

# FIXED CONSTITUTIONAL COMMITMENTS: EVALUATING ENVIRONMENTAL CONSTITUTIONALISM'S 'NEW FRONTIER'

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*This article identifies a type of constitutional provision that departs markedly from most past constitutional practice in general, and environmental constitutional practice in particular. Constitutional protections for the environment typically exhort governments, in broad terms, to pursue objectives such as mitigating climate change. By contrast, a 'fixed constitutional commitment' secures both a substantive policy and its precise quantum. By entrenching a specific magnitude of activity, the fixed commitment is intended to curtail vagueness, open-endedness and interest-balancing — features that, though standard in contemporary constitutional procedure, are poorly suited to chronic emergencies requiring unwavering policy responses over the long term. Fixed constitutional commitments on the environment have been enacted thus far in Australia (Victoria), Bhutan, Kenya and the United States (New York). This article evaluates these existing cases and further prospective examples in the area of climate change. Fixed constitutional commitments raise both pragmatic and normative concerns. After setting out the defining features of such commitments, this article focuses on — and ultimately refutes — a significant normative objection: that taking foundational questions of substantive policy offline unduly curtails democratic deliberation.*

## CONTENTS

I	Introduction.....	83
II	Defining Fixed Constitutional Commitments .....	90
	A Fixed.....	90
	B Binding.....	96
	C Entrenched .....	101
III	Objection and Replies.....	105
	A Objection from Democracy .....	105

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B Replies .....	108
1 External Replies .....	109
2 Internal Replies .....	112
(a) Mal-Representation.....	112
(b) Constitutional Indecision.....	116
IV Conclusion .....	121

## I INTRODUCTION

In 2019–20, when France’s Citizens’ Convention for Climate convened 150 randomly selected citizens to deliberate and recommend a climate change mitigation strategy, both the process and its outcome attracted worldwide attention.<sup>1</sup> The Convention proposed an alteration to the *French Constitution of 4 October 1958* to provide that France ‘guarantees environmental protection and biological diversity, and combats climate change.’<sup>2</sup> The change promised to burnish the country’s, and President Macron’s, reputation for innovative climate action. Yet the Senate soon watered down the language, which it viewed as too strong and incompatible with the country’s economic interests.<sup>3</sup> Divided parliamentarians ultimately abandoned the constitutional initiative altogether.<sup>4</sup>

International media accounts generally understood the French case as a missed opportunity for environmental constitutionalism. It was an especially bitter disappointment to many activists.<sup>5</sup> Yet many close observers of constitutions will read the episode as just another case of misguided enthusiasm for broad, hortatory constitutional provisions as solutions to policy challenges. Constitutional guarantees, rights and obligations regarding the environment

<sup>1</sup> See Dimitri Courant, ‘The Promises and Disappointments of the French Citizens’ Convention for Climate’, *Deliberative Democracy Digest* (Blog Post, 9 June 2021) <<https://www.publicdeliberation.net/the-promises-and-disappointments-of-the-french-citizens-convention-for-climate/>>, archived at <<https://perma.cc/94BB-JBYR>>.

<sup>2</sup> ‘Macron’s Climate Referendum in Doubt ahead of Upper House Vote’, *RFI* (online, 9 May 2021) <<https://www.rfi.fr/en/macron-s-climate-referendum-in-doubt-ahead-of-upper-house-vote>>, archived at <<https://perma.cc/2NTS-6HP8>>. See also Convention Citoyenne pour le Climat, *Citizens’ Convention on Climate Report* (Summary, June 2020) 6–7.

<sup>3</sup> David Coffey, ‘French Senate Blocks Referendum on Climate Change’, *RFI* (online, 6 July 2021) <<https://www.rfi.fr/en/france/20210706-french-senate-blocks-referendum-on-climate-change>>, archived at <<https://perma.cc/MT5B-48BA>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Charles Girard, ‘Lessons from the French Citizens’ Climate Convention’, *Verfassungsblog* (Blog Post, 28 July 2021) <<https://verfassungsblog.de/lessons-from-the-french-citizens-climate-convention/>>, archived at <<https://perma.cc/P3LJ-BHHV>>.

have proliferated since the first modern example in Portugal in 1976.<sup>6</sup> The French amendment would have joined an expanding global set of provisions entrenching, for instance, a ‘healthy environment’<sup>7</sup> and commitments to climate action.<sup>8</sup> As with other constitutional laws, however, environmental provisions have mixed records. Nearly all existing entrenched environmental provisions set out aspirational principles that are expressly or implicitly subject to forms of limitation. Nearly all trigger some form of the ubiquitous proportionality test or other kinds of balancing. And nearly all, therefore, permit economic interests and other presumptive concerns to continue offsetting robust environmental protections.<sup>9</sup>

In this article, I explore a novel type of constitutional provision that departs markedly from most past constitutional practice in general, and environmental constitutional practice in particular. This provision, which may be termed the ‘fixed constitutional commitment’, secures both a substantive policy and its precise quantum (eg net-zero carbon emissions by a given year).<sup>10</sup> The commitment is ‘fixed’ in that, after enactment, the policy is intended to be insulated from balancing analyses or outright derogation. Additionally, unlike most entrenched provisions, the fixed commitment does not merely secure the vague

<sup>6</sup> John H Knox, ‘The United Nations Mandate on Human Rights and the Environment’ in Erin Daly et al (eds), *New Frontiers in Environmental Constitutionalism* (United Nations Environment Programme, 2017) 14, 15; *Constitution of the Portuguese Republic* art 66.

<sup>7</sup> Over half of the world’s national constitutions now include environmental rights or obligations: Knox (n 6) 15. See also James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015) 4.

<sup>8</sup> At least 11 countries have constitutional provisions relating to climate change: Algeria, Bolivia, Côte d’Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam and Zambia: Ademola Oluborode Jegede, ‘Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities’ in Erin Daly and James R May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press, 2018) 84, 87; James R May and Erin Daly, ‘Global Climate Constitutionalism and Justice in the Courts’ in Jordi Jaria-Manzano and Susana Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing, 2019) 235, 240; Karla Martinez Toral et al, ‘The 11 Nations heralding a New Dawn of Climate Constitutionalism’, *Grantham Research Institute on Climate Change and the Environment* (Commentary Post, 2 December 2021) <<https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/>>, archived at <<https://perma.cc/QX3B-KD3R>>.

<sup>9</sup> For a discussion on the limitations of recognition in Australia, see Meg Good, ‘Legal Recognition of the Human Right to a Healthy Environment in Australia: Useful, Redundant or Dangerous?’ in Erin Daly et al (eds), *New Frontiers in Environmental Constitutionalism* (United Nations Environment Programme, 2017) 160.

<sup>10</sup> A seeming oxymoron, ‘chronic emergency’ (or ‘ongoing emergency’) is nevertheless an apt description of long-term existential threats, which call for both sustained and immediate remedial action. See this concept in, eg, Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018) 15 (‘*Environmental Emergency*’).

outlines of a principle, but a specific magnitude of activity. The fixed commitment is intended to resist casual suspension, limitation or revision. Its objective is thus to put an end to further contestation about whether, and to what degree, a community should adopt a basic policy priority.

Many ordinary statutes similarly purport to limit discretion in environmental decision-making by, for example, setting targets and timelines for planning, and requiring mandatory reporting to track progress.<sup>11</sup> Yet these legislative requirements too often translate neither to adequate judicial enforcement, nor to meaningful changes on the ground.<sup>12</sup> At the same time, while constitutional provisions on climate have expanded in the last decade, these generally have not included high levels of specificity.<sup>13</sup> In this light, *quantitative* constitutional standards have been described as a “new frontier” in environmental constitutionalism’ and as ‘a remarkable step.’<sup>14</sup> Indeed, while they have mostly eluded

<sup>11</sup> See, eg, *Climate Change Act 2008* (UK), which sets an overall target to reduce greenhouse gas emissions to net zero by 2050: s 1; requires the Secretary of State to set ‘carbon budgets’ every five years: s 4; and requires the independent Committee on Climate Change to report to Parliament annually on progress in meeting the 2050 target and the carbon budgets: s 36. The *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 similarly sets a target of net-zero national greenhouse gas emissions by 2050: s 6; requires the Minister of the Environment to set interim national targets with a view to achieving the 2050 target: s 7; and requires the preparation of emissions reduction plans: s 9; of progress reports: s 14; and of assessment reports: s 15. See also Alina Averchenkova and Sini Matikainen, ‘Climate Legislation and International Commitments’ in Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar Publishing, 2017) 193; Jennifer Huang, ‘Exploring Climate Framework Laws and the Future of Climate Action’ (2021) 38(2) *Pace Environmental Law Review* 285.

<sup>12</sup> Bruce Pardy, ‘Environmental Assessment and Three Ways Not To Do Environmental Law’ (2010) 21 *Journal of Environmental Law and Practice* 139, 144–9.

<sup>13</sup> See, eg, *Constitution of the Republic of Zambia* art 257: ‘The State shall, in the utilisation of natural resources and management of the environment ... establish and implement mechanisms that address climate change’; *Constitution of the Socialist Republic of Vietnam* [tr International IDEA’s Constitution Building Programme, ‘Final Constitution of the Republic of Vietnam Adopted by the National Assembly 28 November 2013’] art 63: ‘The State ... takes initiative in prevention and resistance against natural calamities and response to climate change’; *Constitución de la República Dominicana* [Constitution of the Dominican Republic 2015] art 194:

The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State.

<sup>14</sup> Stephen J Turner, ‘Quantitative Standards within the Environmental Provisions of National Constitutions: Bhutan and Kenya’ in Erin Daly et al (eds), *New Frontiers in Environmental Constitutionalism* (United Nations Environment Programme, 2017) 212, 213, 215.

scholarly attention thus far,<sup>15</sup> fixed constitutional commitments are likely to attract greater notice as the climate emergency deepens.<sup>16</sup>

Under most of the current statutory, constitutional and international climate commitments around the world, governments may adopt robust policy responses only to have them impeded or reversed by less committed governments later on. Thus, an emergency that calls for an unwavering set of policy solutions well into the future may instead encounter a democratic system that can offer only intermittent and precarious responses. Fixed constitutional commitments may therefore be particularly apt tools for responding to policy challenges that require resolute action over the extreme long term. In particular, if they are effective, fixed commitments may be constitutional devices by which a jurisdiction can commit to a consistent course in response to the long-term existential policy challenge of climate change.

Yet despite their evident appeal, fixed constitutional commitments raise a suite of objections. Many of these are pragmatic, including questions about how to formulate, entrench and enforce fixed constitutional commitments. I canvass a number of these in this article. I also begin to lay down a critical set of questions interrogating whether fixed constitutional commitments are normatively justifiable in the first place.

Fixed constitutional commitments especially seem to challenge the influential set of normative constitutional theories that I group together as ‘contemporary proceduralist’. I take these theories to include varieties of dialogue theory,<sup>17</sup> and of deliberative,<sup>18</sup> popular<sup>19</sup> and political constitutionalism.<sup>20</sup> Within each, open-endedness and prospectivity are among the key selling points of constitutional practice. That is, contemporary proceduralists understand the ongoing contestability of substantive standards as a condition precedent for constitutional practice if it is to remain broadly compatible with democracy. To sustain

<sup>15</sup> Ibid 222. Turner’s own important contribution is an exception.

<sup>16</sup> See generally Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis* (Sixth Assessment Report, 7 August 2021).

<sup>17</sup> See, eg, Peter W Hogg and Allison A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35(1) *Osgoode Hall Law Journal* 75; Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019).

<sup>18</sup> See, eg, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1996) 384 (‘*Between Facts and Norms*’); Ron Levy and Hoi Kong, ‘Introduction: Fusion and Creation’ in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 1.

<sup>19</sup> See, eg, Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

<sup>20</sup> See, eg, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

this condition, constitutional provisions should do no more than outline democratic procedures, or should set out merely the broad substantive starting points (eg vaguely worded substantive rights) of an ongoing democratic conversation about public policies. In either case, there remains a core democratic role for citizens or their representatives — even if courts are still ultimately expected to enforce the provisions — because elite legal actors are obliged to remain responsive, directly or indirectly, to broad currents of public opinion. Contemporary proceduralist theories therefore dispute the well-known charge that constitutional practice is irredeemably counter-majoritarian.<sup>21</sup>

For our purposes, the difficulty posed by this account is that fixed constitutional commitments appear to depart markedly from proceduralism's prospectivity. These commitments are meant to be largely backward-looking: to secure and invoke a community's past declarations of priorities, and to prevent ongoing uncertainty about those priorities. At least on the surface, then, fixed constitutional commitments provide a decidedly poor fit to contemporary proceduralism.

