Reciprocity, Boundaries, and Regression. On Ferrara's Sovereignty Across Generations

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"Sovereignty Across Generations" is a major work on philosophical constitutionalism. The book addresses what Ferrara identifies as a fundamental paradox: "how can a constitution created by one generation legitimately bind future generations who had no voice in its creation?" To respond to this paradox, which challenges "the very foundations of constitutional democracy" (p. 3), Ferrara articulates a theory of democratic sovereignty as a normative commitment of the people across multiple generations. The book painstakingly discusses the implications of this idea and argues that the identification of the popular subject should be extended over its living segment to include future (and past) generations. The key element of this framework is the idea that sovereignty, as a continuing practice across generations, operates through what Ferrara calls the 'chains of legitimation', a temporally extended engagement (mostly discursive, we can assume) in which "each generation both receives and transmits constitutional authority" (p. 3). He calls this conception 'sequential' sovereignty (as opposed to 'serial' sovereignty), referring to the unity of this multigenerational project whose foundation lies in the principle of "vertical reciprocity", a principle regulating the relations "among free and equal generations of the same people" across time (p. 4).

I cannot do justice to the complexity of the book here. For the purpose of these comments, I will explore three aspects of the project: the principle of vertical reciprocity; the democratic boundary problem; and the risk of democratic regression.

Vertical Reciprocity

In a central passage of the book (pp. 274-275), where he discusses the limits of the amending power, Ferrara explains that, in a just society

inhabited by reasonable individuals, the relationship between citizens is characterized by both horizontal and vertical obligations of reciprocity. Horizontal reciprocity is the relationship of mutual obligations that hold among the living segment of reasonable citizens with regard to the terms of their social cooperation; vertical reciprocity is the relationship of mutual obligations among reasonable citizens belonging to "subsequent generations of the same people", which are not-living generations and therefore cannot "directly" agree to the obligations of reciprocity with regarding to the "fair terms of intergenerational cooperation". For this reason, they must be represented by institutions that cannot be the actual electorate or its representatives, which might adopt decision in their generational self-interest (ibid.) The task of a 'philosophical theory of intergenerational constitutional justice' (this is, properly formulated, Ferrara's theory) is to spell out the terms of vertical reciprocity and their underlying constitutional values and regulative principles and values. The premise of the theory is that no single (suppose, actually living) generation can claim absolute sovereignty over the terms of its intergenerational constitutional commitment, and thus unilaterally change those terms by, for instance, imposing burdens on future generations that these generations could neither agree on or contest.

To start with, let me say that there is some ambivalence in this formulation, as we shift from the lack of a 'direct' agreement to the impossibility of an agreement. The point is not about the formulation per se, but the tension at the source of the theory expressed by that formulation.

To see this, notice here that 'can' be read in two different ways in this context: according to the first meaning, the actual generation cannot decide for future generations in the sense that it 'should' not. It is a normative reading of can. But, in a second 'modal' sense, on which the first normative sense depends, the actual generation cannot decide of their behalf because the futures generations *could not possibly* agree on those terms, as they are not born yet[1].

The first sense of this normative prohibition is clear. The actual generation cannot decide for a future generation because this would represent a case of 'judex in causa sua' (p. 262), and this would privilege

1 In theory, this applies also to past generations, who could not agree because they are already dead. Ferrara, at times, seems to include past generations in the intergenerational pact, because his theory claims that vertical reciprocity should also remain faithful to the commitments of the past. However, the gist of the theory seems clearly forward-looking oriented given the obvious impact that our decisions now have on the future, but cannot have on the past.

our own present interests over those of future generations. I think that many would agree on this point.

The second sense of impossibility is more fundamental. The actual generation *cannot possibly* commit (in a modal sense) to whether future generations would in fact express agreement on those terms, because they do not yet exist. The present generations lack the power to bind future generations to any claim of reciprocity. Since future generations aren't parties to any agreement, so how can they be bound at all? We cannot ensure that they will respect the intergeneration pact. Vertical reciprocity is asymmetrical, in this sense, because it binds present to future generations, but can't guarantee the reverse.

Ferrara acknowledges this problem. For this reason, he draws an important distinction between "representing future generations for the purpose of policy-making," and "representing them for the purpose of protecting their equal rights and political autonomy". It is this more fundamental constitutional function that Ferrara assigns to Supreme Courts, as the institution best equipped to determine whether the rights of citizens from different generations living under the same constitution align with one another (ibid.). The justification for the un-amendability of the constitutional essentials across time lies in the principle of reciprocity that "binds all the free and equal generations of the same people and excludes the very idea, central for populism, that the presently living generations might be —to use Orwell's phrase— 'more equal than others.' (pp. 274-275). What is at stake here is the idea that the requirement of equality is equally binding for any generation, in virtue of the commitment to reciprocity.

