clauses within the constitution itself which permit the legislature to impose “reasonable limitations” on some of the rights and freedoms, so long as they can justify doing so.¹⁴ In Canada, as well, the notwithstanding clause gives legislators the authority to pass a law despite the judiciary deeming it unconstitutional. Thus, it seems, despite the apparent rigidity of the constitution once enacted, there exist ways for the present body politic to ‘customize’ it to reflect current commitments. If this is the case, then we need not worry about the dead hand of the past. The concern about the apparently non-democratic nature of the constitution, however, is second to the concern about the non-democratic role of the judiciary.

The question of whether judges engaging in judicial review are creating law or not, and how to know either for sure, has become a core battleground for much of the constitutional debate. At present, many theorists are attempting either to defend or to refute the thesis that judges are not overstepping their allotted office to create law, but are merely *interpreting* law and the political commitments that we have already made. These arguments rely on ideas coming out of the

¹² Waluchow 2007, 139

¹³ Waluchow 2007, 142

¹⁴ Waluchow 2007, 3

philosophy of language, like theories of representation and meaning, differentiating between a concept and its many conceptions, or theorising about how meaning can change over time. These arguments are shot back and forth between two large camps of theory: originalism and non-originalism (or, living-tree constitutionalism). I will explain each in turn.

Originalists, like the late Justice Antonin Scalia, Robert Bork, and Randy Barnett, claim that the role of the judiciary, when engaging in judicial review, is to understand the constitution with an eye to its original status *as far as possible*.¹⁵ This idea, I would say, points to the fundamental value of originalist interpretive theory; if our interest is stability or consistency, then we ought to keep the root of our legal system in mind as we hammer out unexpected and seemingly unprecedented cases. If the case before the court is unprecedented, then the court may *not* reach a decision without engaging in constitutional construction.¹⁶ Whether this is permissible depends on the theorist, but for the most part, a judge standing in the legislative role is typically held to be democratically problematic. As such, it is extremely important to know when a decision is contained within the original meaning or spirit of the constitution. To do so, many legal theorists have looked to the philosophy of language to investigate the relationship between a single *concept* and its many *conceptions*.

¹⁵ Waluchow 2007, 54

¹⁶ Waluchow 2007, 57; Goldsworthy, Jeffrey. 2009. "Constitutional Interpretation: Originalism." *Philosophy Compass* 682-702, 683.

We can agree on the importance of a value¹⁷ like *equality*, and yet still disagree on what precisely equality *is*. Originalists typically will hold that the constitution was created with a specific *conception* of a given *concept* in mind. Thus, for example, if *equality* as procedural equality is entrenched in a constitutional charter or rights, the judge may not decide a case using the conception of equality as *substantive* equality, *even if* the substantive conception is more resonant with contemporary use. This would have a significant role in cases pertaining to affirmative action, social assistance, and the like. However, many think there is little reason to act as though a single conception was entrenched in the law. This is the crux of the living-tree constitutionalist view. For this non-originalist camp, which includes Wil Waluchow and David Strauss, language is organic, capable of growing and developing in meaning through its use in the law and in ordinary communication.¹⁸ Thus, *even if* the framers of the constitution had the procedural conception of equality in mind, and *even if* we could somehow know what that conception was, judges are permitted to use the substantive conception in their decisions, provided it can be demonstrated to have evolved through the setting of legal precedent.¹⁹

Both originalists and non-originalists depend on the understanding of constitutions as tools of *rational precommitment*, the same understanding

¹⁷ Marmor, Andrei. 2013. "Meaning and Belief in Constitutional Interpretation." *Fordham Law Review* 577-596, 579. While the example Marmor uses is that of "philosophical talent", his basic point is the same

¹⁸ Waluchow 55

¹⁹ Waluchow 55

expressed through the Ulysses allusion. As should be apparent, how much each group of theorists relies upon the precommitment justification varies *wildly*. Living-tree constitutionalists appear to rely on precommitment only in so far as the developing ‘tree’ of language must have its root, and the original constitution acts, at best, as the starting point for this evolution. Originalists, however, are *extremely* dependent on the understanding of constitutions as tools of rational precommitment. If the precommitment aspect were of less importance, the evolution of language would be embraced and the need to cling so vehemently to a particular conception of a concept would dissipate. The original constitution is not just the starting point; it is the end all and be all of their constitutional law. Yet the fundamental point of *precommitment* remains in both camps; if the constitution is that to which we have bound ourselves, and that commitment is what makes my job as judge or legislator democratically legitimate, then I must *as far as possible* and *as much as required* respect that commitment. Interestingly, however, little work has been done into the nature of this commitment, or of commitment more generally. I take this to be a fundamental flaw in the structure of some of the constitutional arguments. This flaw is *especially* apparent in those arguments whose conclusions depend on any of the argumentative commitments I have mentioned previously. We shall review those.

Constitutions are deeply entrenched, and often extremely difficult to change. Critics of constitutions worry that the constitution may be undemocratic for precisely this reason. Not only is the content of constitutional law outside the

control which rightfully belongs to the democratically elected legislature, but in countries like Canada and the United States, it is defended by unelected judges. Proponents calm the critics by saying, “entrenchment might be a problem, but we are acting like Ulysses. These are our rational precommitments. They, united, are a secure structure set in place to keep us on track, but which does not prevent us from making appropriate changes. And the judge-as-legislator concern is unfounded, as they are not *making* law. Judges are simply *clarifying* the law already contained in the constitution, the meanings and implications that are already present, that to which we have already committed.” This means precommitment plays a very important role in the defence of entrenched constitutions. Despite this, rational precommitment to an amendable constitution has not been given much attention on a conceptual level. It is taken for granted that it is possible to make the kind of elastic commitment that constitutionalists claim we have made. However, in my work, I will be complicating this very assumption.

Most defences of entrenched conceptions or judicial obligations are dependent on the perceived legitimacy of some level of precommitment, and come *after* the assumption is already made that constitutional precommitment *itself* is coherent on a conceptual level. This is an idea expressed by Andrei Marmor. In his chapter entitled “Meaning and Belief in Constitutional Interpretation,” Marmor says the following:

“What I have tried to show is that the protagonists in the debate got the direction wrong here. They conduct the argument as if the linguistic considerations about the concept versus conceptions distinction can be utilized to support their moral-political views about the rationale of a constitutional regime and its moral legitimacy. But, in fact, it is exactly the other way around. The moral-political views about the rationale of a rigid constitutional regime are the ones that should inform the ways in which we think about what kind of speech act constitutional documents are, and the kind of conversation that constitutions establish.”²⁰

I agree with Marmor insofar as I think *some* constitutional theorists argue in the wrong direction. If you think of the idea of intergenerational precommitment as legitimate and binding, then you are going to be some kind of originalist; if you are wary of the bindingness of that precommitment, then you will be something else. I also think constitutional theorists are making a second problematic assumption: that constitutional precommitment is possible. But what does it take for precommitment to be conceptually possible?

I will be complicating the arguments surrounding the rational precommitment justification and testing its soundness as a theory of constitutions. My argument has two main foci: the concept of commitment, and the type of object we take our constitution to be. I will show that the only way to

²⁰ Marmor 2013, 580

make sense of constitutional precommitment in the context of the current debate is to view the constitution as a ‘hybrid’ object: an object that has both essential and non-essential features. If theorists are not willing to take this view of the constitution on board, then constitutional precommitment is not a justified approach to constitutionalism.

In the next chapter, I will explicate the theory of commitment which currently serves as the foundation of much of the constitutional debate. Jon Elster’s work on rationality and self-binding is the most extensive work on commitment in play in this debate. After explaining his conceptual analysis of commitment, I will show that Jon Elster’s theory does not support the kind of constitutional precommitment that theorists understand him to endorse. Thus, I will have to give my own *extremely* skeletal account of what commitment is; to my mind, if my extremely bare account of commitment cannot make sense of constitutional commitment, then it suggests that constitutional precommitment is problematic.

In chapter 3, I will then turn to the realm of metaphysics to answer the question posed in the second half of my work: what *kind* of object is the constitution? In choosing between three mereological options, I will show that there are, *at best*, only two ways to make sense of what kind of object we understand the constitution to be *given* all the other descriptive features of the constitutional debate.

Finally, in chapter 4, I will combine the insights from my analysis of commitment with the insights from my analysis of the type of object a constitution may be, and determine that theorists (living tree and originalist alike) already agree that the constitution is a hybrid object. I will thus conclude that the foundational question of constitutionalism ought *not* to be “how does constitutional meaning work,” but instead “what are the essential features of a constitution?” My aim is to suggest that this account of what constitutionalists are doing will help strip away irrelevant foci and pinpoint the actual work that needs to be done to make headway in defending the notion of constitutional precommitment.

2. Precommitment

It has been said that constitutions are, by their very nature, precommitment devices.²¹ If I hope to make any headway in this project, I must start as close to the beginning as possible, particularly with the question *what is commitment?* For this investigation, I will use the work of the same author relied upon by proponents of constitutional precommitment: Jon Elster.

Elster's two works, Ulysses and the Sirens and Ulysses Unbound, together make up the extensive body of work on rationality, self-binding, and commitment used by several theorists in constitutionalism.²² Given the popularity of the precommitment understanding of constitutions, one might expect much more work to have been done investigating commitment and self-binding and its relationship to constitutionalism. However, little effort has been made to develop a separate theory of commitment and of what it means to commit oneself to something, especially with respect to constitutions. The widespread reliance on Elster's account of commitment results in a gaping void in the literature on self-binding and commitment. It has been taken for granted that Elster's conception of commitment is sufficient for the project constitutionalists have undertaken, even though Elster himself believes otherwise.

That Elster's account is *not* compatible with constitutionalism as it is discussed currently is a serious issue because there seems not to be any

²¹ Waluchow 2007, 132; Marmor 2013, 593

²² Waldron 1999; Waluchow 2007; Besson 2005; Marmor 2013; While my list of direct citations may be short, Elster's account of commitment seems to have become the implicit standard despite lack of awareness of its source.

alternative theory of commitment suitable for its endeavours. The resulting problem is twofold. Firstly, the absence of a strong foundational understanding of commitment makes any attempt to justify rational precommitment merely cursory. If our current understanding of commitment to constitutions is unfeasible, then some other justification for rational precommitment must be given. Secondly, if we cannot come up with a better account of commitment, rational precommitment may not be a viable way of characterizing our relationship to our constitution, at least not while maintaining all the other features of constitutionalism to which we cling (such as amendability).

In this chapter, I will explain Jon Elster's account of commitment or self-binding. I will then explain his own reasons for thinking our relationship with the constitution is *not* one of precommitment and self-binding, but of something else. Finally, I will try to create the broadest and most adaptive conception of commitment to determine what it might take to make our constitutional precommitment theories make sense.