Before I reach this objection and possible replies to it, however, I will lay out key definitions and practical details of fixed constitutional commitments. Part II leads off by describing fixed constitutional commitments as (i) substantively fixed, (ii) binding and (iii) entrenched. Entrenchment distinguishes fixed constitutional commitments from fixture via ordinary legislation, legal convention, common law and (in most jurisdictions) international law. However, more unique is the substantive fixity of these commitments, according to which judges or legislators may not contest or alter a basic standard or its quantum (although further constitutional amendment remains possible). Fixed constitutional commitments are thus intended to be more than aspirational. They are not goals to be met at unspecified future times. Nor are they indistinct values or contextual factors inserted into a constitution to act as approximate guides to legal interpretation. Rather, fixed constitutional commitments aim to impose a direct obligation upon a government to use law and other policy instruments to meet a defined substantive standard to a defined degree across a definite timeframe. Constitutionalising fixed commitments is therefore intended to settle, well into the future, the substance of a policy debate about an emergency response, and to progress governmental deliberations that may have stalled at the threshold question of whether, or how much, an emergency response should be pursued at all.

Part III turns to the noted normative democratic objection, followed by two broad answers in reply. The first type of reply explores a justification 'external'

<sup>21</sup> See, eg, Levy and Kong (n 18).

to democracy. A state's continued existence in its current form perhaps allows expedients that would be incompatible with good governance in normal times. In the climate change area, fixed commitments may be viewed as emergency constitutional provisions that compel a response from a government unwilling adequately to respond to an existential emergency. Fixed commitments may improve the likelihood of sustaining a mitigation policy over the very long term. Thus, the first reply concedes that fixed constitutional commitments are counter-majoritarian, but views them as justified to the extent that they address a severe and chronic emergency such as climate change.

While I do not discount this external reply to the democratic objection, I focus chiefly on more satisfactory, 'internal' replies. These replies do not concede the objection from democracy, but contest it on its own terms. I argue that fixed commitments may be democracy-enhancing when they correct recurring failures of democratic procedures in long-term emergency policymaking. In this regard I make two more particular arguments. The first relatively straightforwardly proposes that fixed commitments may offset certain obvious faults of democratic processes in relation to climate change. The other suggests, more subtly and counterintuitively, that fixed commitments actually expand the scope for deliberation by taking 'off-line'<sup>22</sup> divisive debates and allowing more productive deliberations to ensue. That is, by entrenching an existing popular consensus on a democratic community's main priorities (such as carbon neutrality by a given year), fixed commitments enable certain stalled forms of governmental deliberation and prompt action on the basis of those priorities. By allowing legislative and executive activity to proceed without indefinitely second-guessing what those priorities are in the first place, fixed commitments may prioritise neglected avenues of governmental debate about the best means of implementing responses to the emergency. Fixed commitments thus arguably widen, in net, the degrees of freedom available to democratic decision-making in relation to a chronic emergency.

If the internal arguments succeed, then the value of this work goes beyond justifying an emergent species of constitutional provision, and beyond the case of climate change. The work's underlying concern is to address what has become a dominating question in comparative constitutional and political studies: is liberal democracy too sclerotic, too prone to hacking (literal or otherwise) by malign actors, and too socially divisive to remain the undisputed 'best' model of governance? Are authoritarian governments even, to some extent, correct to argue that the post war liberal democratic wave has receded, or that it should? Soon after his election, President Biden set out the stakes,

<sup>22</sup> Gerald J Postema, 'Sweet Dissonance: Conflict, Consensus, and the Rule of Law' (2010) 17(1) *Harvard Review of Philosophy* 36, 48.

as he saw them, in an address to United States ('US') service personnel at Mildenhall, England:

I believe we're at an inflection point in world history — the moment where it falls to us to prove that democracies will not just endure, but they will excel as we rise to seize the enormous opportunities of a new age. We have to discredit those who believe that the age of democracy is over, as some of our fellow nations believe. We have to expose as false the narrative that decrees of dictators can match the speed and scale of the 21st [century] challenges.<sup>23</sup>

A question in this article is, similarly, whether democratic systems can be salvaged, and especially whether those liberal democracies that still remain can effectively shore up their systems through constitutional and institutional reform. The policy problems facing democracies are both dangerous and complex: for example, climate change, biodiversity collapse and mass human migration constitute, as a whole, a multifaceted and thus far intractable emergency that will span multiple generations and governments.<sup>24</sup> The causes of the emergency are veiled in probabilistic science that are, to say the least, open to misrepresentation and misunderstanding in public debate.<sup>25</sup> The emergency seems almost tailor-made to exploit the weaknesses of representative democracy.

Of course, autocratic governments are often little better at addressing climate change and comparable problems; global emergencies demand collective global action, to which autocracies' generally nationalistic leanings may

<sup>23</sup> Joseph R Biden, 'Remarks by President Biden to US Air Force Personnel and Families Stationed at Royal Air Force Mildenhall' (Speech, Royal Air Force Mildenhall, 9 June 2021). This anxiety is not new: see, eg, President Kennedy's Cold War-era warning on 20 April 1961, that

[i]f the self-discipline of the free cannot match the iron discipline of the mailed fist — in economic, political, [and] scientific ... struggles as well as the military — then the peril to freedom will continue to rise.

John F Kennedy, 'Address before the American Society of Newspaper Editors' (Speech, Statler Hilton Hotel, 20 April 1961).

<sup>24</sup> Jocelyn Stacey, 'Climate Change' in Jeff King and Richard Bellamy (eds), *The Cambridge Handbook on Constitutional Theory* (Cambridge University Press, forthcoming) 1; Dipesh Chakrabarty, 'Humanities in the Anthropocene: The Crisis of an Enduring Kantian Fable' (2016) 47(2–3) *New Literary History* 377, 379–80; Tim Stephens, 'What Is the Point of International Environmental Law Scholarship in the Anthropocene?' in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 121, 133–5.

<sup>25</sup> Arild Underdal, 'Complexity and Challenges of Long-Term Environmental Governance' (2010) 20(3) *Global Environmental Change* 386, 387–8; Wendy S Parker, 'Environmental Science: Empirical Claims in Environmental Ethics' in Stephen M Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 27, 27–8.

be poorly suited. But neither are liberal democracies faring as well as they should. There is a need for new tools of long-term policy action capable of securing a stable response, and of avoiding the policymaking quagmires that have made some democratic societies unable even to begin addressing chronic emergencies in adequate ways. The best constitutional solutions will not concede the inevitability of continuing democratic decline, but will rather aim to elaborate new ways to support and even enhance democratic governance. Fixed commitments can be viewed, similarly, as efforts at democratic repair work. If successfully enacted and enforced, they may demonstrate that democratic societies can remain responsive to emergencies at least as well as democracy's competitors.

## II DEFINING FIXED CONSTITUTIONAL COMMITMENTS

This part defines fixed constitutional commitments, focusing on three necessary features. The discussion is, at turns, descriptive and normative: I describe how several existing fixed commitments have distinct designs and objectives, yet I also occasionally extrapolate from existing cases to suggest a range of further and more speculative possibilities.

### A *Fixed*

Substantive fixity distinguishes fixed commitments from other kinds of constitutional provisions. Fixed commitments cannot eliminate all terminological ambiguity; key terms defining their *scope* may remain open to interpretation. However, a fixed commitment is generally more precise than other constitutional provisions. It especially aims to limit contestation around a constitutional standard's *magnitude*. The provision does not merely purport to resist balancing,<sup>26</sup> but stipulates a precise quantum of activity that is to be permitted or required of governments or other actors. As we saw, contemporary bills of rights typically include balancing provisions that embrace conflicts between rights (or between rights and contrary interests).<sup>27</sup> Some constitutions also include broad interpretive principles or values that tip the scales of a legal balancing or other test in a given direction.<sup>28</sup> Fixed commitments function differently. Such

<sup>26</sup> On 'rules' that are binary rather than subject to balancing, see Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 47–8.

<sup>27</sup> See above n 13.

<sup>28</sup> For example, Weis describes 'directive principles' that give special weighting to particular outcomes in legal tests, such as when courts balance environmental and property interests against

commitments preclude legal balancing tests because the commitments themselves stipulate where the exact balance of competing interests should lie. A fixed constitutional commitment's objective is thus to entrench the outcomes of past deliberations in terms that are precise and generally quantitative,<sup>29</sup> and to insulate the resulting standard from further contestation.

Most constitutional provisions set out just the approximate outline of a standard.<sup>30</sup> Environmental provisions, in particular, are usually deliberately indeterminate and employ 'ambiguously framed' wordings.<sup>31</sup> South Africa's Bill of Rights, for instance, guarantees everyone the 'right ... (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected.'<sup>32</sup> Other constitutional formulations include rights to a 'healthy' environment and stipulate obligations to 'protect and improve' the environment.<sup>33</sup> However, 'decades of experience have proven time and time again that politicians and bureaucrats will exercise their discretion to the environment's detriment.'<sup>34</sup> Fixed constitutional commitments are thus designed to preclude discretionary derogation or limitation based on contrary standards.<sup>35</sup> Fixed commitments especially may direct a numeric standard's fulfilment by a specified time.

Some environmental fixed commitments at the constitutional level have already been enacted. Three of these commit to levels of forest cover.

each other: Lael K Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16(3) *International Journal of Constitutional Law* 836, 863–6. In some cases, directive principles can sway outcomes: see, eg, *Walton County v Stop the Beach Renourishment Inc*, 998 So 2d 1102, 1110–11, 1114–15 (Bell J) (Fla, 2008), applying art II § 7(a) of the *Florida Constitution*, which provides, inter alia, that '[a]dequate provision shall be made by law ... for the conservation and protection of natural resources', quoted in Weis (n 28) 865. But such directive principles are broad and vague, rather than precise and quantitative.

<sup>29</sup> See Turner (n 14) 212.

<sup>30</sup> See Rosalind Dixon, 'Constitutional Amendment Rules: A Comparative Perspective' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 96, 99.

<sup>31</sup> Turner (n 14) 212; S Douglas-Scott, 'Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit?' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) 109, 110.

<sup>32</sup> *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 24(a)–(b) ('*South African Constitution*').

<sup>33</sup> Turner (n 14) 212.

<sup>34</sup> David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003) 293.

<sup>35</sup> There is an interesting analogy between fixed constitutional commitments and peremptory norms of international law (*jus cogens*), both of which are non-derogable. Yet fixed norms do not amount to 'peremptory constitutional norms' in every aspect; the former are not universal but are constitutional enactments specific to a state.

Article 5(3) of the *Constitution of the Kingdom of Bhutan* ('*Bhutanese Constitution*'), enacted in 2008, requires that 60% or more of the country remain forested in perpetuity. This figure provides a highly specific minimum target. The *Constitution of Kenya 2010's* ('*Kenyan Constitution*') art 69(1)(b), in a similar vein, requires minimum forest cover of at least 10%. In addition, in what may be the earliest example of a constitution that includes environmental protection, the *New York Constitution* provides an absolute prohibition on the deforestation of state lands:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.<sup>36</sup>

Absolute environmental standards are effectively quantitative; they stipulate a fixed magnitude of environmental protection, where the quantum of activity allowed is zero. Another example of an absolute prohibition — this one entrenched in the *Constitution Act 1975* (Vic) ('*Victorian Constitution*'), the constitution of the State of Victoria — entered into force in 2021.<sup>37</sup> Sections 98 and 99 of the *Victorian Constitution* now entrench a ban on 'hydraulic fracturing and coal seam gas exploration and mining'.<sup>38</sup> Section 99(1) secures a number of formerly ordinary legislative provisions, such as 'section 16A of the *Petroleum Act 1998*, which prohibits hydraulic fracturing in the course of carrying out a petroleum operation';<sup>39</sup> and 'section 8AC of the *Mineral Resources (Sustainable Development) Act 1990*, which prohibits carrying out exploration for, or mining of, coal seam gas on land'.<sup>40</sup> The new provisions stipulate that the Victorian Parliament 'may not by any Act, whether expressly or by implication', change any of these provisions.<sup>41</sup> The rationale

<sup>36</sup> *New York Constitution* art XIV § 1.

<sup>37</sup> *Constitution Act 1975* (Vic) ss 98–9 ('*Victorian Constitution*').