Yet, this solution seems to relocate, not resolve the problem. The argument is entirely built on the premise that a present commitment of the people at this time prevents the violation of equality against future generations; but, it fails to establish that future generations will be equally bound by that principle when they come to existence. For vertical reciprocity has two directions: present-to-future, and future-to-present. We can reasonably accept, as the present generation of a constitutional people, not to alter the constitution in order to preserve reciprocity towards the future, but can we make that agreement on behalf of those future generations?

Ferrara claims that vertical reciprocity is "also applicable to future generations acting on a basis defined by the constitutional commitments" (p. 273). But this begs the question: future generations are bound to act

on a basis they had no voice in defining. The point recalls Dworkin's famous argument against Rawls's original position, "a hypothetical contract is not simply a pale form of an actual contract; it is no contract at all." (Dworkin 1975, p.18). If hypothetical consent cannot bind even oneself, how can it bind others who do not yet exist?[2]

One might object that there is a Kantian dimension to Ferrara's argument. Kant argues that rational beings bind themselves to the moral law, and this act of self-legislation is precisely what makes them free. Perhaps, binding one's political community across generations can be conceived of as an exercise of autonomy. Could vertical reciprocity be understood as the political community's self-legislation across time? The analogy fails. Kantian autonomy requires that the same rational agent both legislates and obeys the law. In the intergenerational case, present generations legislate (through constitutional commitments) while future generations —agents who do not yet exist— are expected to obey. Thus, when the argument from autonomy is extended to collective agency (across non-overlapping generations), we face not a case of self-legislation, but of legislation for others.

The point is not merely factual. For all we know, any generation could break the agreement. It is, rather, a matter of principle: how can future generations experience the "strains of commitment" (as Rawls puts it) which presuppose a voluntary undertaking? Here, there is a fundamental asymmetry between present generations, who choose to honor vertical reciprocity through deliberation, and future generations, who inherit it through constitutional entrenchment that binds them without consent.

The problem, as I said, doesn't concern only policy-making. It affects the constitutional level and the amending power vested in the living segment of citizens (p. 13). Ferrara claims that the Supreme Courts have the role of transgenerational mediators, ensuring at each stage that amendments do not alter the constitutional essentials "in ways that would make it putatively less than reasonable for future (or, counterfactually, for past) generations of the people to be willing to live their political life within the new constitutional order" (p. 273). But here again, at

2 Against Dworkin's argument, one should recall that, for Rawls, the original position is not intended to impose obligations but is rather a device for discovery that helps us work out what is already implicit in the features of the parties, thus incorporating conditions we do in fact accept as rational beings (Rawls, 1999a, pp. 514-515; 1999b, p. 402). Notice, however, that in Ferrara, vertical reciprocity is not a mere explanatory device; it genuinely binds future generations.

the constitutional stage, are we not also binding future Supreme Courts? The work of a Supreme Court, in this framework, would enforce unity over the people even when such people might not agree in the future.

There is, of course, a rational expectation that the Supreme Courts would bind future generations only to constitutional essentials that we could rationally expect those future generations would also agree upon. However, despite the generality of these essentials, we might question whether some of the provisions that Ferrara includes in the list of implicitly unamendable content (including international and regional supranational law) should be entrenched as he suggests.[3] If such background conditions embed forms of inequality or domination, should these remain unamendable?

To conclude on this point, the principle of vertical reciprocity implies mutual recognition between actual parties; but future generations, being non-existent, cannot be parties to any reciprocal agreement. Therefore, either (a) they aren't bound, thus making sequential sovereignty collapse into serial sovereignty, or (b) they are bound by the present, making sequential sovereignty a form of temporal domination that contradicts its own democratic premises.

The Boundary Problem

This leads me to a second point of criticism, what we might call the intergenerational boundary problem. The democratic boundary problem is a classic question of inclusion: who has the right to participate in collective decision-making? (Christiano & Bajaj, 2024). Several criteria or principles have been suggested in response: national self-determination (Miller 1995), the interests of all those affected by collective decisions (Goodin, 2007), or those subject to the state's duties and obligations (Abizadeh, 2008). These proposals all share the common feature of addressing what Ferrara calls horizontal reciprocity, that is, a relationship among contemporaries.