2.1 Jon Elster's Criteria of Self-Binding

In his work on rationality, Jon Elster investigates why individual agents might choose to limit themselves, and how they would go about doing so. Different reasons for which one might limit one's own behaviour include the aims of delaying gratification or of overcoming passion and self-interest, among others.²³ Elster's general thesis is that the phenomenon of precommitment "is a

²³ Elster 2000, 6

privileged way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means.”²⁴ He does not have a definition of his own, but suggests that there are five criteria on which any definition of proper precommitment *must* bear:

1. To bind oneself is to carry out a certain decision at time t1 to increase the probability that one will carry out another decision at time t2.²⁵
2. If the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.²⁶
3. The effect of carrying out the decision at t1 must be to set up some causal process in the external world.²⁷
4. The resistance against carrying out the decision at t1 must be smaller than the resistance that would have opposed the carrying out of the decision at t2 had the decision at t1 not intervened.²⁸
5. The act of binding oneself must be an act of commission, not of omission.²⁹

I will go through each requirement in turn.

²⁴ Elster, Jon. 1979. *Ulysses and the Sirens: Studies in Rationality and Irrationality*. London: Cambridge University Press, 37.

²⁵ Elster 1979, 39

²⁶ Elster 1979, 42

²⁷ Elster 1979, 42

²⁸ Elster 1979, 44

²⁹ Elster 1979, 46

The first requirement deals with the intentionality of the resulting decision. The increased probability of the decision at t_2 *must* be the motive of the bond made at t_1 for the bond to be one of precommitment. With this requirement, Elster is excluding those cases where the desired outcome has emerged as a side effect of another action, or as an unpredictable but welcomed effect of the engaged action.³⁰ The case of the smoker who desires to quit smoking is a useful case for clarifying this distinction. Self-binding would require the smoker, for example, to inform his friends of his intention to quit smoking. Presumably, if he tells his friends of his intention, it will increase the probability of his choosing not to smoke at a future time (lest he risk ridicule or shame). This state of not smoking is directly connected to the decision made at time t_1 . This would be contrasted with the smoker who goes on a walk and forgets to take his lighter with him. Forgetting to bring one's lighter might bring about the desired state (not smoking), but cannot be said to be a case of commitment. Presumably the smoker would have smoked had the lighter been present.

The second requirement, Elster admits, seems a rather *ad hoc* inclusion, but nevertheless plays a significant role. Elster notes that his other four criteria are compatible with the thought that *any* sacrifice of present goods in order to make more goods available later is precommitment, and thus thinks they must be constrained in some way. This second requirement is what separates proper precommitment from other forms of self-binding, such as merely delaying

³⁰ Elster 1979, 40

gratification. If the goal of the bond made at time t_1 is to preclude action y at time t_2 , then a proper bond would preclude y as an option at time t_2 . Elster seems to require some irreversibility in this understanding of what it takes to be legitimately committed. Thus, if y is still a feasible option at t_2 , the commitment is, in essence, reversible (if a genuine commitment at all). The sommelier who leaves the bottle of wine to age is not committing himself to anything beyond the present moment; the wine can always be drunk. It should be noted, however, that an agent may commit himself to an irreversible allocation of consumption over time,³¹ such as the case of the smoker who commits to limiting how many smokes he may have per day. This method will re-emerge in relation to the fourth requirement later.

The third requirement is necessary to preclude what Elster calls “decisions to decide.”³² This would be the smoker who does not set any tangible condition on his behaviour (informing friends, locking away the cigarettes, etc.), but simply steels himself to the claim that, should he find himself desiring a cigarette, he will simply will himself not to cave in. Elster does not think this sort of decision is completely without efficacy, though he does hold that processes of this sort have very little impact, and it ought to be clear why. As Elster notes, the very reason for engaging in this precommitment is out of recognition of a weak will and infirm resolution. It seems intuitive that what it is to bind oneself is to deposit our will

³¹ Elster 1979, 42

³² Elster 1979, 43

into some external structure, even if only temporarily.³³ As seen from the explication of the second criterion, if *y* is to be avoided at time *t*₂ yet remains a feasible option, then one has not committed himself but has, at best, delayed gratification.

The fourth requirement is a response to humanity’s “general resistance to walking uphill, and our preference for downhill strolls.”³⁴ The chain smoker who wishes to quit might find quitting outright to be too difficult, and so may decide to build up the will power. But if going to the gym to instill discipline or taking up a hobby for distraction are going to require the very strength of will he needs to quit smoking, these are obviously going to be poor strategies for following through on his commitment.³⁵ Instead, the smoker might commit himself to an indirect method, one that speaks more of a “one step back, two steps forward” compromise. This might include steadily decreasing the number of cigarettes he may have a day, knowing that while he is still smoking, he will reach a point where the habit is sufficiently subsumed by his willpower and he can achieve the final state of ‘not smoking’.

The fifth and final requirement simply holds that *not engaging* in the particular behaviour is not the same as committing oneself *not to engage* in the behaviour. Being committed to something means not only that you will do that thing, but also that you will not do otherwise if and when given the chance. As

³³ Elster 1979, 43

³⁴ Elster 1979, 44

³⁵ Elster 1979, 46

Elster notes, “the fact that someone prefers not to leave a given state is not evidence that he would freely have entered that state from all of the states that are open to him.”³⁶ While some other method of binding oneself might include going out of one’s way to avoid that which triggers the desire to smoke, a *commitment* ought to be binding whether the individual is in the face of temptation or not.

2.2 Problems with Constitutional Precommitment

The five criteria outlined in the previous section are what Elster thinks distinguish precommitment from other methods of self-binding. These criteria are also what make it difficult to understand constitutions as instruments of self-binding. In his first major work on self-binding, *Ulysses and the Sirens*, Elster broadly touches on the topic of Ulysses’ self-binding in relation to the problem of democracy.³⁷ As previously mentioned, the myth of Ulysses is commonly used to capture the essence of precommitment – especially in relation to *constitutional* precommitment. Elster sees this commitment story as being a result of the problem of democracy. He argues that the problem of democracy at its core is actually a chain of problems, each link supplied to bandage one problem, but creating more problems in turn.

Direct democracy is the starting point. For the purposes of political stability, a direct democracy is problematic. While it might represent the ideal of democracy, it will unfortunately “tend towards zig-zag policies and constant reevaluation of past plans,” resulting in a government which is “incontinent,

³⁶ Elster 1979, 47

³⁷ Elster 1979, 88

vacillating and inefficient.”³⁸ This constant wavering of policy is going to prove more troubling as the body of citizens grows; it will be difficult for citizens to follow along with the changing rules and govern themselves accordingly. Therefore, some level of stability is required. Binding oneself to certain policies and political considerations will grant a desirable level of stability, and so members of some constituent assembly decide to come together to draft a constitution.³⁹ The constitution will pre-set and entrench the important rules and principles.

There is one problem with the constituent assembly though. Elster says, “each generation wants to be free to bind its successors, while not being bound by its predecessors.” This is the problem which he has called *the paradox of democracy*.⁴⁰ The constituent assembly gains a role by mere happenstance; they fulfill a privileged role for no merit but birth order. We could try to permit generation-to-generation alterations, but this would seem to be self-defeating.⁴¹ Permitting each generation to be its own constituent assembly in order to escape the paradox would sacrifice the very stability the constitution is meant to provide.

2.3 Response to Popularity

So ends Elster’s first discussion of constitutional precommitment. He concludes, at least at first, that constitutional precommitment is at the very least not *impossible*, but refuses to go much further. Owing to the popularity of his

³⁸ Elster 1979, 88

³⁹ Elster 1979, 93

⁴⁰ Elster 1979, 94

⁴¹ Elster 1979, 96

works on precommitment, especially in relation to constitutions, Elster revisits the paradox of democracy and the intergenerational democratic worry. Elster's new tactic is to question the degree to which constitutional precommitment is analogous to self-binding, especially since constitutions are meant to reign as the mode of governmental organisation across generations of citizens. This would mean, it seems, that rather than being a commitment to bind one's *own* behaviour, constitutions serve to bind the behaviour of others.⁴² But worse than the realisation that constitutions may in fact bind others is the realisation that it is questionable whether constitutions can legitimately bind *at all*.⁴³

Constitutions are meant to be difficult to change (if they are changeable at all). As Elster notes, continuing his discussion from Ulysses and the Sirens, constitutions are supposed to grant us stability that is otherwise lacking in democratic procedure. They occupy a more fundamental realm of law than our ordinary legislation, and, as such, require different and more stringent methods of amendment.⁴⁴ Nevertheless, Elster argues that they must *have* procedures for amendment; a constitution which was impervious to amendment and aimed to rule with an iron fist could in fact have the opposite effect. If constitutional change were impossible, Elster argues, citizens might endeavour to escape the bond in one of two ways: either claustrophobic citizens would decry the stringent limitation for its own sake; or unrealistic or unattainable measures of an

⁴² Elster 2000, 92

⁴³ Elster 2000, 94

⁴⁴ Elster 2000, 94

otherwise acceptable constitution would simply fall into habitual disuse.⁴⁵ Extreme limitation on constitutional amendment would be an unacceptable barrier to inevitable change.⁴⁶ The response would naturally be to loosen the bonds, but then we must deal with where to draw the line such that citizens are bound to the constitution without being “too bound.” Moreover, because extraconstitutional action is always possible, we lack the external structure which Elster includes as his third criterion of legitimate precommitment.

That constitutions may not be binding on society *at all* is thus a result of trying to walk the fine line between implementing too rigid a restraint on one hand, and a laughable one on the other. If constitutions are not self-binding in the relevant sense, or if constitutions are by and large only binding “until they aren’t,” then it seems difficult to make sense of constitutional precommitment. And yet, Elster thinks there is some degree to which we *do* think this makes sense; it might require a blatant non-recognition of the theoretical problems, but we do proceed as though societal precommitment is, at the very least, “not meaningless.”⁴⁷ We could understand self-binding in a literal sense, as we do if we consider a constituent assembly’s unanimous vote to limit its own power. Further, if we have reason to think that future generations will have the same reasons for desiring

⁴⁵ Elster 2000, 95. Section 33 of the Canadian Charter of Rights and Freedoms represents a vivid example of the problem of ‘habitual disuse’, surrounding the notwithstanding clause and any attempt at its use with an aura of notoriety.

⁴⁶ Elster 2000, 95

⁴⁷ Elster 2000, 96

restriction, then perhaps we could also understand this phenomenon as populous ‘self’-binding in some loose way.⁴⁸

Of course, Elster notes, even if we grant the conceptual *possibility* of constitutional precommitment, there are yet other problems associated with it. First, he notes, “societies are not individuals writ large.”⁴⁹ This is not the problem addressed before questioning the ability of a collective to bind itself. Rather, this problem works with the analogy between individuals and collectives and the “unity actor” assumption.