<sup>38</sup> *Ibid* s 98.

<sup>39</sup> *Ibid* s 99(1)(a).

<sup>40</sup> *Ibid* s 99(1)(c).

<sup>41</sup> *Ibid* s 99(1). Section 18(2) of the *Victorian Constitution* (n 37) in turn protects ss 98–9 from alteration. Any change to these provisions now putatively requires a highly onerous three fifths vote in each House of Parliament: ss 18(1A), (2). The *Australia Act 1986* (Cth) s 6 and the *Australia Act 1986* (UK) s 6 allow an Australian state to specify the 'manner and form' of future changes to a law of the state, provided that the law concerns the 'constitution, powers or procedures' of the state's parliament. Sections 98 and 99 of the *Victorian Constitution* (n 37) particularly may concern the extent of the Victorian Parliament's powers. However, a court may eventually need to rule on this point.

is to constrain the power of the Parliament to make laws repealing, altering or varying provisions that prohibit hydraulic fracturing and coal seam gas exploration and mining, in order to ensure that the prohibitions, or prohibitions that are no less onerous, remain in force at all times as part of the law of Victoria.<sup>42</sup>

The provisions above each seek to secure, over the long term, a given (in some cases absolute) magnitude of environmental protection. However, still apparently missing from any domestic constitution is a fixed constitutional commitment that addresses climate change directly and comprehensively. Forestation, hydraulic fracturing and gas mining overlap with or lie within the larger issue of climate change. The closest approximation arises in international law: the *Paris Agreement* obligates parties to submit nationally determined contributions setting out emissions targets consistent with the Agreement,<sup>43</sup> and (like other international law) enjoys constitutional status in that subset of monist states where international law is superior to ordinary law.<sup>44</sup> However, while the procedures for establishing substantive commitments are binding under the *Paris Agreement*, the Agreement itself does not set out specific binding standards.<sup>45</sup>

Across all of the examples we have seen, the scope of the provisions may be ambiguous and open to interpretation. For instance, what counts as forest coverage (eg the level of tree density in covered areas) is omitted from the Bhutanese and Kenyan provisions. What is also unclear is how natural setbacks, such as drought, fire or disease, are to be treated. Moreover, the New York provision requires a potentially contested historical analysis to define the extent of the forest preserve as it stood in 1894.<sup>46</sup> In the Kenyan provision, the timing of commitments is imprecise, committing governments only to ‘work to achieve’ the target.<sup>47</sup> This is similar to the language of ‘progressive realisation’ common to many social and economic rights. In Bhutan, where tree cover already

<sup>42</sup> *Victorian Constitution* (n 37) s 98.

<sup>43</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 4(2) (*‘Paris Agreement’*).

<sup>44</sup> See Brian J Preston, ‘The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms’ (Pt 1) (2021) 33(1) *Journal of Environmental Law* 1, 7.

<sup>45</sup> See *ibid* 4, 7–8. The *Paris Agreement’s* (n 43) broad substantive requirements are that nationally determined contributions be geared to mitigation ‘with the aim of achieving the objectives of such contributions’: art 4(2); and each successive contribution must also set progressively higher standards: art 4(3). The Agreement expressly allows for balancing in light of concerns of ‘equity’, ‘sustainable development’ and ‘efforts to eradicate poverty’: arts 2(1), 4(1), 6(8), 14(1).

<sup>46</sup> See *New York Constitution* art XIV § 1; Peter J Galie, *The New York State Constitution: A Reference Guide* (Greenwood Press, 1991) 245–7.

<sup>47</sup> *Constitution of Kenya 2010* art 69(1)(b) (*‘Kenyan Constitution’*).

exceeds 60%,<sup>48</sup> there is currently no ambiguity as to when the standard is to be met.

Nevertheless, in each example, the specification of a quantum of protection is distinctive. For instance, while elsewhere the *Bhutanese Constitution's* obligations and principles invite countervailing considerations and implicit balancing analyses — for example, art 5(2) provides that the 'Royal Government shall ... [s]ecure ecologically balanced sustainable development *while promoting justifiable economic and social development*'<sup>49</sup> — art 5(3) specifies a precise quantum of forest protection.<sup>50</sup> Values of economics or social development cannot evidently budge that standard in the way they might for other aspects of sustainable development. The 60% figure itself is no mere interpretive principle. It sets out not merely a starting point or a waypoint, but an end point of deliberations about the substantive standard to adopt.

There are occasional instances, as well, of fixed substantive constitutional standards outside of the environmental context, including some prominent examples. The *United States Constitution's* Thirteenth Amendment includes an absolute ban on slavery and 'involuntary servitude'.<sup>51</sup> A number of countries have age maximums or minimums for high public office.<sup>52</sup> And some European and US state-level constitutions have adopted balanced budget amendments and other budgetary constraints (eg in 1978, California's citizen-initiated *Proposition 13* banned real property tax above 1%).<sup>53</sup> In each example, the provision aims to deny governments the ability to depart from or diminish a precise standard framed in absolute or otherwise quantitative terms. Interpretive questions regarding the scope of the principle remain (eg what counts as 'involuntary servitude'). However, there is intended to be no leeway for litigants to contest the standard's magnitude, nor to set off countervailing values against the standard.

<sup>48</sup> Turner (n 14) 216.

<sup>49</sup> *Constitution of the Kingdom of Bhutan* art 5(2)(c) (emphasis added) ('*Bhutanese Constitution*').

<sup>50</sup> *Ibid* art 5(3).

<sup>51</sup> *United States Constitution* amend XIII § 1.

<sup>52</sup> See, eg, *ibid* art II § 1 (the President of the US must be at least 35 years old); *Constitution of India* art 58(1)(b) (the President must be at least 35 years old); *Australian Constitution* s 72 (High Court justices must retire upon turning 70 years old).

<sup>53</sup> Colin H McCubbins and Mathew D McCubbins, 'Proposition 13 and the California Fiscal Shell Game' (2010) 2(2) *California Journal of Politics and Policy* 1, 3; *California Constitution* art XIII A § 1(a). On various European constitutional provisions fixing, for example, ceilings on public debts, see Boris Begović, Tanasije Marinković and Marko Paunović, 'A Case for the Introduction of Numerical Fiscal Rules in the Serbian Constitution' (2017) 62(212) *Economic Annals* 7, 16–20. On US state examples, see James M Poterba, 'Balanced Budget Rules and Fiscal Policy: Evidence from the States' (1995) 48(3) *National Tax Journal* 329.

To be sure, fixed commitments sometimes may remain less fixed than intended. Lower-level discretion — that is, room for deliberation about the specific policies needed to execute the standard — is still, of course, necessary. Such discretion opens up possibilities for delay and derailment. Motivated litigants will almost certainly seek loopholes or self-favourable interpretations within the bounds of the standard.<sup>54</sup> In addition, actors in the various branches of government may at times drift or derogate even from apparently absolute standards.<sup>55</sup> De facto or judicial amendment may, for instance, occur when standards are widely seen as unworkable in practice, or as out of sync with changing social and political norms. Even fixed norms, then, can become dead letters or ‘sham’ guarantees.<sup>56</sup>

Yet at least some fixed provisions (eg the Thirteenth Amendment and age conditions) have largely avoided such changes and continue to motivate compliance in practice.<sup>57</sup> Several factors may determine this. One is whether the provision is mostly prohibitory, as opposed to mandatory (mandatory provisions being more difficult to enforce — a point to which I return below). The democratic legitimacy of the process of enactment may also determine compliance.<sup>58</sup> Still another factor appears to be whether the substance of the commitment echoes a widespread popular movement or entrenches a ‘constitutional moment’.<sup>59</sup> a foundational political and constitutional realignment. Speculatively, the climate emergency and its related challenges may be comparable in severity to the stresses (eg the US Civil War and Great Depression) that seem to have prompted past constitutional moments.<sup>60</sup> Polling surveys indeed

<sup>54</sup> See, eg, Craig Collins, *Toxic Loopholes: Failures and Future Prospects for Environmental Law* (Cambridge University Press, 2010). See also Stacey, *Environmental Emergency* (n 10) 45, 52–4.

<sup>55</sup> For example, faced with the seemingly ironclad guarantee in s 92 of the *Australian Constitution* that ‘trade, commerce, and intercourse among the States ... shall be absolutely free’, the High Court devised a number of workarounds and, eventually, a balancing test in *Cole v Whitfield* (1988) 165 CLR 360, 394–5, 398–9 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>56</sup> See generally David S Law and Mila Versteeg, ‘Sham Constitutions’ (2013) 101(4) *California Law Review* 863.

<sup>57</sup> This is, as ever, a matter of degree. Jim Crow-era de jure and de facto discrimination and poor work conditions for African Americans undermined the practical effects of post-Civil War amendments, including the prohibition on slavery: see generally Theodore Brantner Wilson, *The Black Codes of the South* (University of Alabama Press, 1965).

<sup>58</sup> See Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) ch 4; Jeff King, ‘Constitutions as Mission Statements’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 73, 89 (‘Mission Statements’).

<sup>59</sup> See generally Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991) vol 1.

<sup>60</sup> See *ibid* 89.

consistently show that large numbers of respondents nominate climate change as a pre-eminent policy concern. There is high and consistent popular support for active steps toward mitigation in many countries and territories (eg between 70–80% in Australia, Canada and France),<sup>61</sup> even at personal expense.<sup>62</sup>

In sum, at least some fixed commitments may effectively establish a largely backward-looking constitutional method,<sup>63</sup> entrenching an end point of democratic contestation and deliberation. The aim of fixed constitutional commitments is to provide authoritative answers as to which specific substantive policy direction a democratic community should take. In cases where fixed commitments address a chronic emergency, this may allow an emergency response to proceed without indefinite second-guessing and delay. While the enunciation of substantive standards in a constitution is not itself unusual, efforts to design fixed commitments to insulate such standards from further contestation are. As we will see in Part III, fixed commitments appear to go against the grain of dominant proceduralist theory; rather than setting up procedures for ongoing broad-level deliberations, they are products of past deliberations (although, as noted, they open up discussion about the means of implementation). Note that there is no suggestion here of suppressing internal governmental discussion, nor of any censorship of public debate. Yet the fixed commitment renders moot, at least inside the branches of government, further contestation about threshold questions (eg in the climate change area, whether an emergency response should occur at all and, if so, to what degree). The only clear avenue left to derogate from fixed commitments may be through constitutional amendment or repeal.

### B *Binding*

Fixed commitments are not merely aspirational but impose binding obligations on governments (and potentially on others). Unlike constitutional

<sup>61</sup> See Anthony Leiserowitz et al, Yale Program on Climate Change Communication, *International Public Opinion on Climate Change* (Report, 2021) 13–15. A majority of respondents in 31 surveyed countries and territories nominated climate change as a 'high' or 'very high' public priority. See also Natasha Kassam and Hannah Leser, *Lowy Institute Climate Poll 2021* (Report, 2021) 1.

<sup>62</sup> Citizens surveyed across 17 advanced economies were willing to make personal sacrifices to address climate change: see James Bell et al, Pew Research Center, *In Response to Climate Change: Citizens in Advanced Economies Are Willing To Alter How They Live and Work* (Report, 14 September 2021) 3.

<sup>63</sup> See, eg, John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 268.

‘aspirations’<sup>64</sup> and some ‘mission statement’ provisions,<sup>65</sup> fixed commitments must be backed by a robust enforcement process. Someone or something must have the apparent authority and the widely perceived legitimacy to interpret the standard, to determine whether the standard has been breached and to order an appropriate and practically efficacious remedy.

Fixed commitments should, if possible, be negative in form, since commitments with mandatory elements can be difficult to enforce. It is more straightforward to assess whether an act (eg hydraulic fracturing) is occurring and to prohibit that act. However, for a multifaceted problem such as climate change, where the fixed policy may need to be extremely wideranging (eg carbon neutrality across an economy), positive obligations may be needed to prompt governments to give effect to the policy. The question then becomes how to enforce such constitutional mandates. Weis describes one possibility: constitutional directive principles ‘that are designed to be given effect by the political branches.’<sup>66</sup> Here, constitutional provisions obligate those branches to pass implementing ‘directed legislation.’<sup>67</sup> Yet fixed constitutional commitments carve out a separate approach based on scepticism about elected governmental actors implementing policies in consistent ways.<sup>68</sup> The institutions that enforce fixed constitutional mandates should generally therefore be non-elective: courts or independent ‘fourth branch’ bodies of government.<sup>69</sup>

Taking the judicial enforcement route, the forest cover guarantee in art 5(3) of the *Bhutanese Constitution* enlists the Supreme Court of Bhutan’s authority both to interpret the provision and to issue judgments about its breach.<sup>70</sup> Similarly, art 70 of the *Kenyan Constitution*, which is part of a wider chapter on the

<sup>64</sup> Kim Lane Scheppele, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models’ (2003) 1(2) *International Journal of Constitutional Law* 296, 299.