Ferrara does not directly discuss the boundary problem in these terms, which he would probably recognize as a problem for the living segment of a society. For him, political liberalism "takes the boundaries

3 Among the constitutional essentials Ferrara names are also the "provisions rooted in binding international law and treaties, elements of global constitutionalism and regional supranational law such as EU law in relation to member states." (p. 12; see also p. 263)

of the polity as a fact" (p. 149). Rather, constituent power is "the factual formation of a self-conscious sense of commonality," which defines the original boundary of an ethnos and has some influence "on the boundaries of the future demos" (p. 149). But if each generation inherits boundaries as a "fact," who decided those boundaries should have normative force over future generations?

Present generations make decisions on immigration and citizenship criteria and territorial boundaries. Although these are policy-level decisions (thus not entrenched in the constitutional sense discussed above), they all affect membership rules that can exclude future persons from the composition of the demos. Future generations have no voice in these decisions and are bound by membership criteria they didn't choose, and may be excluded before they can even participate. Alternatively, they could decide to overturn past policies in ways that are unfaithful to the decisions made by past generations. In either case, if vertical reciprocity requires treating future generations as "free and equal," how can present generations unilaterally determine who counts as a member of those future generations? Shouldn't the criteria for future inclusion be decided by those temporally closest to (and thus most affected by) them? If future generations are genuinely "free and equal," shouldn't they be able to redefine their political boundaries, the criteria of their citizenship, and ultimately which members should count toward the composition of their own demos?

Here we face a parallel dilemma concerning the boundaries of the demos: either the future demos is bound by present boundary decisions, inherits those decisions, and is thus not free and equal; or the future demos can redefine boundaries, putting into question whether we can speak of 'the same people' in any meaningful way across time. My concern is that there's no stable transgenerational subject in the way the theory requires to ground the normative force of sequential sovereignty. This is a problem even more urgent due to current and emerging crises with restrictive race-based immigration policies in the US and Europe, and political and climate refugees.

Democratic Regression

Related to the last point is a final comment. Ferrara treats constitutional change as directionally oriented toward the preservation of con-

stitutional essentials. But how can we preserve constitutional change from the risk of regression?

To illustrate the problem, consider the shift in Supreme Court history from the Warren Court's civil rights expansion to the current Supreme Court's reversal of Roe v. Wade (Dobbs v. Jackson Women's Health Organization, 2022). The Warren Court (1953-1969) is a sequential sovereignty success story, we might say. Decisions like Brown v. Board of Education (1954), Miranda v. Arizona (1966), and Loving v. Virginia (1967) expanded constitutional protections in ways that passed the test of temporal continuity, as subsequent generations not only accepted but celebrated these interpretations, fulfilling the Constitution's "original promise" of equal protection[4].

From Ferrara's perspective, the Warren Court served as an "intergenerational mediator," advancing cross-temporal commitment against temporary majoritarian preferences. When the Court struck down school segregation amongst white opposition in the Southern States, it vindicated vertical reciprocity by protecting the constitutional essentials that future generations would have later endorse, even if past generations had failed to implement them. No serious political movement, even in the current moment I hope, would advocate returning to "separate but equal." And yet, by overturning Roe v. Wade, the Dobbs decision (2022) creates a difficulty for this narrative of progress. If we apply Ferrara's test of temporal continuity, Roe (1973) should have achieved a similar status of canonical acceptance after nearly fifty years, and yet it was struck down by the current Court as an illegitimate departure from proper constitutional interpretation. If temporal continuity proved the constitutional robustness of Warren Court decisions, how come then that Roe lost its landmark status?

It's hard to find in SAG a principled answer to this conundrum. After all, in Dobbs, the Court explicitly invoked interpretive coherence and constitutional fidelity, which are precisely the values underpinning sequential sovereignty. Justice Alito's majority opinion even argued that Roe lacked grounding in the constitutional text; thus, the ruling reestablished constitutional authenticity against a temporary judicial deviation[5]. Notice that, from the conservative perspective, it could be said that the justices acted upon a principle of vertical reciprocity in reverse,

4 This was also part of Rawls's narrative of intergenerational commitment to bring constitutional practice into alignment with constitutional ideals. See Ferrara's discussion (p. 124; 267) of the 'original promise' in Rawls, 1993, pp. 238– 39.

5 See majority opinion by Justice Alito in Dobbs v. Jackson, 2022, p. 46.

arguing that Roe violated vertical reciprocity and imposed a constitutional right that neither past generations had recognized nor future generations need accept as entrenched.[6]

I'm not sure, in all honesty, whether this problem represents a vulnerability in Ferrara's sequential sovereignty proposal or simply expresses a liberal frustration. For if the framework cannot distinguish between progressive and regressive constitutional change, perhaps, in light of the procedural neutrality we should recognize in courts, we should simply discard the distinction as meaningful. Yet the problem of democratic regression raises another aspect I think is worth considering.