States are like individuals insofar as they are both expected to have consistent and stable preferences that can explain their actions.⁵⁰ The reason one engages in precommitment is because these stable and consistent preferences come into conflict; states, like individuals, can become divided on what to do or how to be.⁵¹ The smoker may desire the stress relief he receives from having a cigarette break, but may also desire to lead a healthier life overall, or to limit frivolous spending. But in the case of the divided individual, there is one part that is in charge and which “can engage in long-range planning” to restrict impulsive actions.⁵² The power relation is thus vertical; the divide is between the self and the subordinate desires. But the power relation in society is horizontal, not

⁴⁸ Elster 2000, 96

⁴⁹ Elster 2000, 167

⁵⁰ Elster 2000, 167

⁵¹ Elster 2000, 168

⁵² Elster 2000, 168

vertical.⁵³ There is no group in society that is said to have any inherent claim to represent the general interest, as there is in the case of the individual. Societies are made up of many individuals, none of whom can properly be said to be “in charge.” Indeed, individuals are put in charge through the democratic process, but there is nothing inherent in those individuals which makes them *naturally* more in charge compared to anyone else. Society, as Elster says, “has neither an ego nor an id.”⁵⁴

Nevertheless, the fact that society is not divided vertically does not prevent some groups from trying to impose their interests over others. This is especially the case for minority groups, whose interests are often neglected or blatantly crippled by the ruling majorities. Even where there is no intention of foul play, minority interests suffer. A minority group in the constituent assembly may be unable to get its rights and interests written into the constitution simply because democracy runs according to majority vote.⁵⁵ Similarly, constituent assemblies are often unable to anticipate the unique interests of future generations.⁵⁶ Elster says there is a risk of thinking of the constituent assembly as “demi-gods legislating for beasts,”⁵⁷ which is an obvious fiction. The only point in favour of the constituent assembly is its temporal priority; they *happened* to show up first.

⁵³ Elster 2000, 168

⁵⁴ Elster 2000, 168

⁵⁵ Elster 2000, 169

⁵⁶ Elster 2000, 170

⁵⁷ Elster 2000, 172

There is no other reason to think of the members as being better suited to draft the constitution than any others who could have been a part of the group.

Elster summarises his view on constitutions thus: if society is to be an individual, then the constitution is the Freudian super-ego. Despite any of the good things one can say about it, the beneficially stable framework of the constitution can *yet* prove problematic, occasionally preventing what end up being sensible, or even the most *optimal* behaviour. We thus need to tread lightly in order not to suffocate the citizens. We may have to implement “safety valve clauses” to avoid the aforementioned problems. But, Elster notes, “if the framers try to prevent the constitution from becoming a suicide pact, it may lose its efficacy as a suicide prevention device.”⁵⁸

2.4 Fallout

Clearly, Elster has some good reasons for thinking constitutional precommitment is an incoherent idea. His criteria are in direct conflict with constitutional precommitment. As mentioned previously, everything done on a constitutional level can be undone or simply ignored. Parts of the constitution may fall into disuse, limiting their ability to do anything at all, let alone bind behaviour. But the interesting problem emerges in relation to formal amendment.

Elster’s second and fifth criteria⁵⁹ raise some interesting problems about formal amendment. With formal amendment, at least in principle, one is always

⁵⁸ Elster 2000, 174

⁵⁹ “If the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the

presented with the possibility of adding or removing parts of the constitution, which seems to go against the second criterion. As an explicit example, one may consider the repeal of the 18th amendment of the American constitution. The 18th amendment, ratified in 1919, concerned Prohibition; that is, the manufacturing and sale of alcohol in the United States.⁶⁰ In 1933, the amendment was repealed, permitting the consumption of alcohol when consistent with the other active legislation.⁶¹ Clearly, the 18th amendment intended to prevent an individual at time t_1 from engaging in a certain behaviour (consuming alcohol). But that amendment was repealed, resulting in the law's *complete* reversal. The behaviour intended to be removed from an individual's set of options at time t_2 was thus clearly not removed.

An opponent could argue, with reference to the fifth criterion, that the fact that individuals were no longer bound by the 18th amendment does not mean that the commitment was undone. After all, Elster's fifth criterion says the commitment is supposed to stand *even* in the face of temptation: the repeal of the 18th amendment only provided a test to the commitment. Individuals who did *not* give in to the consumption of alcohol, despite the legal permission to do so, thus really *are* committed.

This is an interesting argument, but presupposes a very complicated relationship between citizens and the constitution. This example leaves

new feasible set includes the old one"; "the act of binding oneself must be an act of commission, not omission,"

⁶⁰ U.S. Const. amend. XVIII (repealed 1933)

⁶¹ U.S. Const. amend. XXI (ratified 1933)

reasonable doubt as to whether the individual was committed to the constitution, or *against* the consumption of alcohol. On its own, this argument does not appear to be much of a problem, yet it flies in the face of Elster's first criterion. This criterion notes that there must be a direct relation between the commitment and the outcome. It may very well have been the case that the individual was not consuming alcohol and thus cooperating with the constitution. But the cooperation with the constitution is a side effect; the commitment itself is against the consumption of alcohol.

Regardless, I am sympathetic to the previous argument, despite it being clearly incompatible with the rest of Elster's ideas which 'any conception of commitment must have.' Elster's views on commitment represent an extremely high standard, which would immediately prevent any possibility of constitutional commitment. The logical conclusion is thus that we need to come up with a *better* conception of commitment, and perhaps ought to take this fifth criterion as the foundation.

2.5 Commitment: A Basic Account

A commitment is only one of many potential (what I call) agent/action relations, a category of moral relations which includes things like promising, obedience, intentions, and duties, among others. Of these agent/action relations, commitment is intuitively considered most closely related to promising. Like promising, committing is an agent's expression of allegiance or devotion to some X, where X may be an object, a value, or a process or course of action. As in the

case of promising, when one fails to meet the conditions of one's commitments one is often thought to have done something wrong. There may be good reasons for renegeing on both promises and commitments, but those reasons may often only provide justification; they are not exculpatory. However, unlike promises, commitments are often thought to have a greater standard of expectation, and are thus a greater wrong when broken. If we look at what we intuitively mean when we say we are committed to something, it seems we are expressing *two* intimately related claims. Firstly, we are expressing a promise or statement of allegiance to meet the expectations of that thing: we will do as asked. Secondly, though, it is a limitation of freedom: we will not do otherwise. If the subject of our commitment comes into conflict with some alternative subject or mode of action, the commitment wins out.⁶²

Why are commitments not just really strong promises? What are the differences between commitment and promises, and why is it so important that what we are doing is *committing* to the constitution? For some, promises and commitments are the same in basic structure. Commitments are just promises which only mean to express a stronger devotion to the subject of the commitment. However, while I concede that there are not many differences between the two, I nevertheless maintain that the few differences that exist are quite significant.

⁶² Of course, certain situations may complicate this, such as situations of extreme coercion or duress, in which case the commitment has been broken, even if legitimately so.

The first significant difference is that when I make a *promise* to do something, my mental recognition and acceptance *of* that promise is the only thing keeping me to the terms of that promise. I may feel compelled to keep promises because I wish to be known as trustworthy and as having integrity, but those are mind-forged manacles. When I am committed to doing something, however, I am required to have some external mechanism to ensure that the commitment is held. On the point of external causal mechanisms, I agree strongly with Elster's claim that the purpose of the commitment is *typically* to combat weakness of will. Part of the stringency of commitment is that, like Ulysses tied to the mast, we may at some point experience weakness of will and no longer wish to meet the expectations of that commitment. If Ulysses had only promised to stay on board and did not have the external mechanism holding him to his promise, then once he and his crew sailed near the sirens, he would have promptly jumped overboard. However, the external bind over which he had no control ensures that the promise side of his commitment was held.

One question which might emerge is thus: if I am insisting that external mechanisms are essential to commitment, how is my account of commitment different from Elster's? When it comes to how we differ, it is most clear when we focus on cases where one *fails* to meet the terms of a commitment. For Elster, recall, not only must there be an external mechanism holding me to my commitments, but *legitimate* commitment requires that the behaviour to be avoided is made *impossible*. Do I not require the same?

To illustrate the difference between Elster’s expectations and my own, I will tell a story. Let us imagine I set aside some money in a bank account and commit to letting it accumulate interest for 10 years. Let us also imagine that I know I may have moments of weakness, so I sign up for a bank account which is endowed with a ‘freeze’ option, permitting me to place the money in the account, but not allowing me to remove it until after the date I decided my commitment would end. Now imagine that six years into my saving, I have a financial emergency and have only the frozen saving account in my name. I have no choice but to remove the money I had set aside, and though it is difficult and requires meeting with bank officials and tons of paperwork, I am finally able to take the money.

For Elster, by taking my money before the 10-year mark to which I had committed, I did not renege on my commitment: I was just never legitimately committed in the first place. For Elster, remember, a sacrifice of present goods “does not count as binding oneself if the new feasible set [of potential actions] includes the old one.”⁶³ Since it was possible for me to take the money back, I was never committed.

However, Elster’s account is too stringent for two main reasons. Firstly, whether I am committed to something seems to remain an open question until either a) I do the very action to be avoided, b) the expiry date of the commitment (if implemented) passes, or c) I die and thus become *unable* to do the action to be

⁶³ Elster 1979, 42

avoided. Secondly, there would be very few things to which we *could* commit, as almost *everything* which can be done may also be undone. On Elster's account, it appears as though the action to be avoided must be a *causal* impossibility. The external mechanism we set in place serves to increase the difficulty of performing the undesired action. Elster's standard for the second criterion is that the action to be avoided must not be in the committer's set of feasible future actions. However, Short of aging and, perhaps, burning my dinner, my future set of potential actions may almost always include the action to be avoided and that action is not feasible 'until it isn't' and I manage to do it. In this case, any successful attempt at doing the action against which one has committed would become a part of the feasible set of options, meaning the 'commitment' was never a real commitment in the first place. Therefore, Elster's account is far too high a threshold, especially for long-term or *lifelong* commitments.

On my account, however, the example of taking my money out of the account early *is* compatible with having been committed at some prior point in time. The result of my action is not to deny that I had ever made the commitment in the first place, but instead to claim that, though I *was* committed to X, my commitment has been broken. The action to be avoided may have been in my feasible set of options despite the external mechanism. My account does not require the action to be avoided to be a complete, causal impossibility, which gives constitutionalists a chance to get the precommitment idea off the ground.

Thus, while my definition shares the external mechanism requirement with Elster, my definition is significantly weaker, and thus more feasible.

To my mind, this two-part conception of commitment is as broad as we may get before there is no *meaningful* difference between it and other agent-action relations (such as mere ‘promising’ or ‘intending’). If this is the case, then it seems fair to say that if constitutional precommitment cannot get off the ground with *this* skeletal conception, then proponents of rational precommitment are going to be extremely hard-pressed to maintain their positions. Unfortunately, there is already at least one way in which this conception is incompatible with constitutionalism as we practice and theorize it.