<sup>65</sup> King, ‘Mission Statements’ (n 58) 81–2. Using King’s typology, fixed commitments would be examples of mission statement provisions that are ‘judicially enforceable’ as opposed to ‘largely declaratory’: at 82.

<sup>66</sup> Weis (n 28) 853.

<sup>67</sup> *Ibid* 847.

<sup>68</sup> See below Part III for further discussion.

<sup>69</sup> ‘Fourth branch bodies’ can refer to independent governmental or quasi-governmental bodies generally: see Peter L. Strauss, ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ (1984) 84(3) *Columbia Law Review* 573, 579. Alternatively, and more specifically, the phrase may refer to bodies charged with preserving constitutional democracy: see generally Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021). Given the arguments to be seen in Part III below, either definition may apply to fixed commitment enforcement bodies in the climate area.

<sup>70</sup> See *Bhutanese Constitution* (n 49) arts 1, 21(18). Cf Turner (n 14) 216.

environment and land use, contemplates both negative and positive remedies in the '[e]nforcement of environmental rights':

- (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate —
  - (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
  - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
  - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.<sup>71</sup>

Provided that courts are largely both trusted and trustworthy in a given jurisdiction, their authority may help to secure fixed commitment compliance.<sup>72</sup> Yet judicial enforcement of environmental constitutional commitments has often fallen short.<sup>73</sup> While a right to a quality environment is recognised in numerous constitutions around the world, only a small proportion of these constitutional provisions have been judicially considered in constitutional or apex courts.<sup>74</sup> Even jurisdictions that amend their constitutions to include fixed commitments may find that ingrained institutional separation assumptions make courts reluctant to comply.<sup>75</sup> Judges may hesitate to carry out what they understand to be fixed policy objectives that unduly curtail their own discretion. Moreover, in light of concerns about judges' competency in relation to complex and

<sup>71</sup> *Kenyan Constitution* (n 47) arts 70(1)–(2).

<sup>72</sup> In a similar vein, on the possibility (but not the necessity) of judicial enforcement to increase compliance with mission statement provisions, see King, 'Mission Statements' (n 58) 82, 87.

<sup>73</sup> Apex courts in, for example, Switzerland, the Netherlands and Greece have been reluctant to recognise enforceable environmental rights in constitutional provisions concerning environmental laws or policy: May and Daly, *Global Environmental Constitutionalism* (n 7) 123–4. Similarly, the Constitutional Court of Turkey has construed the constitutional provision that '[e]veryone has the right to live in a healthy, balanced environment' narrowly to confine its operation to 'facial challenges to legislation': at 124, quoting *Türkiye Cumhuriyeti Anayasası* [Constitution of the Republic of Turkey 1982] art 56.

<sup>74</sup> May and Daly, *Global Environmental Constitutionalism* (n 7) 109.

<sup>75</sup> See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

polycentric environmental matters,<sup>76</sup> judges may view themselves as ill-suited to enforcing fixed constitutional commitments.

Judicial enforcement may, in turn, have difficulty influencing governments or wider communities. This is a familiar problem in multifaceted policy areas. Courts have crafted enforcement strategies, notably including ‘structural injunctions’, or variations thereof, by which they enunciate broad substantive standards and assume ongoing oversight roles.<sup>77</sup> Structural injunctions see courts mandate other government actors to undertake the more detailed work of formulating and executing plans in line with the standard.<sup>78</sup> The courts assess compliance with standards over time and issue further clarifications of standards as needed. The use of such injunctions is geographically widespread but only intermittently effective, as might be expected given the vexed subjects they cover (eg school desegregation, prison reform, housing availability).<sup>79</sup> Structural injunctions meet, and respond to in turn, resistance from highly motivated partisan litigants and communities. Judges often must issue a series of injunctions in reaction to evolving social conditions and litigation strategies.<sup>80</sup>

A common variation on the structural injunction model in the climate context sees courts reviewing the formal budgets of a jurisdiction, which may include financial or carbon budgets. Many countries now have mandatory carbon budgets as part of climate legislation in ordinary law.<sup>81</sup> Reviewing carbon budgets is a relatively circumscribed role for judges, and one to which they arguably are well-suited. This relatively narrow role can make use of judicial deliberative capabilities, such as established methods for (i) testing evidence (including expert evidence), (ii) assessing causal arguments for soundness, and (iii) querying

<sup>76</sup> Weis (n 28) 853–6.

<sup>77</sup> Donald L Horowitz, ‘Decreeing Organizational Change: Judicial Supervision of Public Institutions’ (1983) 32(6) *Duke Law Journal* 1265, 1266–8.

<sup>78</sup> On US structural injunctions, see, eg, *ibid*; Charles F Sabel and William H Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117(4) *Harvard Law Review* 1015, 1018–19.

<sup>79</sup> In the US, see, eg, *Brown v Board of Education of Topeka*, 347 US 483, 495 (Warren CJ for the Court) (1954) (*‘Brown I’*) (mandating school desegregation); *Brown v Board of Education of Topeka*, 349 US 294, 301 (Warren CJ for the Court) (1955) (*‘Brown II’*) (clarifying the remedy to be applied in *Brown I* (n 79): different school districts pose different difficulties but, in each, ‘all deliberate speed’ must be exercised following the Court’s order); *Cooper v Aaron*, 358 US 1, 7 (Warren CJ, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan and Whittaker JJ) (1958) (further orders in the face of Southern defiance of *Brown I* (n 79) and *Brown II* (n 79)). In Canada, see, eg, *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3, 29 (Iacobucci and Arbour JJ for McLachlin CJ, Gonthier, Iacobucci, Bastarache and Arbour JJ). In South Africa, see, eg, *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46, 62 [24], 83 [82] (Yacoob J).

<sup>80</sup> See Horowitz (n 77) 1268.

<sup>81</sup> See above n 11.

whether government claims rest on defensible rationales presented in good faith.<sup>82</sup> Each of these may be brought to bear in budget vetting. Hence a fixed constitutional commitment could require judges to undertake considerably less nebulous tasks than those involved in wideranging structural injunctions. The budget review process could be relatively regularised and specific, applying judicial procedures to test budgetary compliance with a narrow set of bright-line environmental standards. If well publicised — and especially if transparent in its reasoning and procedures — the process may even enhance the real and perceived legitimacy of decisions,<sup>83</sup> and perhaps compliance in turn.<sup>84</sup>

As an alternative to judicial enforcement, however, there may be purpose-designed fourth branch bodies such as independent climate commissions or advisory panels. These are common institutional devices for environmental decision-making;<sup>85</sup> their creation has even been judicially mandated.<sup>86</sup> Like a court, a commission can exercise a monitory role for financial and carbon budgets.<sup>87</sup> And like some courts, a commission may be more likely than elected government actors to steer a consistent course free of partisan influence.<sup>88</sup> Yet unlike a court, fourth branch bodies can draw on extensive internal research staff to keep up with developments in the science and engineering of climate change mitigation. A commission also potentially avoids some of the noted separation of powers concerns.<sup>89</sup>

Commissions might be called upon to not only to review the headline elements of a climate budget, but to assess the factual assumptions behind the

<sup>82</sup> See Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017) 42–5.

<sup>83</sup> On reason-giving and legitimacy, see, eg, Jerry L Mashaw, ‘Reasoned Administration and Democratic Legitimacy: Reflections on an American Hybrid’ in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 17; Stacey, *Environmental Emergency* (n 10) ch 4.

<sup>84</sup> See, eg, Tom R Tyler and Jonathan Jackson, ‘Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement’ (2014) 20(1) *Psychology, Public Policy, and Law* 78.

<sup>85</sup> See Stacey, *Environmental Emergency* (n 10) 56–60.

<sup>86</sup> See *Ashgar Leghari v Federation of Pakistan*, WP No 25501/2015 (Shah CJ) (Lahore High Court).

<sup>87</sup> Similarly, an ‘electoral management body’ can ‘supervise crucial elements of the electoral process’: Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’ (2016) 21(1) *Review of Constitutional Studies* 85, 95, quoting Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) *Harvard Law Review* 633, 713.

<sup>88</sup> Cf Stacey, *Environmental Emergency* (n 10) 56–60; Pal (n 87) 90–1.

<sup>89</sup> The legislative separation of powers (prohibiting legislatures from fully abdicating their law-making powers) may pose far weaker constraints: see, eg, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 121 (Evatt J).

budget and the plausibility of a government's plans for technological and legal change to meet commitments. Granted, an important difficulty raised by fourth branch bodies is their potential instability: the susceptibility to underfunding, disbandment or cooption by elected government branches.<sup>90</sup> While a constitutional provision may seek to guarantee the body's continuity and independence, even this may not always be effective.<sup>91</sup> On the other hand, a number of fourth branch bodies in practice have indeed enjoyed long-term independence and influence (eg many electoral commissions and reserve banks).<sup>92</sup>

An additional difficulty with the fourth branch option is the apparent democratic deficit entailed in expert-driven oversight. As Stacey notes, environmental 'decisions involv[e] incommensurable trade-offs' and not merely 'objective expertise';<sup>93</sup> the decisions necessitate a degree of value-based reasoning which requires democratic rather than wholly technocratic decision-making. However, Stacey also observes that options for democratic decision-making go beyond the traditional electoral representation model.<sup>94</sup> Oversight bodies can be designed to be apolitical in a partisan sense (ie members are neither elected nor representatives of political parties), yet still representative of a diversity of public views.<sup>95</sup> A number of established fourth branch bodies (eg electoral re-districting commissions) have such functions — they include procedures for canvassing individual, group and party-political views, yet remain broadly trusted and impartial.<sup>96</sup>

### C *Entrenched*

After becoming entrenched, a legal norm usually can be changed only through the use of formal procedures going above and beyond ordinary lawmaking.<sup>97</sup> In addition, in most (but not all) cases, especially onerous formal rules are required to entrench the provision in the first place. Yet formal requirements do not exhaust all the possibilities for entrenchment. Even informal or *de facto*

<sup>90</sup> The Inter-State Commission provides an example of this: Stephen Gageler, 'Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28(3) *Public Law Review* 205, 216–17.

<sup>91</sup> See, eg, *Australian Constitution* s 101, mandating an 'Inter-State Commission', which has fallen into disuse: *ibid* 217.

<sup>92</sup> See generally Pal (n 87).

<sup>93</sup> Stacey, *Environmental Emergency* (n 10) 59.

<sup>94</sup> See *ibid* 110.

<sup>95</sup> See, eg, Pal (n 87) 87–8.

<sup>96</sup> See generally *ibid*.

<sup>97</sup> Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 3.

special rules of enactment may prevent governments from repealing or altering legal norms once those norms have been created.<sup>98</sup> For instance, enacting a norm via a super-majority vote, a referendum vote or a citizens' assembly (a randomly selected deliberative democratic convention), even if not legally required, may in practice help to secure the amendment against future repeal.<sup>99</sup> The process may stamp a new norm with an appearance of greater legitimacy, which may prevent against efforts to repeal, curtail or ignore the norm.<sup>100</sup> Such norms may even in effect be widely understood as constitutional, in the sense of being foundational and difficult to alter.<sup>101</sup> Governments may hesitate to antagonise their constituents by breaching norms enacted via extraordinary democratic or deliberative democratic procedures.<sup>102</sup>

There are evident risks when climate change policies are left unentrenched, either in the formal or informal sense. For instance, in 2011 Australia passed the *Clean Energy Act 2011* (Cth), which created a new federal carbon price, by a bare majority in Parliament.<sup>103</sup> The federal government had announced, but ultimately abandoned, a policy of using a citizens' assembly on climate change to determine the directions of climate policymaking.<sup>104</sup> Under pressure from the Australian Greens party — which understood the science of climate change as largely settled, and a citizens' assembly as therefore 'a complete abrogation of responsibility' — the government discarded its assembly plan.<sup>105</sup> But as a political and policymaking matter, how best to approach mitigation remained unsettled. A new federal government repealed the carbon price soon after.<sup>106</sup> Repeal may have posed greater political costs, and may thus have been less likely, had the Act been at least informally entrenched via the citizens' assembly's extraordinary deliberative democratic procedures. In the decade since Australia

<sup>98</sup> See, eg, Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press, 3<sup>rd</sup> ed, 2004) 239; Scottish Affairs Committee, *The Referendum on Separation for Scotland: Oral and Written Evidence* (House of Commons Paper No 1608, Session 2010–12) ev 44.