The progressive expansion of civil rights was built on existing commitments (equal protection and due process), creating new rights that became harder to reverse over time. For instance, school desegregation contributed to more integrated interracial relationships and established a path dependence in social expectations, making the reversal increasingly costly. Dobbs, on the contrary, suggests that, despite fifty years since Roe, abortion rights have not shown the same robustness, and, unlike school integration, have not generated an equivalent institutional and social entrenchment.

The role of path dependency in reinforcing the intergenerational commitments of a people is overlooked in Ferrara's framework when he points to courts as the primary locus of constitutional adjudication. While courts exemplify the messy debate in public space, they are also vulnerable to stronger or weaker social entrenchment, potentially causing discontinuities by expanding or contracting rights. If the expansion of rights tends to entrench itself through social practice, rights contraction can occur rapidly through institutional capture. If coherence, as he rightly argues, does not make the difference in reconstructing which interpretations should prevail (both conservatives and progressives can claim coherence), the ultimate difference, if at all, lies in the ways certain rights have been historically received. This doesn't solve the problem of what should count as the right interpretation of constitutional commitments. It does unveil, however, a more complex dynamic occurring between the courts and the people, where the role of intergenerational mediator of the courts is not restricted to the sole interpretation of constitutional essentials but extends to social expectations.

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6 Still Dobbs v. Jackson majority opinion: "On many other occasions, this Court has overruled important constitutional decisions….Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country." (pp. 42-43)

Since nothing can prevent a people from establishing a regressive path dependency, the criterion for adjudication cannot simply be to reflect those social expectations. Or rather, courts must be able to adjudicate whether to exercise their power of judicial review to reinforce or reverse them. *Vis-à-vis* Ferrara's commitment to liberal neutrality and his skepticism towards what Rawls called 'vectorially oriented philosophy of history' (p. 267), the question remains whether we should accept court decisions that are regressive by any liberal standard of democratic politics as legitimate outcomes of constitutional correction.

In my understanding, a commitment to a political conception of liberalism implies that we cannot privilege progressive over conservative interpretations unless we invoke substantive democratic values that sequential sovereignty purports to bracket. As Dobbs teaches us, we should be able to criticize the courts when we believe that their decision does not align with our best interpretation of progressive politics, for otherwise neutrality turns the idea of sequential sovereignty into a reconstructive view that does not allow us to distinguish between courts protecting democracy against majoritarian bias (the Warren Court on civil rights) and courts enabling democratic regression through ideological capture (the current Court on abortion rights, voting rights, etc.).

Without an independent theory of *substantive* democratic minimums, as we might call it, sequential sovereignty provides no sufficient resources for adjudicating between conflicting interpretations, but only wait and see which interpretation achieves temporal continuity. The way I understand it, a democratic minimum is not a constitutional essential itself. The point, in fact, is that courts can adjudicate on matters of public relevance in light of the Constitution while leaving those essentials intact. What is at stake is not the entrenchment of those essentials but rather which substantive rights are upheld or struck down. There is no way to escape politics from the court, and whether or not we believe that their role is exclusively interpretive (as a mediator between generations), they do act in the political arena, with far-reaching consequences that can affect the path of future decisions. Thus, to conclude, the complex architecture of sequential sovereignty cannot dispel the role of democratic values in determining which rights should be promoted for future generations and in reserving a higher place for them in the constitutional framework, especially when courts themselves become *loci* of ideological dispute.

Conclusion

The legacy of the Warren Court and the current Court's conservative turn exemplify a characteristic tension in the liberal commitment to neutrality and its more normative ideals: on one side, we could embrace substantive democratic values (equality, dignity, autonomy) that distinguished the Warren Court expansion from the current Court contraction. However, this would result in abandoning the claim of neutrality. On the other side, we could maintain the commitment to procedural neutrality, treating both Courts as legitimate interpreters whose decisions will be validated or rejected through temporal continuity. However, this would equate to making sequential sovereignty a descriptive rather than normative principle. It would represent a description of how constitutional meaning evolves, but could not offer an argument against democratic regression.

It is a great merit of "Sovereignty Across Generations" to address the intergenerational reach of this tension and present a theory that integrates the dual commitment to neutrality and intergenerational unity. Whether vertical reciprocity can bridge the gap between past commitments and the freedom of future generations to set the terms of their constitutional agreement remains a central challenge of this conception.

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