Once again, formal constitutional amendment presents the problem of changing commitments that we experienced with Elster in relation to the 18th and 21st amendment of the American constitution. Any commitment we make to a constitution is still open to the possibility of us ‘doing otherwise’, given that it is possible to amend the constitution and thus change the terms of the commitment. If we want to be able to say we are *committed* to the constitution, we need to make sure we are not renegeing on the very actions we committed to honour.

We do not need to go so far as to follow Elster’s insistence that the behaviour to be avoided must not be available in any future set of options; this is much too high a standard, and cannot be assessed unless we can tell the future. But perhaps there is some degree to which the second criterion might point us in

the right direction. We *do* need some way to ensure that when we say we are *committed* to something, we are not just making hollow claims.

One way to begin this investigation is to ask what our commitment is *tracking*. What is it that a commitment latches to—the whole constitution, or only its parts? Maybe we can have constitutional commitments, but not be committed to the constitution. We must then ask what is the relationship between a change in the constitution and any resulting changes in our commitments. Is *every* change to a constitution also a change to the commitments we have made? Or is it perhaps the case that the things we can change are *not* and *never were* part of our commitment? Maybe constitutional precommitment operates a bit differently than we currently think. How would this be the case?

All arguments about constitutional commitment necessarily presuppose that the constitution is a particular *kind* of object. It is common for individuals to describe constitutions as having parts, or as being *complex* objects. If a constitution is an object with parts, then it is structured such that either each piece is an essential and irremovable feature, or no piece is an essential feature, or somewhere in between. Part of the complication of the constitutional precommitment debate is that thus far, we have not agreed on the type of object the constitution is. Perhaps an investigation into what kind of thing the constitution is will help us refocus the precommitment debate, making clearer what it is to which we are *actually* committing.

3. Constitutional Metaphysics

Before we can make sense of our constitutional commitments, we must first establish a clear understanding of each of their two components: ‘commitments’ and ‘constitutions.’ In the previous chapter, I dealt with the problem of commitment and offered a new account of what it means to be committed to something. In this chapter, I will address the metaphysical side of the debate and discuss what kind of object a constitution could be. Though the nature of the constitution as *object* has not been vastly explored, there is much to be drawn about the objecthood of the constitution from the existing arguments from constitutionalism. Before I get to that set of discussions, I will provide some basic definitions and distinctions which will prove valuable for understanding how my metaphysical argument works.

3.1 Terminology

Mereology is a branch of metaphysics dealing with the relationship between a thing and its parts. *Mereological Essentialism* is the name of a theory which holds that an object, strictly speaking, can never undergo any change of its parts.⁶⁴ While the terminology I plan to use in this thesis is consistent with an essentialist terminology, I wish to make it very clear that I am not intentionally assuming or committing to any essentialist or mereological theory. Instead, I aim only to discuss constitutions and change in the simplest terms available, which appear to reference objects with parts that can change.

⁶⁴ Chrisholm, Roderick. 1976. *Person and Object: A Metaphysical Study*. London: George Allen and Unwin, 145

The first distinction I would like to draw is between essential and non-essential features.⁶⁵ An essential feature is a property an object must have and may not lose without being destroyed or changing into some other *different* object.⁶⁶ So, an essential feature of a rock is hardness, and an essential feature of a bachelor is maleness. Due to such a dependent relation between an object and its essential features, if a rock were to lose its hardness, it would cease to be a rock. A non-essential feature is a feature a thing possesses, but not by necessity or identity.⁶⁷ It might be necessary that a rock be hard, but it matters not whether it is large or small, painted, or covered in moss. These features are accidental, or non-essential.

Metaphysicians have carved also out a second, wider notion of an “essential feature”. The second instance of an essential feature is a quality or property that an object must have *in every possible world*. On this version, an essential feature is a feature that an object will always possess in every possible world in which it exists and will never exist without it.⁶⁸ However, this definition aims to reach too high for the purposes of this investigation: we are talking about our world, not every possible world. For our purposes, the narrower definition of essential feature is sufficient.

⁶⁵ Also, essential and ‘accidental’ features or properties

⁶⁶ Lowe, E. J. 2009. *A Survey of Metaphysics*. New York: Oxford University Press Inc., 96.

⁶⁷ Lowe 2009, 97

⁶⁸ Lowe 2009, 96

The next important distinction is between *qualitative* and *numerical identity* in relation to *change*. If a thing has changed, this means that some feature or quality of the thing has been gained or lost.⁶⁹ Most of the time when an object has been said to have changed, it means that it is *qualitatively* different but *numerically* the same. An object could theoretically change any of its non-essential features and yet remain numerically identical to itself. For example, the rock could become chipped, and yet be recognised as the same rock. Intuitively, there is nothing strange about saying a thing has changed but is numerically still the same thing. *Logically*, however, change gives rise to a few puzzles, one of which is the puzzle about the ship of Theseus.

Theseus was a great Athenian war hero. To honour Theseus' successful naval campaigns, Athenians housed his ship in a harbour for many years. Over time, of course, pieces of the ship began to rot and require replacement with exact replicas. Eventually, the condition of the ship was such that no piece of it had been present at the time when Theseus had stood on board. Given the complete makeover the ship had undergone, can it make sense to say it is still Theseus' ship? At what point, if any, does a change in qualitative identity lead to a change in numerical identity?⁷⁰

When we say a thing has changed over time, we mean that an object existed in a certain state at time t_1 , and an object existed in a certain *different* state at time t_2 , *and* that these two objects are numerically the same object.

⁶⁹ Lowe 2009, 23

⁷⁰ Lowe 2009, 24

Simultaneously, the object is the same but different, insofar as it is qualitatively different but numerically the same.⁷¹ The ship of Theseus represents an interesting problem because it raises questions about persistence of identity and existence and potentially problematizes our ordinary conceptions of change.

We may be willing to say that the ship in the harbour, after undergoing a complete change in its qualitative identity, is yet numerically the same ship, albeit fixed up over time. But what about the pieces of wood that were removed from the ship as they degraded? If we were to reassemble them at a different location, resulting in two ships, would the ship in the harbour be numerically identical to the original ship? Or would Theseus' ship be the ship recreated out of the original planks, which were actually present when Theseus himself stood aboard? Are both Theseus' ship? Is neither? To make sense of change and understand how and when an object persists, we must consider the different ways an object's features may be arranged.

If we assume a metaphysics that accepts the distinction between essential and non-essential features, and spell out all the possible arrangements an object, X, could theoretically have, we are left with three options: X can have *only essential features*; X can have *only non-essential features*; or, X may have *both essential and non-essential features*, resulting in what I will call a "hybrid" object. As an object, then, Theseus' ship must have one of these three arrangements of features. If the ship is the kind of object which has *only essential features*, then it

⁷¹ Lowe 2009, 23

would be unable to change qualitatively without changing numerically. For an object, X, to undergo qualitative change, there must be a version of X at time t₁ that has a certain set of features, a version at time t₂ that has a different set of features, and a relation between X at t₁ and X at t₂ such that they are numerically identical. However, if all the features in the set for X at time t₁ are essential, then there is nothing in the set which is up for revision, meaning that any qualitative change in the set at t₁ destroys X and replaces it at t₂ with a new object Y.

If we view the ship as having solely essential features, then the ship may not be changed. This seems counterintuitive, however, as we are perfectly willing to change a plank in the ship, thereby changing it qualitatively, and yet acknowledge it as numerically the same ship. We are therefore led to our second extreme option – that the ship is completely made of non-essential features. If the ship has no essential features, then any part in its set of features is available to be changed. Removing a non-essential feature means the ship may change qualitatively and yet persist numerically through the change, resulting in a view of the object which better maps onto our intuitions. However, abandoning *all* essential features results in its own absurdities. Because the ship in the harbour had remained the same in its general form, the possibility for absurdity does not clearly arise in this thought experiment. However, if there are no essential features to the ship of Theseus, then there is *nothing* limiting the changes that the ship may undergo. Instead of wood, the ship may have been repaired with brick. Instead of keeping the same shape, the ship could have been rearranged to look

more like a firetruck than a boat. Theseus’ “ship” could theoretically be entirely unrecognisable, unable to float and fulfill its purpose as a ship, and yet remain numerically the same ship.

Thus, if we are attempting to plot the ship on a spectrum between “all essential features” at the one end and “no essential features” at the other, Theseus’ ship would have to fall somewhere in between. There would have to be at least one essential feature to distinguish Theseus’ ship from a firetruck, but there must also be at least one non-essential feature to permit the ship to undergo qualitative change without sacrificing numerical identity. What those features might be is up for debate, and it is most certainly not in the scope of this project to answer the paradox. But if arranging the puzzle in this way does *anything* to help us make sense of the paradox of the ship of Theseus, then there is reason to believe that it might prove useful in discussions surrounding the nature and interpretation of constitutions.

3.2 Metaphysical Reflections on Constitutions

Now that the basic metaphysical terminology is on the table, I can begin to discuss the constitution as an object. Though the question of what kind of object the constitution is has not been *explicitly* addressed in contemporary legal philosophy, debates surrounding the nature and interpretation of constitutions seem to presuppose a particular view of what kind of object a constitution is. From these debates, I have been able to extract some of the intuitions theorists seem to hold. It is important to note again that the discussion is limited to

theorists who rely on the view of constitutions as tools of rational precommitment, whether they use this view to argue for *or* against constitutionalism. Those who reject the precommitment view may still be interested in the constitution of constitutions, but they do not appear to be dependent on any particular outcome.

If we are going to think of constitutions as tools of rational precommitment, then we must also intend them to be the very things to which we are rationally precommitting, however concretely or ephemerally we may do so. This is consistent with the way we discuss the constitution, as ‘the mast to which we bind ourselves,’ in our arguments. But we wish to be able to amend the constitution as well, and thus often write our constitutions with clauses dictating the procedures for formal amendment. These two facts – that we wish to be bound and committed to the constitution, yet maintain the ability to change it– reveal significant information about the kind of object we understand a constitution to be and will be the justification for the conclusion I draw.

As I did with Theseus’ ship, I will consider all three of the arrangements available on this essential/non-essential dichotomy.

First, one might attempt to look at the constitution as an object with no essential features. Naturally, the solely non-essential-property constitution has the same result as the solely non-essential-property ship. If there is no essential feature to, say, the American constitution, then there is nothing limiting the scope of what the constitution may be. As a result, the constitution could qualitatively

change into *anything* and be the numerically same constitution, a result I assume we should want to avoid. But there is an additional concern in relation to constitutions which has no role in the ship example.