<sup>99</sup> See David Beetham, 'Max Weber and the Legitimacy of the Modern State' (1991) 13(1) *Analyse and Kritik* 34, 39–40.

<sup>100</sup> See *ibid*; King, 'Mission Statements' (n 58) 87–8.

<sup>101</sup> See Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45(2) *Duke Law Journal* 364, 366–7.

<sup>102</sup> See, eg, Russell (n 98) 239.

<sup>103</sup> See generally Simon Copland, 'Anti-Politics and Global Climate Inaction: The Case of the Australian Carbon Tax' (2020) 46(4–5) *Critical Sociology* 623.

<sup>104</sup> John Boswell, Simon Niemeyer and Carolyn M Hendriks, 'Julia Gillard's Citizens' Assembly Proposal for Australia: A Deliberative Democratic Analysis' (2013) 48(2) *Australian Journal of Political Science* 164, 166–7.

<sup>105</sup> *Ibid* 170.

<sup>106</sup> *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth) sch 1.

floated and abandoned the idea, a range of further jurisdictions have run citizens' assemblies for climate policymaking.<sup>107</sup>

Of course, there remains the pragmatic political question of whether climate fixed commitments are likely to be entrenched at all. Where popular or elite opinion on the matter remains unsettled, any mooted solution may be unrealistic if it calls not only for ordinary legislation, but for formal or informal constitutional entrenchment. Yet we have seen that fixed commitments have been adopted in some jurisdictions. Political attitudes may be relatively unified on the need for climate change mitigation in a given jurisdiction. In these places, fixed commitments may solidify such attitudes while potentially guarding against wavering official policy in the future.

Elsewhere, however, majority political support may be less forthcoming, at least among legislators. In such places the case for entrenchment may be stronger, but the likelihood of entrenchment weaker. To be sure, given the exceptional duration of the climate emergency, the majority support needed to entrench a fixed commitment may at least transiently materialise sooner or later, for instance after tangible demonstrations of catastrophic climate change (eg extreme temperatures). The only question may be whether majority agreement can materialise soon enough to aid mitigation in a timely way.

In some places, including the Australian states, under certain circumstances an initial Act entrenching a constitutional provision may be no more onerous to pass than ordinary legislation.<sup>108</sup> In other places, where the act of entrenchment does require special procedures, these procedures may sometimes facilitate rather than prevent entrenchment. Direct or deliberative democratic procedures, in particular, may lend outsized influence to majorities of citizens, who generally favour mitigation, compared with legislators, who are often more reluctant to act.<sup>109</sup> In some jurisdictions (eg Croatia, Italy, New Zealand, Switzerland and several US states), formal or informal constitutional change can begin at the behest of citizens who initiate the process via a petition that triggers a

<sup>107</sup> See, eg, in the United Kingdom: Stephen Elstub et al, *Evaluation of Climate Assembly UK* (Report, July 2021); France: Courant (n 1); Scotland: Stephen Elstub, Jayne Carrick and Zohreh Khoban, 'Democratic Innovation in the Scottish Parliament: An Evaluation of Committee Mini-Publics' (2021) 30(4) *Scottish Affairs* 493; and in Budapest: Daniel Oross, Eszter Mátyás and Sergiu Gherghina, 'Sustainability and Politics: Explaining the Emergence of the 2020 Budapest Climate Assembly' (2021) 13(11) *Sustainability* 6100.

<sup>108</sup> *Australia Act 1986* (Cth) s 6; *Australia Act 1986* (UK) s 6. Effective entrenchment depends, however, on legislation fulfilling the requirements previously discussed.

<sup>109</sup> See below Part III.

referendum.<sup>110</sup> This presents an important opening for fixed commitments to be enacted and entrenched despite the general opposition of legislators.<sup>111</sup>

A further possibility is that an extraordinary democratic or deliberative process not formally authorised by a government may nevertheless be influential. Such a process does not require the support of a reluctant or divided government. Yet a prominent and carefully conducted non-governmental process, such as a privately-run plebiscite or citizens' assembly may, speculatively, consolidate and demonstrate public support for a mitigation policy. Though this possibility is, as of yet, untried, a non-governmental process in its own way may prompt a policy's enactment, and even perhaps its informal entrenchment — assuming, again, that governments hesitate to depart from policies with demonstrated democratic support.<sup>112</sup>

Whatever the precise mechanism of entrenchment, the rationale for entrenchment is clear. The origins and nature of a legal rule may determine whether the rule is perceived as legitimate and persists over the long term.<sup>113</sup> Strategic climate change litigation, which is on the increase,<sup>114</sup> has aims broadly comparable to those of fixed commitments: to secure, through law, a program of climate change mitigation to force reluctant governments to take action. Judicially imposed commitments may bypass the epistemic and other failures of

<sup>110</sup> In Croatia: *Ustav Republike Hrvatske* [Constitution of the Republic of Croatia] art 87; Italy: *Costituzione della Repubblica Italiana* [Constitution of the Italian Republic] art 75; New Zealand: *Citizens Initiated Referenda Act 1993* (NZ); Switzerland: *Bundesverfassung der Schweizerischen Eidgenossenschaft* [Federal Constitution of the Swiss Confederation] tit 4 ch 2. In the US, see William B Fisch, 'Constitutional Referendum in the United States of America' (2006) 54 (Fall Supp) *American Journal of Comparative Law* 485, 494–6.

<sup>111</sup> In November 2021, New York voters approved a ballot initiative to add a hortatory commitment — 'a right to clean air and water, and a healthful environment' — to the state Bill of Rights: *New York Constitution* art I § 19; '2021 Statewide Ballot Proposals', *The Official Website of New York State* (Web Page, 2021) <<https://www.elections.ny.gov/2021BallotProposals.html>>, archived at <<https://perma.cc/BM6E-M7BR>>. This highlights a path to entrenchment that environmental fixed constitutional commitments might also follow.

<sup>112</sup> See generally Caroline W Lee, *Do-It-Yourself Democracy: The Rise of the Public Engagement Industry* (Oxford University Press, 2014); Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) ch 6.

<sup>113</sup> See generally Tyler and Jackson (n 84) 89; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E Fleming (ed), *Getting to the Rule of Law* (New York University Press, 2011) 3, 4–5.

<sup>114</sup> See, eg, *State of the Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands, No 19/00135, 20 December 2019) [tr 'Landmark Decision by Dutch Supreme Court', Urgenda (Web Document) <<https://www.urgenda.nl/en/themes/climate-case/>>, archived at <<https://perma.cc/78UW-9LGB>>]. There has also been a recent global wave of youth climate litigation: see, eg, *Juliana v United States*, 217 F Supp 3d 1224 (D Or, 2016) ('*Juliana*'); *La Rose v Canada* [2020] FC 1008; *Sharma v Minister for the Environment (Cth)* (2021) 391 ALR 1, revd (2022) 400 ALR 304. See also Stacey, 'Climate Change' (n 24) 5–6.

elected branches of government that have led to inaction. Yet courts generally cannot set out long-term emergency responses that are sufficiently broad in their reach; judicial implication alone is unlikely to create a standard comprehensive enough to address all key aspects of the emergency, nor to manage various aspects holistically.<sup>115</sup>

Neither can we expect such commitments necessarily to remain entrenched over the very long term. The limits of judicially-enacted constitutional reforms are well recognised, particularly in jurisdictions where judges are most active in this regard.<sup>116</sup> The apparent ‘losers’ in litigation may lose only for a time, as formal or substantive reversals of law may later arise. In particular, political backlash against judgments is common where judicial incursions into democratic policymaking are understood by large or vocal blocs of dissenters as illegitimate.<sup>117</sup> Questions about the legitimacy of a norm’s enactment are not, then, merely philosophical. A legislative commitment that is solely judicial in origin may remain comparatively unstable, particularly in areas of sharply polarised disagreement where activists habitually litigate or lobby for the reversal of judicial decisions.

### III OBJECTION AND REPLIES

In this part, I focus on one potentially formidable objection to fixed commitments. The ‘objection from democracy’ is in some respects akin to familiar objections to constitutional rights and freedoms, yet also in key ways distinctive. After introducing the objection, I discuss external and internal arguments in reply.

#### A *Objection from Democracy*

Fixed constitutional commitments are distinctive by the lights of contemporary proceduralist constitutional theories. Proceduralists are concerned about the counter-majoritarianism of constitutional provisions that empower judges to

<sup>115</sup> Weis (n 28) 855.

<sup>116</sup> See, eg, Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 2<sup>nd</sup> ed, 2008) 298; William N Eskridge Jr, ‘Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics’ (2005) 114(6) *Yale Law Journal* 1279.

<sup>117</sup> A key example is the ongoing constitutional ‘tug of war’ over abortion access in the US: Eskridge Jr (n 116) 1285–7. Cf Reva B Siegel, ‘Community in Conflict: Same-Sex Marriage and Backlash’ (2017) 64(6) *UCLA Law Review* 1728, 1746–51. See also Rosenberg (n 116) pts 2, 4.

issue rigidly binding decisions.<sup>118</sup> John Hart Ely's original proceduralist model of 'representation reinforcement' viewed the judicial role in constitutional decision-making as justified only insofar as judges protect democratic procedures from cooption by powerful political factions.<sup>119</sup> Proceduralists after Ely expanded, and arguably improved, on this basic model. Unlike Ely's approach, contemporary proceduralism may be open to substantive provisions being in a constitution, as long as ordinary democratic citizens or their representatives can contribute to the provisions' interpretation over time.

In contemporary proceduralist accounts, constitutions have little objective a priori content that judges can simply uncover and apply; constitutions instead stipulate just the wide outlines of flexible and continually revisable commitments.<sup>120</sup> These theories understand judges as properly sharing the process of interpreting, applying and developing constitutions with democratic actors, and thus describe democratically inclusive ongoing systems for working out the substance of constitutions. For instance, deliberative constitutionalists expect the precise contents of constitutional rights to be elaborated through long-term processes of public deliberation that include formally empowered elites (eg judges, legislators and administrators) as well as wider arrays of citizens (eg individuals, media, foundations and civil society groups).<sup>121</sup> Dialogue theorists similarly, though much more narrowly, imagine the contents of constitutions being worked out over time through partnerships between courts and legislatures.<sup>122</sup>

Proceduralist theories rescue a legitimate role for judges in constitutional decision-making, but in a diminished form. Rather than displacing democratic processes, judges are seen as correcting democratic faults, or as contributing a distinctive rationalist perspective — informed by attention to constitutional text and precedent — to a deliberative democratic system populated by a wide

<sup>118</sup> Yannis Papadopoulos, 'On the Embeddedness of Deliberative Systems: Why Elitist Innovations Matter More' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 125, 138–42. See generally Erika Rackley and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 283.

<sup>119</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 101–3.

<sup>120</sup> Habermas, *Between Facts and Norms* (n 18) 384.

<sup>121</sup> Ron Levy, 'Rights and Deliberative Systems' (2022) 18(1) *Journal of Deliberative Democracy* 27, 28 ('Rights and Deliberative Systems').