If the constitution is a tool of precommitment, it follows that the constitution must provide a standard of commitment. We want it to tell us what we need to do and to place limits on our ability to disobey its dictates. However, if there is no essential part of the constitution and every part may be changed, then there is nothing that our commitment tracks and nothing to give us the standard we are meant to meet. If a constitution has no essential feature, commitment to a constitution is not meaningfully possible. There must be *some* degree to which the subject of our commitment is not allowed to change, lest the commitment itself be one only in name. If the subject may undergo a complete qualitative change—to the point of being unrecognizable—yet be said to remain numerically the same object and still the subject of the *same* commitment, then we would have to be working with a truly superficial understanding of ‘commitment’.

Obviously, one could disagree. Saying that change is enough to undo a commitment opens the doors for broken contracts and broken vows. We expect change, and the point of commitment is that it stands *despite* the change. Marriage vows, for example, stand “for better, for worse, for richer, for poorer, in sickness and health,” the changes *included* in the commitment. As such, the subjects of our commitment must obviously be able to change.

It should be clearly noted that I have not stated the subject of commitment *cannot* change. Rather, I ask *how much* a thing can change. Your partner can change his or her hair, clothes, profession, ambitions, and yet remain the subject of your commitment. But what if his or her behaviour, voice, thought patterns, and memories all change too? How many changes are permitted before your partner is no longer one and the same person? Are commitments to Phineas Gage⁷² still applicable after his accident? Could we substitute the partner's twin and still claim that the commitment holds? If yes, then this is a very strange understanding of commitment. If not, then *what is it* precisely to which we are committing?

The conclusion to take from these examples is that there must be *some* limit on the amount of qualitative change the constitution may undergo, after which it becomes a numerically new object. Just like the Theseus' ship example, if there are no essential features to the constitution, then there is *nothing* limiting the changes that it may undergo. The constitution could theoretically be entirely unrecognisable and yet remain numerically the same constitution. If it is the same constitution, then it would appear to be the same commitment as well. But committing to a constitution which may qualitatively change into anything and everything is absurd. Thus, to serve as a tool of precommitment in any

⁷² If you don't know the story of Phineas Gage, you really should because it is fascinating. An explosion sent a metal rod through his skull, causing such a drastic (though perhaps hyperbolic) change in his subsequent behaviour and character that friends and family ceased to recognize him as Phineas Gage.

meaningful sense, a constitution cannot be composed solely of non-essential features.

At the other end of the spectrum is the option that a constitution is solely composed of essential features. If a constitution is made of entirely essential features, then no part of it may be altered without destroying the constitution and bringing a new one into existence. Unlike the ship example, it is not *obviously* theoretically impossible to have a constitution which has only essential features. We could meaningfully say we are committed to a constitution which has only essential features and buy into the extreme limitation such a commitment would impose upon us. If each feature of this constitution is essential, there is no part of it which is legitimately up for qualitative change. To change the qualitative identity of a constitution like this is inevitably to change it numerically. If the constitution is changed numerically, then the constitution has been destroyed and a new one has taken its place. If the constitution is destroyed, gone is the object of our commitment. Therefore, at the very least, it seems possible to be committed to a constitution that contains only essential features.

One may object to my claim that we cannot change constitutions having only essential features without changing them numerically. The effect which I claim is necessary—destroying the constitution and creating a new one—may only apply to the removal or change of *already existing* essential features. If the change removes one of the essential features, then perhaps it necessarily creates a new constitution. However, if we were only *adding* to the constitution, it seems

we could qualitatively change the constitution while leaving its essential features intact. This seems tenable, at least initially, but there are some issues with whether we would then categorise the added parts of the constitution as essential or non-essential.

If we add some feature to a constitution, that feature itself will either be essential or non-essential. One could argue, even if the feature was added later, or was not some essential feature prior to its addition, it *acquires* essential status once it become a feature of the constitution. For example, the date a constitution was written or those by whom it was written do not seem to be essential features of any constitution. Any number of people could have written the American constitution, and it also could have been written much earlier or later it was. But once that group of founding fathers sat down and wrote it on the date they did, perhaps those facts became essential features. After all, different framers might have different intentions, and different years would provide different economic or technological considerations. One could argue that any of these differences *could* have resulted in the constitution being numerically different from what it is, and thus, for the sake of argument, it seems plausible to classify arbitrary facts as constitutional essentials.

However, the problem with this post hoc ranking is similar to the concerns I aired in relation to an entirely non-essential constitution. To put it simply, there is effectively nothing preventing us from calling *any* added feature essential, at least if we can tell some story about it (and *that* may even be unnecessary).

Rather, this approach seems to be a convoluted way to avoid admitting that the added features are not essential, or that the qualitative change has resulting in a new constitution.

I find it reasonable to think that many Western originalists would claim that all the features of their constitution are essential. Originalists, whether their focus is the text, the original public meaning, or the original framers' intentions, act as though those features must be protected from dilution or misuse. Larry Alexander asks whether those who argue about the 'supreme law' are using the constitution of "the original authors or that of any of the indefinite number of hypothetical authors."⁷³ According to originalist Jeffery Goldsworthy, "originalists insist that unless it has been formally amended, the constitution continues to mean today what it meant when it was first enacted or adopted."⁷⁴ The purely essential composition of the constitution can explain the vehemence with which these scholars uphold the original constitution. However, the conceptual possibility of a purely essential constitution is complicated by the descriptive fact of formal amendment. In a constitution which does not have a process for formal amendment, having only essential features is acceptable. But even originalists rely on formal amendment; without it, constitutionalists are subject to the 'dead hand' objection and the 'democratic worry' once again. It could be argued that a constitution with only essential features may yet be formally amended if we conclude that a successful formal amendment results in

⁷³ Alexander, 11

⁷⁴ Goldsworthy, 683

the creation of a numerically new constitution. However, this does not accurately capture the way we talk about our constitutions.

There are two ways to understand Originalists' commitments to the original constitution. First, we may think that when an American originalist talks about the original constitution, he or she *should* mean the constitution that was put in place in 1787. Any basic explanation of Original Framer's Intent Originalism states that when an originalist judge is deciding what to do in a case, he or she is referring to the intentions of the founding fathers, not those who most recently amended the constitution. As mentioned previously, the American constitution has been formally amended many times since it was first created. If formal amendment brought into existence a new constitution, originalists would be referring to the constitution as it exists after its latest amendment.

But Original Public Meaning originalists do not look for the public meaning of 'persons' from 1900 or 2000; they look for the meaning of 'persons' from 1787. Original Intention Originalists do not look for the original intention of a legislature who amended the constitution, but for the intentions of its framers from 1787. Even after a qualitative change resulting in a complete reversal of the prohibition, originalists keep going back to 1787. While continuously reaching back, originalists are thus understanding originalism to work in the *second* way, which treats the constitutions pre- and post-amendment as numerically identical. They may interpret the original *and* its amendments according to the relevant original framer or meaning for each. But in doing so, their actions no longer line

up with what they describe themselves as doing—that is, *unless* the amendments do not change the numerical identity of the constitution. Therefore, though they may seem to argue as though each part of their constitution is essential and thus not permitted to change, originalists *act* as though a qualitatively changed constitution may persist numerically.

At this point, it seems we have good reason to conclude that our constitutions are hybrid objects- objects which have both essential *and* non-essential features. If a constitution must have at least one essential feature to track our commitment, and one non-essential feature to permit qualitative change but maintain numerical identity, then it must be a hybrid object. I do not yet think it *impossible* to have a constitution possessing only essential features, but given how we interact with our constitutions and think of their ability to survive change, I find it unlikely that we currently engage in this sort of arrangement.

If we accept constitutions are hybrid objects, there are suddenly many interesting developments. If we view a constitution as a collection of amendments and sections, and view each of those as its ‘parts’, the implication would be that only *some* of those sections are essential and some are, obviously, non-essential. If our commitments track those essential features, then we have changed our relationship with the constitution, when and how we are able to change both it *and* our commitment to it. Those non-essential features are still a part of the constitution, and therefore maintain their superordinate legal standing, but their

non-essentiality means that to change them has little effect on our commitment to the constitution.

Of course, viewing the written constitution itself as a collection of essential and non-essential features is only one possibility. We could also view a written constitution as itself one composite part of what a ‘full’ Constitution is. Recall an argument from Chapter 2, which suggests there is a difference between committing to the Prohibition era constitution and committing to abstain from consuming alcohol. If we may have commitments that are ‘constitutional’ only insofar as they are *in* the constitution, *without* being committed *to* the constitution, it appears there may be some other feature which carries the commitment from one step to the other. The written constitution could itself be the non-essential feature of a larger Constitution. The essential feature may be something like a Hartian rule of recognition, or Waluchow’s community’s constitutional morality, or some other process which stands somewhat apart from the written contents of the law.⁷⁵ In this arrangement, the non-essential written aspect may change, however much, but our commitment tracks the essential *je ne sais quoi* which stands over and above the written law. If we figure out what that

⁷⁵ A rule of recognition for Hart is a fundamental rule by which all other rules in a legal system are identified and understood. It may be something like ‘What the prime minister says is law,’ which would then mean that anything said by the prime minister is law. If that rule of recognition is an/the essential feature, then that would mean that if the rule of recognition changes (to instead become something like “what the UN says is law”) then we have destroyed our previous commitment and created a new one.

essential thing is, we could get a better idea about how our constitutional commitments and legal systems actually function.

Whichever way we choose to view a constitution, framing questions about constitutional precommitment in terms of the hybrid constitution's essential and non-essential features permits some change in the structure of the constitutional debate, and may cause a change in how we understand the kinds of questions and concerns constitutionalism tackles. Accepting this alternative framing of the debate opens many possibilities for streamlining our discussions. However, rejecting the essentialist-hybrid framing, as we shall see, will lead to great difficulty for proponents of constitutional precommitment.

Chapter 4: The New Frame

At this point, the fundamental details of my argument are on the table. Before I continue to explicate the results of my argument, I will recap the highlights that ought to be kept in mind. I will show how my argument necessitates that we either change how we view our constitutional arrangement itself or abandon the notion of constitutional precommitment, dealing with some questions and objections along the way. Then, I will show some of the implications that my argument has for constitutionalism, jurisprudence, and general legal theory. Finally, I will conclude my thesis by suggesting some research questions that may come out of this framing of constitutionalism.

4.1 The Fundamentals: Review

In Chapter 1, I began by explaining the study of constitutionalism and where the notion of ‘rational precommitment’ is situated in it. Constitutions are legal instruments which outline the fundamental structure of society. As the highest law of the land, they determine the tripartite division of power between the legislative, judicial, and executive branches, as well as whether and to what extent each of these branches is limited. Many constitutions contain a section – a charter or bill of rights- wherein they outline protected areas by which the government is limited on behalf of the citizens. To further protect these rights, they are placed in the constitution, which is then *entrenched* into the law and made difficult (though, in many cases, still possible) to change. Entrenched

constitutions tend to be long lasting, and, as such, tend to provide long term stability as the core of the rest of the legal system.

Unfortunately, that entrenchment is part of the reason why constitutions have critics. Because of the importance of the powers the constitution has the permission to bestow and the rights it protects, constitutions are not amendable through the regular democratic standard of majority vote. Instead, they often require an even higher standard. Secondly, because the constitution is from whence legislative power comes, the legislature is not permitted to overstep the bounds of the constitution. Instead, those elected officials must abide by the limitations set by the constitution's founders, no matter how many citizens voted for them. For these reasons, constitutions, it has been argued, are undemocratic and subject legislators to the dead hand of the past.

To respond to critics, one might suggest that these concerns are the price you must pay for living in society with other people. This is perhaps the route *I* would take, though perhaps I am a bit of a cynic. Other approaches, however, have been to show that the apparent concerns of the ultra-conservatism of the dead hand and the undemocratic nature of legislative limits are, in fact, *non-*issues. The proponents' method of response is to claim that constitutions are tools of *rational precommitment*, which only contain commitments or ideals which any *reasonable* person would find acceptable. In this way, the constitution is more like a hollow shell into which we may place all of our modern social,

political, and legal views than it is like a chain tying us to the views of someone else.

If the view of constitutions as tools of rational precommitment is sound, then those who argue in favour of it appear to have made some progress in calming *some* of the critics. However, I have argued that the rational precommitment understanding has some problems with its conception of commitment.

In Chapter 2, I began to dissect the conception of commit proffered by Jon Elster. As Elster’s theory of rationality and self-binding has significantly guided discourse and opinion in constitutionalism, I chose to begin with his work as the definition of commitment. However, in the course of my investigation, it soon became clear that Elster-style commitment is not compatible with the other kinds of claims that constitutionalists wish to make. After laying out Elster’s five criteria on which any definition of proper commitment must bear, it appears that modern understandings of constitutional commitment basically clash with all of them. And yet, Elster thinks there is some degree to which we *do* think this makes sense; it might require a blatant non-recognition of the theoretical problems, but we *do* proceed as though societal precommitment is, at the very least, “not meaningless.”⁷⁶

If we have reason to think that future generations will have the same reasons for desiring restriction, then perhaps we could also understand this

⁷⁶ Elster 2000, 96

phenomenon as populous ‘self-binding in some loose way. This is along the same line of argumentation used by proponents of the rational precommitment view; since the things contained in our constitution are things any reasonable group could commit themselves to, then the broad attachment we and other generations have to the constitution might *just* be able to count as *self-binding*.

Unfortunately, Elster ultimately concludes that even if we *can* find someone way to prove that what we are doing is *self-binding* to these commitments, rather than binding others, we may have to implement “safety valve clauses” to avoid the kinds of problems raised with the democratic worry, dead hand, and others.

Implementing escape clauses, limitation or notwithstanding clauses and other ways through which we might loosen the bonds of the commitment *may* go some way toward appeasing the critics of constitutionalism. However, “if the framers try to prevent the constitution from becoming a suicide pact, it may lose its efficacy as a suicide prevention device.”⁷⁷

Admittedly, Elster-style commitment is quite strong and there are several boxes he thinks must be checked for some bind to count as real commitment. So, my next task was to come up with my own conception of commitment which was as weak as commitment could be, before there is no meaningful difference between it and other agent-action relations like intention or promising. To do so, I begin with a comparison between commitment and promises. Like promises, commitments are expressions of allegiance or devotion to some X, where X may

⁷⁷ Elster 2000, 174

be anything from a process or object to some abstract value or ideal. Also like promising, when one fails to meet the terms of the commitment, it is often thought that one has done some kind of moral wrong. Overall, promises and commitments have many things in common.

In fact, the similarity is so close that may think that when we commit to X, we are only making a very strong promise; there is no fundamental difference between promising and committing. However, I follow Elster in claiming that what differentiates the two is the external mechanisms of commitments. When I make a promise, I have only my acceptance of that promise and my internal motivations ensuring that I keep it. However, when we *commit* to X, we rely on external mechanisms to keep us bound to the terms of the commitment, even when we experience times of weak will.

The conception of commitment I reach after this analysis is as an agent-action relation which expresses two intimately related claims. Firstly, when we make a commitment we are expressing a promise or statement of allegiance to meet the expectations of the subject of the commitment, whether that is a person, or an object or a course of action: we will do X. Secondly, though, it is a limitation of freedom: we will not do -X. If the subject of our commitment comes into conflict with some alternative subject or mode of action, the commitment wins out.⁷⁸ On this account, commitment is all or nothing: there are no degrees.

⁷⁸ Of course, certain situations may *complicate* this, such as situations of extreme coercion or duress, in which case the commitment has been broken, even if legitimately so.

One might have very good reasons to not follow through on one's commitment, but good reasons do not provide exoneration: they merely provide justification.

I explain the differences between Elster and I, especially in relation to broken commitments. On Elster's account, the threshold for maintaining one's commitments is so high that it appears unlikely that *anyone* of mortal blood gets by without breaking them. In fact, on Elster's account the limitations are so strict that if one reneges on a commitment, the result is simply that one was never actually committed in the first place. This seems strange, for *surely* we may say we *were* committed, even if we ended up breaking the commitment. My aim was to provide an account of commitment that could give constitutional commitments a chance, even *if* they do not meet all of the five criteria Elster deems so necessary to 'real' commitment. And while my account of commitment is lax enough to get constitutional commitment on its radar, there is yet a problem making it compatible with formal amendment.

Formal constitutional amendment problematizes our commitment to a constitution because it highlights that any commitment we make is still open to the possibility of being changed to permit, or perhaps *require*, us 'to do -X.' If we want to be able to say we are *committed* to the constitution, we need to make sure we are not reneging on the very actions we committed to honour. It is not as though we should go out of our way to ensure that breaking that commitment is completely and eternally impossible. That is the kind of standard Elster appears to set, and it is simply excessive for humanity. But at the same time, it would

make no sense to think of a commitment as containing both “an expectation that one does X and does not do $-X$ ” and “permission to do $-X$.” In this case, we would have to say that these are two different commitments, the latter having been set in place after we reneged on the former. But when we look at an example like the 18th and 21st amendments regarding Prohibition, we do not actually think we *broke our constitutional commitments*. Surely something else is going on there. I begin to question what it is we are *actually committing to*. We often claim to be committed *to the constitution*, but there is another way of viewing the metaphysics of our constitution which may also alter the structure of our constitutional commitments in such a way as to prevent *every* formal amendment from problematizing them.

In Chapter 3, I began a metaphysical investigation into the *constitution of* constitutions by providing two sets of distinctions: *essential* and *non-essential* properties and *qualitative* and *numerical identity*. In adopting this terminology, I assume a parts/whole or *mereological* metaphysics. My justification for doing so is that while we may speak of our commitments as being to *the constitution*, we also normally talk about things and how they change in relation to their *parts*. Thus, the simplest terms available to discuss the changing constitution appear to refer to it and its parts.

For this project, I define *essential feature* as some property an object must have and may not lose without being destroyed or changing into some other

different object.⁷⁹ A *non-essential* feature is a feature a thing possesses, but not by necessity or identity.⁸⁰ Losing a non-essential feature does not alter the identity of the object. For the purposes of illustration, an essential feature of a rock may be its hardness. If a rock were to lose its hardness, it would cease to be a rock, but it matters not whether it is large or small, painted, or covered in moss. These features are accidental, or non-essential.

The terms *qualitative* and *numerical identity* refer to the state of an object changing and persisting through change. If a thing has changed, this means that some feature or quality of the thing has been gained or lost.⁸¹ Most of the time, when an object has been said to have changed, it means that it is *qualitatively* different but *numerically* the same. An object could theoretically change any of its non-essential features and yet remain numerically identical to itself. For example, the rock could become chipped, and yet be recognised as the same rock.

Change is a philosophically interesting issue because while intuitively there is nothing strange about saying a thing has changed but is numerically still the same thing, *logically* this gives rise to a few puzzles. I use the famous example of the Ship of Theseus to demonstrate the complicated questions about persistence of identity and existence and our ordinary conceptions of change. When we say a thing has changed over time, we mean that an object existed in a certain state at time t₁, and an object existed in a certain *different* state at time t₂, *and* that these

⁷⁹ Lowe 96

⁸⁰ Lowe 97

⁸¹ Lowe, 23

two objects are numerically the same object. I question which parts of a thing, X, may change before it no longer makes sense to call it X and not some other thing, like Y. On this mereology-inspired metaphysical framework, I suggest that there are three broad combinations of essential and non-essential features a thing could have: X can have *only essential features*; X can have *only non-essential features*; or, X may have *both* essential and non-essential features, resulting in what I will call a “hybrid” object. In claiming there are three options, I do not mean to commit to the metaphysical *possibility* of all three, but only to be thorough.

My application of the three arrangements is the same for both the ship of Theseus example and the discussion of constitutions. In both cases, for X – whether it is a ship or a constitution-- to undergo qualitative change, there must be a version of X at time t₁ that has a certain set of features, a version of X at time t₂ that has a different set of features, and a relation between X at t₁ and X at t₂ such that they are numerically identical. However, if *all* the features in the set for X at time t₁ are *essential*, then there is nothing in the set which is up for revision between t₁ and t₂, meaning that any qualitative change in the set at t₁ destroys X and replaces it at t₂ with a new object Y. Because I do not wish to disturb our common understanding of constitutions, which includes the assumption that they can both change *and* persist through change, I conclude that it is not the case that constitutions are composed of only essential features.

This first conclusion is complicated by the fact that some theorists (mostly those of the originalist leaning) discuss constitutions *as though* they only have

essential features, which must be protected from misuse. However, this view is complicated by the descriptive fact of formal amendment. In a constitution which does not have a process for formal amendment, perhaps having only essential features makes sense. But even originalists rely on formal amendment; without it, they are subject to the ‘dead hand’ objection and the ‘democratic worry’ once again. It could be argued that a constitution with only essential features may yet be formally amended if we conclude that a successful formal amendment results in the creation of a numerically new constitution. However, as noted above, this does not accurately capture the way we talk about our constitutions. At the very least, then, we do not theorize constitutional law as though we are only dealing with essential features. I thus conclude that it remains rejected.

I also conclude that constitutions cannot have only non-essential features, since if there were no essential feature to our constitution, then there is nothing limiting the scope of what the constitution may be. As a result, the constitution could qualitatively change into *anything* and be the numerically same constitution, a result I assume we should want to avoid. Further, if constitutions had only non-essential features, our constitutional commitments could not be meaningfully possible. If we are supposed to be committed to the constitution, which would mean “we will do X and not do -X”, but the constitution had only non-essential features and could thus *completely* change, X could change into *anything* without sacrificing its numerical identity. If Theseus’ ship had no essential features, then it could be remade with concrete blocks, change into a

motorboat, or even to a firetruck, and yet remain numerically *Theseus' ship*. If X, whatever it may be, had no essential features then it could *also* be $\neg X$, permitting us to be committed to internally contradictory principles or values or courses of action. We want the constitution to be able to change to some degree, but surely there must be *some* limit on the kinds of changes that could occur. For this reason, I conclude that constitutions must not have only non-essential features.