<sup>122</sup> Hogg and Bushell (n 17) 80–1. See generally Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, 'Introduction: The "What" and "Why" of Constitutional Dialogue' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy and Institutions* (Cambridge University Press, 2019) 1.

set of actors.<sup>123</sup> Proceduralist conceptions thus re-imagine judicial action not as simplistically opposed to democracy, but as integral or complementary to it. However, judicial input must stay within certain bounds. For instance, while judges may provide distinctive perspectives to inform democratic deliberations, binding substantive judicial decisions at the apex level should come only at the end of protracted and diverse public deliberations, and even then the decisions should remain revisable.<sup>124</sup>

Based on this account we can better understand the democratic objection to fixed constitutional commitments. Fixed commitments seem a poor fit to proceduralist constitutional conceptions. In relation to high-level substantive policy priorities, fixed constitutional commitments offer not vague and open-ended provisions to allow ongoing democratic dialogue or deliberation, but rather a backward-looking methodology that freezes the outcomes of past decisions in place. Granted, fixed constitutional commitments do not suspend all or even most democratic deliberation; democratic lawmaking and policymaking must still determine how best to implement the standards that fixed commitments set out. Nevertheless, taking foundational policy objectives 'off-line' curtails some significant forms of democratic activity. In this vein, addressing Victoria's fracking ban, one former state opposition MP reasoned that

[u]sing the constitution to fortify policy positions may well be appealing if you happen to agree with the particular policy in question ... But that does not answer the broader question about whether the constitution should be used in this way ... Leave the constitution as a document that sits above politics as far as possible and let the current bans on fracking and coal seam activities reside in the legislation that established them.<sup>125</sup>

Indeed, for those fixed constitutional commitments that are not merely prohibitory (like the Victorian anti-fracking provisions), but that may have mandatory aspects (like the forestation provisions in Bhutan, Kenya and New York, or a fixed target for greenhouse gas reductions),<sup>126</sup> the space for governments to make decisions is even more limited. Mandatory commitments compel governments to act even when they may not wish to. A number of mandatory provisions that compel governmental action exist in constitutions around the world.

<sup>123</sup> See, eg, Levy and Kong (n 18) 4–5.

<sup>124</sup> Levy, 'Rights and Deliberative Systems' (n 121) 29–30.

<sup>125</sup> John Pesutto, 'Victoria's Constitution Should Not Be Used To Prop Up Fracking Ban', *The Age* (online, 20 April 2020) <<https://www.theage.com.au/national/victoria/victoria-s-constitution-should-not-be-used-to-prop-up-fracking-ban-20200417-p54ko8.html>>, archived at <<https://perma.cc/EN7R-M62W>>.

<sup>126</sup> See above nn 36–42 and accompanying text.

But most of these are aspirational, broadly-cast exhortations, with pragmatic limitations or proportionality structures embedded in the texts themselves;<sup>127</sup> governments can readily respond to such provisions with delay and evasion.<sup>128</sup> By contrast, the obligations in mandatory fixed commitments are intended to be difficult to circumvent.

In sum, ongoing deliberations about substantive policy may foreclose, in turn, the democratic processes that contemporary proceduralists understand as part of legitimate constitutional practice. At the level of priority-setting, fixed commitments lock up — or ‘fortify’ — just one potential priority out of many. The possible harm to democracy may be described in intrinsic terms (ie democratic departures are problematic *per se*). A contemporary proceduralist might also argue, more instrumentally, that processes of vetting that involve ongoing and democratically inclusive deliberative processes yield more sound and effective policy.<sup>129</sup> Such processes may even improve the perceived legitimacy of public decisions and compliance with those decisions in turn.<sup>130</sup> Hence, declaring democratic contestation about foundational policy priorities to be at an end risks both democracy and its benefits.

### B Replies

I suggest two types of normative reply to the democratic objection. The first is ‘external’. Echoing defences of strong entrenchment of rights,<sup>131</sup> this argument concedes fixed commitments’ counter-majoritarian effects, but argues that they may sometimes be justified by concerns arguably greater than democracy. I do not wholly embrace this first reply. Rather, I argue for more satisfactory ‘internal’ replies, which call fixed commitments’ presumed democratic deficits into doubt, and thus challenge the democratic objection on its own terms.

<sup>127</sup> See, eg, *South African Constitution* (n 32) ss 26(1)–(2): ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of’ the right to ‘adequate housing’.

<sup>128</sup> King observes similar risks from ‘non-minimalist’ mission statement provisions, in that their ‘non-minimalism could extend the influence of conservative groups and obstruct the channels of progressive change’, but ultimately discounts this: King, ‘Mission Statements’ (n 58) 95.

<sup>129</sup> See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) 102–3; Levy, ‘Rights and Deliberative Systems’ (n 121) 29.

<sup>130</sup> See Beetham (n 99) 39–40; Levy, O’Flynn and Kong (n 112) 109.

<sup>131</sup> See, eg, discussion in Mark Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries’ (2003) 38(2) *Wake Forest Law Review* 813.

## 1 External Replies

Variations of the notion that ‘being comes before well-being’ are often invoked to override democratic and liberal values in times of emergency.<sup>132</sup> The emergency in question may threaten the collectivity itself: a credible challenge to the current political order (eg threats of invasion or infiltration). Or it may affect individuals on a wide scale (eg COVID-19, terrorism and climate change), posing risks to life or causing severe economic shocks and other collective traumas. The stakes in emergencies are viewed as sufficiently severe to break from ordinary procedures for decision-making. Democracy and liberal guarantees may be understood as expendable, up to a point, if they block efficient responses to pandemic, security, environmental or other emergencies.

There have always been strands of environmentalism that openly or tacitly flirt with authoritarianism.<sup>133</sup> There is also a thread of environmentalism that places faith in elite scientific rule.<sup>134</sup> Both of these influences may lead many environmental scholars to be comfortable with the external response. However, another tack in environmental scholarship simply observes that liberalism’s protections do not go far enough when they focus too heavily on individual freedoms. For instance, the lower court in *Juliana v United States* observed that ‘the right to a climate system capable of sustaining human life is fundamental to a free and ordered society’<sup>135</sup> — a variation, arguably, on the ‘being comes before well-being’ formulation.

Whatever their exact nature, external replies may justify a range of extraordinary constitutional responses to emergencies. Some responses clear away constitutional limitations or shift such limitations from being rigid to being somewhat more flexible. The limitations affected may be rights guarantees or the usual slow and notionally deliberative procedures of democratic decision-making.<sup>136</sup> During the Second World War, faced with autocratic foes able to prosecute a war free from onerous legal and democratic demands, Allied courts

<sup>132</sup> Chief Justice Latham ascribed this phrase to Oliver Cromwell: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141.

<sup>133</sup> See, eg, Dan Coby Shahar, ‘Rejecting Eco-Authoritarianism, Again’ (2015) 24(3) *Environmental Values* 345.

<sup>134</sup> See, eg, Amanda Machin and Graham Smith, ‘Ends, Means, Beginnings: Environmental Technocracy, Ecological Deliberation or Embodied Disagreement’ (2014) 21(1) *Ethical Perspectives* 47.

<sup>135</sup> *Juliana* (n 114) 1250 [48] (Aiken J).

<sup>136</sup> See generally Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

often deferred to legislative and executive choices.<sup>137</sup> In our own time, in responding to terror and pandemic crises, governments have cited emergencies to curb freedoms such as criminal process protections and the freedom of assembly.<sup>138</sup> Express provisions sometimes allow for formal derogations from or suspensions of standard rights and processes.<sup>139</sup> And doctrines of deference or proportionality may have broadly similar effects.<sup>140</sup>

In addition, emergencies may be thought to justify additional powers for executive or legislative action where such powers are normally absent. For instance, in a federal or devolved system, sub-national jurisdictions may be unwilling to join in the concerted and costly action needed to address an emergency.<sup>141</sup> Central governments may thus invoke rare emergency (or 'crisis') powers to address these challenges.<sup>142</sup> In short, the divided state becomes a little more unitary, as central governments augment and bypass standard constitutional arrangements that appear too inefficient in a crisis.<sup>143</sup>

Fixed constitutional commitments are in part distinct from these standard forms of emergency response. Fixed commitments do not assume that a government is motivated to respond to an emergency and would do so if only certain constitutional barriers could be set aside or new constitutional powers conferred. On the contrary, fixed commitments recognise the possibility that a government lacks the will to act. The provisions are intended as tools to direct

<sup>137</sup> See, eg, *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 335, 339–40 (Latham CJ, McTiernan J agreeing at 345), 342 (Rich J), 344 (Starke J), 346 (Williams J).

<sup>138</sup> See, eg, *COVID-19 Emergency Response Act 2020* (ACT) amend 1.68, as at 8 April 2020, inserting *Supreme Court Act 1933* (ACT) s 68BA (allowing judge-only pandemic-era trials); *Hamdi v Rumsfeld*, 542 US 507, 527–8 (O'Connor J for the Court) (2004) (concerning executive discretion to detain enemy combatants). See also Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016).

<sup>139</sup> See, eg, *United States Constitution* art I § 9, allowing the suspension of habeas corpus for public safety 'in Cases of Rebellion or Invasion'.

<sup>140</sup> See, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 9(2); *Canada Act 1982* (UK) c 11, sch B pt I s 1 ('*Canadian Charter of Rights and Freedoms*').

<sup>141</sup> See generally Richard B Stewart, 'Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementations of National Environmental Policy' (1977) 86(6) *Yale Law Journal* 1196; Luke Fowler, *Environmental Federalism: Old Legacies and New Challenges* (Routledge, 2020); Stacey, 'Climate Change' (n 24) 6–7.

<sup>142</sup> See Stacey, *Environmental Emergency* (n 10) 17–18; Gross and Ní Aoláin (n 136) 8.

<sup>143</sup> See, eg, the 'nationhood power': *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 89 [233], 91 [241] (Gummow, Crennan and Bell JJ); the 'peace, order and good government' emergency powers in Canada: *Fort Frances Pulp & Power Co Ltd v Manitoba Free Press Co Ltd* [1923] AC 695, 703–4 (Viscount Haldane for the Court) (Privy Council).

policy development in the face of present or future governmental foot-dragging. As we saw, fixed commitments can obligate reluctant or wavering governments to use law and other policy instruments to meet, for example, a defined climate standard. Whether it is mandatory or prohibitory, a fixed constitutional commitment's aim is to settle, over the long term, the substance of a policy debate about a chronic emergency.

Standard liberal democratic constitutional processes may be neither quick nor ultimately effective enough to respond to the emergency. That is, while there may be nothing generally amiss in a state's usual constitutional structures for policymaking (eg deliberations that proceed through party, executive and legislative stages with bicameral and federal input), these structures may be ill-suited to making the required emergency decisions. Even when functioning as designed, unwieldy democratic processes may not achieve policy outcomes that the environment, and those who depend on it, may need. It can be argued that fixed constitutional commitments should compel these outcomes, even if this means bypassing some of the usual elements of liberal democratic decision-making.

Given the severity of some emergencies, the argument that, on balance, existential risks may justify departures from standard liberal democratic governance is not necessarily wrong. Yet the argument suffers from key weaknesses, including indeterminacy about when it should apply. It is initially difficult to know whether the actual magnitude of an existential risk justifies adopting a fixed commitment: whether a suitable balance has been struck between existential necessity on the one hand, and democratic and liberal norms on the other. In some respects, this is just the standard problem of weighing incommensurables.<sup>144</sup> Weighing exercises are fraught at the best of times.<sup>145</sup> However, emergency measures especially call for leaps of faith: balancing the equities of action or inaction based on hazy predictions of future risk. The difficulty deepens when, on both sides of the balance scale, a risk can be classified as existential. One side is the risk of conquest, revolution, natural catastrophe and the like. The other is the risk to the constitutional order — an order that might not merely weaken, but transform into a substantially new and less liberal or democratic order. Indeed, the use of 'emergency powers brings all the risks of executive aggrandizement and restrictions on civil liberties that attract the concern

<sup>144</sup> T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96(5) *Yale Law Journal* 943, 972–6. Environmental policymaking typically involves trade-offs among, for example, economic costs to communities, ecosystems, industries and even lives: see generally Richard L Revesz, 'Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives' (1999) 99(4) *Columbia Law Review* 941.

<sup>145</sup> See, eg, Jamal Greene, 'Foreword: Rights as Trumps?' (2018) 132(1) *Harvard Law Review* 28, 43–55.

of constitutional theorists.<sup>146</sup> Few would still argue today that liberal constraints should effectively be abandoned amid emergencies.<sup>147</sup>

The dilemma therefore seems to be how to balance one set of existential risks against another. Yet, is the assumption that fixed constitutional commitments present risks to democratic and liberal norms warranted in the first place? In the next part, I turn to an examination of internal replies to the democratic objection. These replies do not take for granted that constitutional political systems are running as intended. They instead pin responsibility for chronically weak emergency responses on certain unintended pathologies of contemporary democratic governance, which fixed commitments can seek to correct.

## 2 *Internal Replies*

The internal replies to the democratic objection observe how fixed commitments may step in where democratic procedures have been failing under stress. Given the profound uncertainty about what counts as an effective or ideal democracy,<sup>148</sup> there is, in turn, uncertainty about what counts as a democratic failure. Yet there are certain stand-out faults of contemporary democratic practice in a number of jurisdictions. The first fault to be identified below concerns failures of representation, which are often evident in the stark mismatch between the considered preferences of citizens and the decisions of their representatives. The second fault, which is quite distinct from the first, returns us to the claim that liberal democratic systems are increasingly sclerotic. These systems are often unable to establish their own essential substantive priorities, and are therefore unable to move on to address key subsequent stages of deliberation about policy.