With two of the three possible arrangements of features proven incorrect for thinking of constitutions, I am left to investigate the third arrangement. On this arrangement, constitutions are blends of both essential and non-essential features. If a constitution must have at least one essential feature to track our commitment, and one non-essential feature to permit qualitative change but maintain numerical identity, then by simple logic it must be a *hybrid object*.

The conclusion that constitutions are hybrid objects does not seem to contribute very much to any debate. Stating that there are essential and non-essential features to *any* object seems an uninteresting conclusion. But in relation to constitutional precommitment, the hybridity of constitutions leads to some very interesting results. The first and most important is that, if my argument is correct, acknowledging the hybridity of a constitution is the only way to make sense of our commitments while simultaneously preserving other important basic constitutional facts (entrenchment, stability, etc.).

4.2 Keeping Constitutional Precommitment Afloat

Before I fit all the puzzle pieces together, I want to remind the reader of my ultimate goal. As noted in Chapter 1, proponents of constitutionalism have used the view of constitutions as tools of rational precommitment to provide a response to the critics. On their account, a constitution is not trying to force us to follow any one political view, but only aims to provide a stable framework within which our regular legal interactions and institutions may exist. Constitutions aspire “to be both *stable* and morally and politically *neutral*.”⁸² They are not oppressive *skeletal hands* forcing us to abide by the rules of the past, but *full skeletons*, without which the vital organs of our society would be unable to thrive or even be non-existent. Rather than being undemocratic, constitutions aim to permit democratic action to take place *at all*. Therefore, if we can show that what has actually been entrenched in the constitution is only a loose framework which can be ‘personalised’ or ‘evolved’ to suit societal developments, proponents have a shot at appeasing the critics.

However, while they have been trying to make sense of the *constitutional* side of the coin, the commitment side appears to have fallen by the wayside, despite some serious problems. The biggest problem I find is that what we claim to be doing in constitutionalism does not really seem like ‘commitment’. When we

⁸² Waluchow, Wilfrid J. "Constitutionalism", *The Stanford Encyclopedia of Philosophy*.
<https://plato.stanford.edu/archives/spr2014/entries/constitutionalism>.
Date Accessed: Aug 1, 2017

think about what commitment really is, constitutional commitment seems unlikely to work.

Thus, the broad question I tackle in this project is *what it would take* to make constitutional precommitment work at the *theoretical* level. To my mind, there really is no *single* aspect of constitutional precommitment which independently topples the entire foundation. Instead, the problems emerge because of several moving parts, all of which are trying to hold themselves together but each of which is slightly out of place. Nevertheless, the largest source of instability lies with the metaphysics of constitutional precommitment.

If we are going to buy into the ‘parts/whole’, ‘amendments/constitution’, mereological framework, then we can make some progress. The reason for suggesting a mereological framework arises out of how individuals talk and think about objects and change in our regular, everyday conversations. We tend not to go beyond simple ‘parts/whole’ dichotomies. Therefore, for an initial investigation into a realm where most individuals are *not* metaphysicians, I find my metaphysical assumptions acceptable. However, if there are critics who suggest a different metaphysical framework ought to have been used, I happily invite them to take the task upon themselves. Either way, I do believe that any metaphysical framework may be used to shed some light on our relationship with constitutions and the law and things like commitment; I take my approach to represent only one possibility.

Again, the most troublesome aspect of constitutional precommitment to an amendable constitution is not so much how we understand commitment, but more how we understand the object-ness of a constitution *in relation to* commitment. A commitment is often theorised as being a more stringent bind on one's behaviour than a mere request, or even a promise. Frequently changing or renegeing on commitments represents a kind of wrong which we would typically like to avoid unless circumstances simply do not permit. But when commitments are being undertaken on a massive national level, in the form of constitutional commitments, frequent changes are near inevitable and renegeing is occasionally required. As a response to this fact of 'infidelity', we try to deny the changes we make so we may say we uphold the commitments to which we have been bound. But this is simply not the case.

But if a constitution has only *essential* features, as our conversations seem to suggest, then how do we maintain our commitments after it has been altered? The short answer is: we can't. If we are going to conceptualise commitment as a more stringent standard of binding our behaviour and also conceptualise the object-ness of constitutions as we do, then we have no choice but to admit that every qualitative change to a constitution changes its numerical identity as well, resulting in a new object *and* a new object of our commitments. This is not a horrible conclusion on its own, but when paired with the fact that we desire constitutional law to be stable and long lasting, we run up against yet another

problem. If the constitution and our constitutional commitments are constantly changing, how can we have the long-term stability we hope for?

There are a few different ways to respond. We could bite the bullet and insist that our constitutions *are* comprised only of essential features. This would require embracing the constant creation and destruction of our constitution, thereby abandoning all hope of long-term constitutions or commitments. However, this seems to defeat the very purpose of having a constitution in the first place. Critics of constitutionalism would never accept the rational precommitment response if the stability this framework is supposed to provide is non-existent. Alternatively, we could reject the view that the relation we have to a constitution is one of commitment, thereby avoiding the rational precommitment problem altogether. But this *again* means we would need a new response to the critics who posit the ‘dead hand of the past’ and the ‘democratic worry.’

It very well may be the case that rational precommitment is only functionally plausible and cannot be defended on a pure, theoretical level. For some, the fact that constitutionalism may have a somewhat shaky foundation is permissible if the rest of the theory works. But I wholeheartedly argue that purely theoretical arguments are not without value. Even if we are unable to fully justify constitutionalism from the ground up, we may yet develop a richer account if we engage in the theoretical dirty work. Nevertheless, I do not yet think the critics have won. The third response is to reject the claim that the constitution is made only of essential features and opt instead for a hybrid account.

I hope to have convincingly argued my case. It is difficult to have a stable commitment to an unstable constitution—this seems a simple claim. But we are unable to have a stable constitution if constitutions have only essential features, at least while we desire the ability to change its terms. If every qualitative change in an essential constitution alters a fundamental feature which makes that constitution *what it is*, then any little qualitative change poses a huge problem. It is time for a change. Instead of insisting that every single part of a constitution is essential, why not acknowledge that there are some parts that are essential and others are not? I am willing to argue that there are many good and interesting reasons for doing so.

4.3 Questions and Objections

Features of Constitutions

The first question that I think anyone is going to have from this entire work is what I mean when I talk about *features*. I have mentioned essential and non-essential features a significant amount in this work, but never explicitly stated what the features of a constitution are. One might consider each clause of a constitution as a feature, so that clauses or amendments and features line up. This works perfectly fine with my idea of the constitution as a hybrid object. However, part of the benefit of the metaphysical framework I have been using is that it does *not* mandate written constitutions. While it is of course compatible with written constitutions, an unwritten constitution may yet have features which are essential to what it is.

Likewise, this framing is compatible with intangible constitutional features which have been argued for by various legal theorists already. Authors like Wil Waluchow, Ronald Dworkin, H.L.A Hart, and John Finnis, among many others, have given us accounts of what those unwritten or intangible features could be—rules of recognition, a community’s constitutional morality, natural laws, or principles of political morality. Any one of these (or others) could stand as our essential feature, compatible with a theory of constitutionalism containing both written and unwritten components. As a result, what *counts* as a feature will depend greatly on whether one is discussing written or unwritten constitutions *and* on whether one is convinced of the existence of abstract features like the ones listed previously. They could be as broad as moral principles like freedom or equality, or as specific as the number of consecutive terms a president may serve. For a constitutional commitment to something like equality, so long as we maintain equality on a *broad* level, we need not be committed to the individual clauses pertaining *to* equality. Thus, for example, we may add to or change the Equality Rights of the Canadian Charter without affecting the status of equality as one of our commitments.

Once we know what counts as a feature, the debates may begin surrounding which features are essential and which are not. These debates are going to be much more focused on the individual countries and their views of their own constitutions than on broad determinations as to where the distinction lies. We need to begin thinking about what it is about our constitution that makes

it *what it is*; what would need to happen to the constitution for it to become something else? Canada, for example, may consider section 4 of the Canadian Constitution, which states “there shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons,” to be an essential feature.⁸³ To change this (or any other essential feature) would amount to having created a new constitution. However, we may instead think that the structure of our parliament is non-essential; we may change that feature and do so without creating a new constitution or set of commitments.

Part of these determinations—what is essential and what is not—may be tied to national identity or ideals. In Germany, for example, the ‘Basic Law’ protecting democracy, human rights, and rule of law, is protected by an article that precludes repeal (though not rewording) unless a new constitution comes into effect.⁸⁴ Part of the reason for the status of these sections as essential features of their constitution is Germany’s history; they presumably wish to ensure that another political party like Hitler’s National Socialist party could never come to power *legally*.

Germany also represents the fact that something like the hybrid constitutional framework *already exists*. Some may be concerned that changing the way we view the status of parts of the constitution may prove difficult or, at the very least, difficult to implement. We may not know where to start. Germany

⁸³ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

⁸⁴ Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 1 des Gesetzes vom 23.12.2014 (BGBl. I S. 2438) § 79

is proof that this idea--that different parts of a constitution are essential and others are not--is far from new. Further, deeming some part of the constitution as non-essential does not reject it as a part of the constitution. It can still be entrenched; the only difference is what happens as a result of a change to a non-essential feature. A non-essential feature may be changed without altering the numerical identity of the constitution. It would still be supreme law.

*Entrenchment and Commitment*⁸⁵

Throughout this work, I have mentioned the hybrid account being useful for changing our constitutions without changing our commitments. I claim that because our commitments are tied to the *essential* features, and *not* the non-essential features, changes to the non-essential features of the constitution change neither the ‘essence’ of the constitution *nor* the terms of our commitments. It may be argued that if *all* of the features of the constitution--essential and non-essential-- are entrenched, we must thus be *committed* to them all. If that is the case, then by suggesting that we can change the non-essential features without impacting the constitution or the commitment, I must be suggesting that we either lessen the level of entrenchment of the non-essential features or remove it completely. However, to my mind, this kind of claim is making one significant mistake; it is conflating entrenchment and commitment.

What entrenching a constitution accomplishes is to implement a stringent threshold for those who wish to *legally* change the constitution. Entrenchment is

⁸⁵ Thank you Dr. Waluchow for providing me with the next few points of consideration. I never would have thought of these on my own.

an external mechanism which aims to make $-X$ a *causal* impossibility (or infeasibility). As far as possible, we want to prevent any ability to perform the action to be avoided. We may entrench our commitments and, if commitments typically must have an external mechanism limiting one's ability to do $-X$, then entrenchment may be *one very good* kind of external mechanism with which to do so. But entrenchment and commitment are not interchangeable. One reason the two are not interchangeable is that while entrenchment can occur in different levels or degrees, commitment—even in my weaker form—cannot. How deeply entrenched something is will only correspond to how difficult it is to *legally* change that thing. But if we are going to buy the conception of commitment with which I have been working, then commitment does not have different levels.

If what it is to commit to something is both to express allegiance to some X and to sacrifice the ability to do $-X$, then there is no room for degree; you either fulfill the terms of the commitment or you do not. I concede that what I present as commitment is certainly not the most desirable of possibilities. The idea of commitment as a scale is a plausible one, but I think this misses the point of what a commitment is supposed to be. Commitment does not aim to make the action to be avoided a causal impossibility. I *may* be committed to some X , and yet take no initiative in setting up a *strong* causal mechanism against my doing $-X$. But when I do $-X$, then I have *broken my commitment*. Entrenchment as commitment is compatible with performing $-X$ and not performing a moral wrong *provided* one performs $-X$ via the predetermined means. However, my point has been that

once one has committed to X, it is logically impossible for one to perform -X without breaking that commitment (or fully admitting to abandoning it and creating a new one).

If entrenchment and commitment were synonymous, then our commitment would have to be to the constitution *in its entirety*. I have already shown this to be problematic. If our commitment was to the constitution in its entirety, then we would either have a constitution of only essential features or we would have to be committed to non-essential features. But neither option has a favourable outcome. Again, a constitution made solely of essential features may not undergo change; it may only be destroyed and replaced with a new one. If there *are* non-essential features, then if we are willing to concede to the two-part conception of commitment, there is *no limit* on what the commitment may require.

Recall the example of the repealed Prohibition laws. If the commitments to the American Constitution was to the constitution *in its entirety*, formal amendment would present a problem in relation to the 18th and 21st amendment of the American constitution. By saying we are committed to the American constitution in its entirety, (including non-essential features) what we are saying is that we promise to do all that it asks *and not to do otherwise*. When the 18th amendment was added, it committed Americans not to consume, produce, sell, etc. alcohol. But when the 18th amendment was repealed, American were suddenly permitted to do the very things they committed against doing.

Again, we can claim one of three things: we can say that the commitment of which the 18th amendment was a part continues to stand after its repeal; we can say that the commitment to the constitution of which the 18th amendment was a part has been undone and a new one has been created; or, we can say that there never was a commitment to the 18th amendment in the first place. If we say it is the same commitment, then the concept of commitment is stretched to its absolute limits and beyond. If the same commitment can contain both the promise “not to do x and to do $-x$ ”⁸⁶ *and* permit one “to do x”, then commitment is meaningless. Saying that they are two different commitments is a fine option, but does not line up with how we discuss our constitutional commitments *and* sacrifices the stability we want from constitutional law.

The final option, claiming that we were never committed to that amendment in the first place, can work in different ways. We might not have been committed to the 18th amendment because we may not have *any* constitutional commitments, or because we *do* have constitutional commitments, but that just was not one of them. Given that my target audience are those who argue *for* constitutional precommitment, ascribing to them the view that we do not have *any* constitutional commitments seems a bit absurd. Perhaps they would claim that we do not actually have constitutional precommitments because we do not actually have a constitution, but this seems even less likely. Therefore, the conclusion that we ought to draw if we think that we have constitutional

⁸⁶ Where ‘x’ is “selling, producing, ingesting, etc. alcohol”

precommitments is just that those commitments are not to the *non-essential* features of the constitution. By adopting this view, we can have a constitution, have our stable constitutional commitments, and be permitted to change those non-essential parts *all while maintaining our commitments*.

Entrenching the constitution is also *not* a way of making oneself ‘more committed’ to the constitution. There is no way to be ‘more committed’ if we are going to use commitment properly. Under my framework, ‘being more committed’ to the constitution could only mean that there is a *higher number* of actual commitments within the constitution, *not* that the commitment itself exists on a scale and may be stronger or weaker. Commitment *can only* track the essential features for the reasons mentioned in chapter three. If there is *no* limit on the ways in which the terms of our commitment may change, then it becomes absurd to talk about being committed to those terms. But if the non-essential parts are not part of our commitment, then why are they entrenched? To my mind, the answer is simple. The constitution as a whole is entrenched because the constitution is what gives the government its power *and* decides what those powers are. If the constitution was not entrenched, the ability for governments to alter the powers they possess could increase exponentially. Non-essential features may not be so central to the constitution that changing them is to destroy the constitution and replace it with a new one, but they do still bestow certain powers upon the government. Without the entrenchment of those clauses which dictate what the legislature may or may not do, it could be extremely easy

for someone like ‘President’ Trump to come along and *legitimately* give himself the power to implement his travel bans and to do so constitutionally.

Commitment and Escape Clauses

One rather interesting idea to consider is the possibility of commitments with built-in escape clauses. An example of this sort of commitment would be something like committing to a certain set of limitations on the state’s power over citizens’ freedom *unless* there is some sort of emergency (like nuclear war, for example). This would mean that in regular governmental processes, the commitments must be upheld, but the bonds are loosened or removed after some threshold has been surpassed. My immediate response is to say that a commitment with an escape clause is simply not a commitment.

Recall the structure of my conception of commitment: a commitment holds “I will do X and will not to –X.” However, if we were to insert an escape clause into this conception of commitment, the structure of the commitment made would require us to say “we will do x *and not* do -x,” but simultaneously allow us to do –x. On Elster’s conception and my own conception of commitment, this type of ‘commitment’ is meaningless. However, this is the *boring* part of my discussion. This idea of an escape clause is fascinating, and to demonstrate why I find it so, I am first going to highlight the two different accounts— ‘my commitment’ and ‘commitment with an escape clause.’

Let us suppose that my grandmother needs someone to take her to the grocery store every week to do her shopping. There are two ways I can formulate

this commitment. The first way is to say, “I will commit to taking you to the grocery store every week.” The second way is to say, “I will commit to taking you to the grocery store every week *unless* there is some emergency.” One week, right around the time I am supposed to go get my grandma, my car breaks down and I have absolutely no other way of getting my grandmother to the store. As a result, I have failed to take my grandmother to the store.

Now, the reason I find the escape clause *so* interesting is the reason someone would want to have it. Clearly, if I committed to taking my grandmother to the store every week and I do not take her, then I have broken my commitment and have thus done some kind of moral wrong. However, if I had instead made the commitment with an escape clause and I do not take her, then so long as my reason for not taking her is in accordance with my escape clause, then I have not reneged on my commitment.

What I find puzzling is why we would bother to have an escape clause. Outwardly, the effects are the same; my grandmother did not get to the grocery store. But internally there is one fundamental difference. Because of the escape clause, *I am free from blame*. Because of the escape clause, even though I had not performed the action to which I was committed, I have not committed any moral wrong, and thus may carry on with a clear conscience.

Maybe there are few consequences on the level of interpersonal commitments, but I really wonder whether this is the sort of situation we would want to have in relation to our constitutional commitments. I am reminded of

Elster’s concern that in attempting “to prevent the constitution from becoming a suicide pact, it may lose its efficacy as a suicide prevention device.”⁸⁷ In the interest of avoiding moral blame, we are putting into our commitments some of the very things from which they are meant to protect us. Admitting I may be heading down a slippery slope, I think there is *yet* some legitimacy to the worry that the conditions for qualifying for the escape clause may not maintain their stringency.

Even if it was not incompatible with my conception of commitment, I would avoid the addition of escape clauses, and instead expect those who breach the terms of the commitment to be expected to face the consequences of doing so. It is not as though once the commitment has been broken we have reached the bitter end. Moral wrongs may require rectification, but it does not mean that the rectification for the wrong must be the same in all cases. Perhaps it was almost universally agreed that the authority who decided to renege on the commitment had very good reasons for doing so. There is no reason that the rectification must be extraordinary; a simple apology could suffice. But I simply do not see avoiding moral blame as a sufficient reason for risking our constitutional commitments.

⁸⁷ Elster 2000, 174

Conclusion

Law and language collided in constitutionalism and opened the door for many fascinating areas of investigation which legal theory alone may never have permitted us to find. For this reason, I am wholeheartedly convinced that bringing more metaphysical ideas and arguments into constitutionalism could help us to develop richer theories and to ask far more probing questions. Even if my own attempt at blending law and metaphysics does not convince everyone, I hope it will at least inspire others to try their own hand at this sort of blending project.

In developing these ideas, I attempt to work through the view of constitutions as tools of rational precommitment and begin as close to its beginning as possible. Proponents of constitutionalism have used this view of constitutions to provide a response to critics of constitutionalism who consider it undemocratic and ultraconservative. In the constitutionalists view, a constitution is *not* trying to force us to follow any one political view, but only aims to provide a stable framework within which our regular legal interactions and institutions may exist. As I noted earlier, it may still be the case that rational precommitment is only functionally plausible (if at all) and cannot be defended on a pure, theoretical level. For some, the fact that constitutionalism may have a somewhat shaky theoretical foundation may be permissible if the practical side of the work can provide us with something. We may never be able to fully justify

constitutionalism from the ground up. But my aim in this work has not been to build any sort of account in order to rebuild constitutionalism.

The understanding of constitutions as tools of *rational precommitment* plays a significantly important role in defending some of the most foundational aspects of constitutionalism from its critics. As such, it is extremely important that constitutional precommitment *itself* be justified strongly enough to support the weight of the rest of the field. My attempt at using metaphysics to refocus and perhaps expand the arguments on ‘rational precommitment’ may prove problematic, but it is a start. What I have attempted to highlight in this thesis is that if we want to preserve the rational precommitment understanding of constitutions, then it is time for a change, and I may have even provided a *good* start. The hybrid framework is sufficiently new to stir up some new questions and arguments, but is sufficiently familiar to mesh with significant portions of work already done in legal philosophy. It is by no means the only new framework we could use, but from the constitutional precommitment perspective, I am willing to argue it is promising.

Works Cited

- Chrisholm, Roderick. 1976. *Person and Object: A Metaphysical Study*. London: George Allen and Unwin.
- Elster, Jon. 1979. *Ulysses and the Sirens: Studies in Rationality and Irrationality*. Cambridge: Cambridge University Press.
- Elster, Jon. 2000. *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*. Cambridge: Cambridge University Press.
- Goldsworthy, Jeffrey. 2009. "Constitutional Interpretation: Originalism." *Philosophy Compass* 682-702.
- Lowe, E. J. 2009. *A Survey of Metaphysics*. New York: Oxford University Press Inc.
- Marmor, Andrei. 2013. "Meaning and Belief in Constitutional Interpretation." *Fordham Law Review* 577-596.
- Waluchow, Wilfrid J. 2007. *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge: Cambridge University Press.
- Waluchow, Wilfrid J. "Constitutionalism", *The Stanford Encyclopedia of Philosophy*.
<https://plato.stanford.edu/archives/spr2014/entries/constitutionalism>.
(Date Accessed: Aug 1, 2017)