### (a) *Mal-Representation*

A democratic system worth the name must, in some sense, represent its constituents; a democracy cannot dispense with popular consent to public decision-making.<sup>149</sup> This is especially so in the arena of constitutional and other foundational decision-making in relation to decisions that are not merely

<sup>146</sup> Stacey, 'Climate Change' (n 24) 9–10.

<sup>147</sup> Schmitt notoriously held that uncertainty justifies suspending the normal constraints of the rule of law: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr George Schwab (University of Chicago Press, 1985) 6–12. See also Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

<sup>148</sup> See Adam Przeworski, *Crises of Democracy* (Cambridge University Press, 2019) 4.

<sup>149</sup> See Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press, 1996) 53–6.

technical but are substantially value-based, and in cases where a long-term policy problem has allowed time for a relatively considered, even substantially well-informed, set of popular positions to develop. Of course, not all decision-making meets these conditions — especially the latter one. Yet while ordinary citizens do not always excel at deliberation about policymaking, on key matters elite representatives have tended to fare considerably worse.

The pathologies of representative democratic systems are well known, nearly ubiquitous globally, and generally on the increase. Abject partisanship and polarisation, and consequently low or uneven trust in public institutions, have intensified in many democracies.<sup>150</sup> Well-funded interest groups pursuing specific agendas exert undue influence, for example via outsized campaign contributions, well-funded media campaigns and concentrated, rather than ideologically diverse, media ownership.<sup>151</sup> In recent decades, too, pedlars of inaccurate and misleading information have of course gone online to find new, high-volume avenues of distribution.<sup>152</sup> These and other factors distort the information environment underlying democratic debate, encouraging readings of policy strictly from within divided and largely hermetic cultural enclaves.<sup>153</sup> Within such enclaves, the impulse to signal group allegiance tends to determine — more than other factors — the reasons that members provide in public debates, and the empirical assumptions that support those reasons.<sup>154</sup> Surprisingly, such motivated reasoning is often most pronounced among various types of elites who, in general, are best able to manipulate their arguments to reach a desired

<sup>150</sup> See, eg, James N Druckman, Erik Peterson and Rune Slothuus, 'How Elite Partisan Polarization Affects Public Opinion Formation' (2013) 107(1) *American Political Science Review* 57.

<sup>151</sup> See generally Graeme Orr, 'Dealing in Votes: Regulating Electoral Bribery' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 130; Papadopoulos (n 118) 131–5; Beth L Leech, 'Lobbying and Influence' in L Sandy Maisel and Jeffrey M Berry (eds), *The Oxford Handbook of American Political Parties and Interest Groups* (Oxford University Press, 2010) 534; Matthew Levendusky, 'Partisan Media Exposure and Attitudes toward the Opposition' (2013) 30(4) *Political Communication* 565, 567, 577.

<sup>152</sup> See, eg, Edson C Tandoc Jr, 'Tools of Disinformation: How Fake News Gets To Deceive' in Shashi Jayakumar, Benjamin Ang and Nur Diyanah Anwar (eds), *Disinformation and Fake News* (Palgrave Macmillan, 2021) 35.

<sup>153</sup> On the significance of culture in political deliberation, see Jensen Sass and John S Dryzek, 'Deliberative Cultures' (2014) 42(1) *Political Theory* 3.

<sup>154</sup> See Dan M Kahan, 'Ideology, Motivated Reasoning, and Cognitive Reflection' (2013) 8(4) *Judgment and Decision Making* 407, 416–18, 420; Matthew S Nurse and Will J Grant, 'I'll See It when I Believe It: Motivated Numeracy in Perceptions of Climate Change Risk' (2020) 14(2) *Environmental Communication* 184, 184–5, 197; Druckman, Peterson and Slothuus (n 150) 72–3.

end.<sup>155</sup> Elite representatives indeed frequently both stoke and exploit group divisions.<sup>156</sup>

We see the worst of these dynamics in discussions of technically complex policymaking problems.<sup>157</sup> Where the context is opaque and counterintuitive, even existential challenges are readily discounted or distorted by empowered elites. These epistemic problems have become widely familiar. A key example is the mal-representation of citizen preferences on climate change. This is evident in the mismatch between popular views and the views of empowered elites.<sup>158</sup> Despite the noted strong popular support for an adequate response to the climate emergency, many communities' notional representatives oppose such a response — and not because they know better.

Much of the elite opposition seems to have little to do with democratic representation. What counts as representation is of course contested. Yet, at a minimum, it must include some form of popularly authorised independent deliberation (trusteeship) or a commitment to channelling the views of citizens (delegation). Democratic mal-representation can involve faults in either or both kinds of decision-making, and within both political parties and governments. Legislative and executive actors are frequently steeped in partisan debates that supersede any sober reflection on the science or economics of climate change. Frequently, representatives who ostensibly serve democratic majorities may, in fact, represent smaller groups defined by commercial imperatives.<sup>159</sup> Even though representatives have better information than their constituents, their incentives often differ. Many notional representatives effectively understand their constituents as comprising the businesses or other influential interests that underwrite electoral campaigns.<sup>160</sup>

Against this background, fixed commitments, which may be seen as correcting certain representational mismatches, may have claims to being majoritarian

<sup>155</sup> See generally Druckman, Peterson and Slothuus (n 150); Ron Levy, 'The "Elite Problem" in Deliberative Constitutionalism' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 351.

<sup>156</sup> See, eg, John S Dryzek, 'Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia' (2005) 33(2) *Political Theory* 218, 226.

<sup>157</sup> See Nurse and Grant (n 154) 185, 195–7.

<sup>158</sup> See, eg, Coffey (n 3).

<sup>159</sup> See, eg, Nathalie Giger and Heike Klüver, 'Voting against Your Constituents? How Lobbying Affects Representation' (2016) 60(1) *American Journal of Political Science* 190, 192, 202; Matthew C Fellowes and Patrick J Wolf, 'Funding Mechanisms and Policy Instruments: How Business Campaign Contributions Influence Congressional Votes' (2004) 57(2) *Political Research Quarterly* 315, 315, 321.

<sup>160</sup> See, eg, David Coen, 'Environmental and Business Lobbying Alliances in Europe: Learning from Washington?' in David L Levy and Peter J Newell (eds), *The Business of Global Environmental Governance* (MIT Press, 2005) 197. See also Pardy (n 12) 149.

rather than counter-majoritarian. Fixed commitments that offset a consistent mal-representation in a given area arguably pursue — albeit in distinctive ways — something akin to the representation–reinforcement function in Ely’s original take on proceduralism. Unlike contemporary contributors, Ely focused mostly on opening up democratic representation’s blocked channels.<sup>161</sup> This objective is pertinent to fixed commitments. But fixed commitments offer a substantive, rather than procedural, fix to these procedural problems. That is, fixed commitments may seek to address the faults in a democratic process indirectly by offsetting the faults’ predictable substantive effects. Fixed commitments may impose the decisions that representative democratic processes would have reached had certain demonstrable procedural faults not repeatedly prevented those decisions. In this way, fixed commitments may enact policy preferences that better reflect the priorities of popular majorities.

Although fixed commitments go beyond what Ely had in mind, they may provide relatively workable substantive correctives to democratic procedural faults — including where no process-based correction seems to be up to the task. In particular, procedural corrections to the problems of abject polarisation and partisanship in public decision-making are thus far elusive. Some small-scale procedural alternatives (eg citizens’ assemblies) are workable as far as they go, but are only limitedly able to reform democratic decision-making as a whole.<sup>162</sup> Fixed commitments may then serve as second-best, substantive avenues for countering the consistent procedural fault of mal-representation.

Intergenerational mal-representation is important in this discussion.<sup>163</sup> Notably, fixed commitments may be characterised as majoritarian to the extent that they accommodate the interests of the (presumably) more numerous generations still to come. However, this is a contingent claim: it depends on whether, simply by taking future interests into account, fixed commitments can represent communities that do not yet exist. Not all versions of representation focus on the representation of interests per se. Other approaches see representation as necessarily participatory. These models stress active engagement of

<sup>161</sup> See Ely (n 119) ch 5.

<sup>162</sup> Fred Cutler et al, ‘Deliberation, Information, and Trust: The British Columbia Citizens’ Assembly as Agenda Setter’ in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (Cambridge University Press, 2008) 166, 168–70.

<sup>163</sup> On intergenerational dimensions of climate change, see, eg, Stephen M Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press, 2011) 153; Jordi Jaria-Manzano and Susana Borràs, ‘Introduction to the *Research Handbook on Global Climate Constitutionalism*’ in Jordi Jaria-Manzano and Susana Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing, 2019) 1, 4, 14.

citizens in any key decisions affecting them.<sup>164</sup> Indeed, Stacey plausibly argues that ongoing public engagement is needed to support deliberative decision-making ('public-regarding reasoning') as well as the legitimacy and authority of public decisions.<sup>165</sup> However, such engagement may be unavailable given that a fixed commitment aims to settle a long-term policy challenge once and for all.

Yet recall the fourth branch institutional design options that, as we saw in Part II, may provide non-judicial, independent and impartial decision-making about the interpretation and enforcement of fixed commitments. This institutional response potentially addresses Stacey's concerns about ongoing community representation in environmental constitutionalism.<sup>166</sup> Survey studies indicate that impartial yet democratically informed decision-making can attract both public and elite trust.<sup>167</sup> Thus, at least in terms of what attracts public perceptions of democratic legitimacy, no single approach to representation is the sole correct one. In the context of fixed constitutional commitments, novel fourth branch institutional approaches to representation may become platforms for long-term deliberation and representation.

(b) *Constitutional Indecision*

The second internal answer to the democratic objection responds to another kind of recurring fault in contemporary democratic practice. Constitutions can 'outline the core, constitutive political commitments of the community', as Jeff King explains.<sup>168</sup> Such priority-setting is indeed not an optional but an essential step in democratic decision-making practice. Yet a democratic system may be biased towards indecision at these foundational, priority-setting stages of decision-making; the system may lack the means for setting out relatively consistent priorities. Before the community can deliberate in depth about policy, it must first define its own essential objectives: what the community stands for, what it fears and what it hopes to achieve.

As we have seen, fixed constitutional commitments aim not merely to set priorities, but also to secure them against ready repeal or amendment. Such fixed commitments may enable a relatively resolute and specific settlement of

<sup>164</sup> Tyler and Jackson (n 84) 89.

<sup>165</sup> Stacey, *Environmental Emergency* (n 10) 50, 85–8. See also at ch 4.

<sup>166</sup> See *ibid* 85–8.

<sup>167</sup> See Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 834.

<sup>168</sup> King, 'Mission Statements' (n 58) 81. King sees the function of such 'mission statements' as being not only to serve 'as ... record[s] of pre-existing sociopolitical conditions and conventions, but often also as ... proactive programme[s] of development': at 73.

policy priorities in vexed areas such as climate change. A democracy that cannot move beyond priority-setting may be unable to agree on coherent or effective policies. Taking certain fundamental priorities out of deliberative contention — locking them up in settled law — may ultimately expand deliberation in net. The effective settlement of priorities may allow deliberation to move past threshold stages of deliberation, and towards the more intricate, numerous and varied questions of policy — especially around the implementation of key priorities.

Once commenced, efforts to address these more nuanced policy questions may form the greater part of the activity of governance. Questions of policy implementation involve, *inter alia*, trial and error policymaking, in which governments take tentative steps along a path of policy development and pause at intervals to assess progress towards a specified priority. A significant volume of public deliberation lies in such ongoing experimentation; iterative cycles of trial, assessment and consolidation are common features of the search for optimal ways of implementing policy priorities.<sup>169</sup>

Priorities that remain weak or tentative may not — or at least not as readily — impel such policy development. In describing the European Union's Emissions Trading Scheme, Mikael Hildén notes how 'some countries and private stakeholders ... were [initially] against the very idea or waited for additional evidence'.<sup>170</sup> He observes that 'important policy innovations remain in an insecure state for a long time, draw fire from many directions ... and *need to be developed in order to survive*'.<sup>171</sup> More firmly fixed priorities may enable more resolute development of decisions regarding policy implementation. Debates about climate change mitigation, for instance, often stumble over lingering scientific, engineering, economic and policy uncertainties, such as the precise costs of action or inaction, as well as precisely how policy and technology innovations can achieve their objectives.<sup>172</sup> Both businesses and governments

<sup>169</sup> Michael Hallsworth, Simon Parker and Jill Rutter, Institute for Government, *Policy Making in the Real World: Evidence and Analysis* (Report, April 2011) 6, 42; Mikael Hildén, Andrew Jordan and Dave Huitema, 'The Search for Climate Change and Sustainability Solutions: The Promise and the Pitfalls of Experimentation' (2017) 169 *Journal of Cleaner Production* 1.

<sup>170</sup> Mikael Hildén, 'Evaluation, Assessment, and Policy Innovation: Exploring the Links in Relation to Emissions Trading' (2014) 23(5) *Environmental Politics* 839, 854.

<sup>171</sup> *Ibid* 855 (emphasis added) (citations omitted), citing Robert Passey et al, 'The Inevitability of "Flotilla Policies" as Complements or Alternatives to Flagship Emissions Trading Schemes' (2012) 48 *Energy Policy* 551. See also Mikael Hildén, 'Time Horizons in Evaluating Environmental Policies' (2009) 122 *New Directions for Evaluation* 9, 10–11 ('Time Horizons').

<sup>172</sup> See Hildén, 'Time Horizons' (n 171) 12–14.

may lack the incentives to invest time and resources in such innovations without the certainty provided by settled policy priorities.<sup>173</sup>

The notion that decisional freedom thrives within conditions of (modest) constraint, though perhaps counterintuitive, is found throughout legal and political theory, from Pufendorf to Habermas. Gerald Postema interprets Samuel von Pufendorf, the 17<sup>th</sup> century German legal theorist, as holding that law must take certain matters ‘off-line’ to free up decisional resources.<sup>174</sup> After prior deliberations about fundamental matters have concluded, governments must be able to act on the basis of those prior decisions in order to take further steps in decision-making.<sup>175</sup> Laws thus play roles in establishing the context that enables deliberation. Settled laws aid deliberation by serving as a ‘surrogate for deliberative public reason’, moving a range of disputes ‘out of the domain of the public and the political’.<sup>176</sup> This view promotes, among other values, ‘determinacy [and] finality’.<sup>177</sup>

Works from Jürgen Habermas and other deliberativists broadly echo this view. In deliberative democracy theory, the principle of non-coercion is on its face sacrosanct: one does not deliberate well if one does not deliberate freely — that is, unconstrained by any force but the ‘force of the better argument’.<sup>178</sup> However, Habermas himself recognises the paradox of this principle: one cannot reach the point of deliberating freely without, in the first place, having the political and legal norms and institutions (eg democratic processes and expressive freedoms) and the societal conditions necessary for such deliberative liberty.<sup>179</sup> Creating these background conditions generally requires institutions and norms set — coercively — by law.<sup>180</sup> Habermas gestures here at the notion that coercion can run counter to coercion.

<sup>173</sup> See, eg, Mathias Fridahl et al, ‘Mapping Multi-Level Policy Incentives for Bioenergy with Carbon Capture and Storage in Sweden’ (2020) 2 *Frontiers in Climate* 604787:1–25, 13.

<sup>174</sup> Postema (n 22) 48.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid* (emphasis omitted).

<sup>177</sup> *Ibid.*

<sup>178</sup> Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, tr Thomas McCarthy (Heinemann, 1984) vol 1, 25.

<sup>179</sup> Jürgen Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29(6) *Political Theory* 766, 772 (‘Constitutional Democracy’); Simone Chambers, ‘Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalisation, and the Limits of Proceduralism’ in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 256, 258.

<sup>180</sup> Habermas, ‘Constitutional Democracy’ (n 179) 772.

Picking up this notion, Archon Fung writes that ‘widespread inequality and failures of reciprocity can justify nonpersuasive, even coercive, methods for the sake of deliberative goals.’<sup>181</sup> Hence, the

scope of permissible nonpersuasive action grows as the conditions for deliberation deteriorate. ... Sometimes, forces more compelling than the better argument are necessary to establish fair and inclusive deliberation or the conditions that support such deliberation. ... Persuasion will seldom be sufficient to effect deep institutional transformation.<sup>182</sup>

The idea that coercion can be ‘enabling’ is embedded in liberal theory, and is a practical feature of laws, institutions and social rules that ‘constrain some conduct in order to preserve valuable forms of social activity.’<sup>183</sup> Legal and institutional interventions may facilitate deliberation where political and societal conditions may otherwise suppress it. For instance, Habermas notes that the ‘strength of privileged interests’ can give rise to ‘illegitimate interventions’ in deliberation.<sup>184</sup> Coercion should thus be understood ‘*in net* ... as a compound of cross-cutting coercive and/or deliberative vectors.’<sup>185</sup> The ‘question becomes whether, in practice and on balance, an institution’s rules and processes offer people the freedom and capacity to deliberate.’<sup>186</sup>

Theories of ‘bounded rationality’ give further support to these perspectives.<sup>187</sup>

<sup>181</sup> Archon Fung, ‘Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World’ (2005) 33(3) *Political Theory* 397, 399.

<sup>182</sup> *Ibid* 400–2, 404. See also Jane Mansbridge et al, ‘The Place of Self-Interest and the Role of Power in Deliberative Democracy’ (2010) 18(1) *Journal of Political Philosophy* 64, 82–3, citing Jon Elster, ‘The Market and the Forum: Three Varieties of Political Theory’ in Jon Elster and Aanund Hylland (eds), *Foundations of Social Choice Theory* (Cambridge University Press, 1986) 103, 116, 119.

<sup>183</sup> Levy, O’Flynn and Kong (n 112) 89. See also Susan Dunn, ‘Introduction: Rousseau’s Political Triptych’ in Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses*, ed Susan Dunn (Yale University Press, 2002) 1, 11; John Stuart Mill, ‘On Liberty’ in JM Robson (ed), *Collected Works of John Stuart Mill* (University of Toronto Press, 1977) vol 18, 213, 253–4.

<sup>184</sup> Habermas, *Between Facts and Norms* (n 18) 150. See also Seyla Benhabib, ‘Liberal Dialogue versus a Critical Theory of Discursive Legitimation’ in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press, 1989) 143, 155–6.

<sup>185</sup> Levy, O’Flynn and Kong (n 112) 89 (emphasis in original).

<sup>186</sup> *Ibid*.

<sup>187</sup> See, eg, Herbert A Simon, ‘Theories of Bounded Rationality’ in CB McGuire and Roy Radner (eds), *Decision and Organization: A Volume in Honor of Jacob Marschak* (North-Holland Publishing, 1972) 161; Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93(5) *American Economic Review* 1449.

Bounded judgment is, among its other uses, a cognitive tool to avoid weighing decisions down with too much information and analysis. Though it brackets many relevant factors, bounded judgment assists in the search for clear and final outcomes.<sup>188</sup>

If these conditions for public deliberation are absent — if the terms of public deliberation are too ill-defined or chaotic — then the risk is that deliberation may not begin or progress in earnest. Robert Goodin similarly observes how deliberative discussion sometimes benefits from taking topics that are too impractical or divisive off the table;<sup>189</sup> ‘to reduce subjectivity, complexity, and discord, deliberation is potentially best practised within a limited sphere.’<sup>190</sup>

We should be wary of extending these notions too far. Bounded reasoning may unduly simplify and distort deliberation. Yet, to some extent, distillation and simplification of deliberation may be essential to ‘expedite judgement, in light of the inevitable frailties of imagination, reasoning, and memory with which we all contend.’<sup>191</sup> In particular, in David Hume’s view, primordial objectives provide direction and purpose to reasoning.<sup>192</sup> An effective democratic system cannot afford indefinitely to put off choosing its foundational priorities, and neither can it reconsider and revise these priorities too often. Deliberation may stall if priority-setting stages are inconclusive and policymaking remains excessively directionless. A normative infrastructure — a key set of values and commitments — is needed for deliberation to proceed towards specified ends.<sup>193</sup> Indeed, the exact ends chosen are beside the point to some extent (ie within a reasonable range of options).<sup>194</sup> The value of priority-setting thus partly lies in the establishment and fixture of priorities per se.

The notion of setting up a normative infrastructure to allow ongoing deliberation to occur may at first seem inapt for fixed commitments; these constitutional provisions, after all, take a significant part of deliberation ‘off-line’. Thus,

<sup>188</sup> Levy and Orr (n 82) 52.

<sup>189</sup> Robert E Goodin, ‘Talking Politics: Perils and Promise’ (2006) 45(2) *European Journal of Political Research* 235, 246.

<sup>190</sup> Levy and Orr (n 82) 56.

<sup>191</sup> *Ibid* 51.

<sup>192</sup> David Hume, *A Treatise of Human Nature*, eds David Fate Norton and Mary J Norton (Oxford University Press, 2000) 266. Cf Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (Yale University Press, 2005) 58–9.

<sup>193</sup> King, ‘Mission Statements’ (n 58) 73.

<sup>194</sup> Deliberative democratic methods for priority-setting may be the most suitable. Experience with climate citizens’ assemblies makes it clear that while the assemblies’ precise recommendations will vary (eg focusing, variously, on broad carbon goals or prohibiting particular sources of carbon emissions), these deliberative democratic processes ultimately all favour robust climate mitigation commitments overall: see above n 107.

they seem to differ from the types of democratically legitimate constitutional provisions that contemporary proceduralists favour, which embrace balancing and ongoing revisability. Yet fixed constitutional commitments may invoke a proceduralist normative defence if they enable or impel distinctive kinds of deliberation. In theory at least, by settling on foundational priorities, fixed commitments may shift the focus of deliberation from basic priorities to fuller considerations of policy design and implementation.

#### IV CONCLUSION

At the 2021 United Nations Climate Change Conference ('COP26') in Glasgow, the international community took further steps, through nationally determined contributions, to meet the goal of ensuring that global temperatures do not rise above 1.5°C by the end of this century.<sup>195</sup> Yet we remain on a trajectory towards higher gains in global temperatures.<sup>196</sup> The apparent dissonance between policy on the one hand, and scientific evidence and public attitudes in favour of mitigation on the other, demonstrates the pressures on governments to respond to a wide variety of stresses. This hard reality has often been the decisive factor in climate law and policymaking — the erosion of policy intent through competing economic and political demands.

This article has identified a species of environmental constitutional provision that, by securing quantified commitments, departs markedly from past approaches. The numeric precision of these fixed constitutional commitments is intended to curtail vagueness, open-endedness and interest-balancing — features that, though standard in contemporary constitutional procedure, are poorly suited to chronic emergencies requiring unwavering policy responses over the extreme long term. As we saw, fixed constitutional commitments have been enacted thus far in Australia (Victoria), Bhutan, Kenya and the US (New York). Future iterations responding to the deepening climate emergency appear likely, even perhaps inevitable.

The prospects of fixed constitutional commitments on climate must be assessed, however, within a context of profound complexity. Fixed constitutional commitments on climate may specify high-level standards, such as net-zero emissions. But in doing so they may have effects that reach across many fields

<sup>195</sup> Mark Robinson, 'COP-26: The Political Conundrum' (2021) 110(5) *Round Table: The Commonwealth Journal of International Affairs* 606, 606; *Paris Agreement* (n 43) art 4(2). See also Pete Smith et al, 'Essential Outcomes for COP26' (2021) 28(1) *Global Change Biology* 1, 1.

<sup>196</sup> See, eg, Robert Rohde, 'Global Temperature Report for 2021', *Berkeley Earth* (Web Page, 12 January 2022) <<http://berkeleyearth.org/global-temperature-report-for-2021/>>, archived at <<https://perma.cc/8MYD-GGVB>>.

at once, including energy, transport, housing, agriculture, forestry, aviation, food, manufacturing and health. To be sure, in this regard, fixed constitutional commitments would join a wider trend of high-level standard setting in international law and domestic legislation. However, and importantly, the fixed commitments seek to adopt the standard-setting model into constitutional texts, where quantified guarantees may be both more effective and more enduringly secure. Fixed constitutional commitments, moreover, may correct defects in environmental democratic deliberation at the national level. Such commitments may potentially help to settle divisive climate debates mired in threshold questions about whether, and how much, a community should pursue a response to the environmental emergency, opening up democratic space for more extensive follow-on deliberations about the specifics of implementation.