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Benjamin N. Cardozo School of Law, sterk@yu.edu

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Retrenchment on Entrenchment

Stewart E. Sterk*

May Congress, by following the process for enactment of an ordinary statute, preclude future Congresses from repealing a new or existing statute? According to the United States Supreme Court1 and a host of eminent legal scholars,2 (buttressed by the work of political and legal theorists writing over the course of several centuries) the answer to that question is no.3 In a recent article, Professors Eric A. Posner and Adrian Vermeule contend that the traditional answer is wrong, and that the rule prohibiting "entrenchment" of statutes should be discarded.4

Posner and Vermeule argue that entrenchment is constitutionally permissible and normatively attractive.5 In particular, they contend that formal legislative entrenchment does not differ materially from many practices that legislatures have long followed and that courts have long sanctioned.6 In addition, they argue that entrenchment enables legislatures to achieve valuable objectives that would otherwise be difficult to realize.7 Hence, on the view of Posner and Vermeule, critics of entrenchment bear the burden of demonstrating why entrenchment is worthy of concern.8

* Mack Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. The author would like to thank Michael Herz, Melanie Leslie, John McGinnis, and Kevin Stack for valuable comments, and Elliot Gardner for helpful research assistance.

1 See United States v. Winstar Corp., 518 U.S. 839, 873 (1996) (quoting Manigault v. Springs, 199 U.S. 473, 487 (1905), in which the Court had written that "a general law . . . may be repealed, amended or disregarded by the legislatures which enacted it," and "is not binding upon any subsequent legislature." The Court in Winstar decided the case, involving the enforceability of a government contract, on other grounds); Fletcher v. Peck, 10 U.S. 87 (1810) (acknowledging the principle "that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature").


5 Id. at 1666.

6 Id. at 1685-88, 1705.

7 Id. at 1670-73.

8 Id. at 1705.
Posner and Vermeule have not made their case. First, they render their normative argument incoherent by refusing to take a position on judicial enforcement of entrenched statutes. If judicial enforcement matters—and it does—then the normative case for entrenchment must depend, in some measure, on whether entrenched statutes are judicially enforceable.

Second, Posner and Vermeule are wrong when they claim that entrenchment is not materially different from other legislative actions that affect the future. Other government decisions, particularly those that commit future resources, have the potential to impose costs on future generations, but they do not have the potential—as entrenchment does—to prevent future legislatures from allocating those costs among members of the polity. Nor do traditional legislative actions, even when they impose future costs, withdraw from successor legislatures the power to repudiate those actions. Moreover, traditional legislative actions, like private contracts, are typically accompanied by escape hatches that would not be available in a regime where a statute that conflicts with an entrenched statute would be, in Posner and Vermeule’s words, “straightforwardly illegal.”

Third, Posner and Vermeule’s normative argument ignores the impact the entrenchment alternative would have on other forms of commitment currently available to legislatures. If legislatures were empowered to provide ironclad guarantees against subsequent repeal or modification, any more measured promise would signal weaker government commitment than the same promise would signal in a regime that prohibits entrenchment. That is, permitting legislatures to entrench does not simply afford the government one additional tool; the availability of entrenchment dulls other valuable tools currently available to government.

I. What Is Entrenchment?

A. The Posner/Vermeule Definition

Because they conclude that entrenchment is a “promiscuous word in the academic literature,” Posner and Vermeule take pains to offer their own definition: “[T]he enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form.” Posner and Vermeule offer several examples of entrenching statutes: (1) a law that provides no bicycles in the park, and the prohibition on bicycles in the park cannot be repealed with less than a two-thirds majority; (2) a law perpetually dedicating public lands in the capital for use as Rock Creek Park; (3) a statute permanently establishing a particular town as the county seat; and (4) a law providing that “this statute (including this provision) may never be repealed (even by a unanimous vote).”

To Posner and Vermeule, a regime authorizing entrenchment is one that permits the entrenching legislature to decide the intertemporal choice-of-law question. In the regime they advocate, “[w]hether the later-enacted statute

9 Id. at 1670.
10 Id. at 1666.
11 Id. at 1667.
12 Id. at 1667-68.
governs in the case of a conflict depends on what the earlier legislature has provided." A subsequent legislature is bound by a prior legislature's entrenching statute (assuming that the entrenching statute is not otherwise unconstitutional).

B. Judicial Enforcement

In a peculiar twist, Posner and Vermeule do not insist that the entrenched statute be judicially enforceable. They contend that arguments about the legality of entrenchment are analytically distinct from arguments about justiciability, and they "take no position here on whether courts should enforce entrenched statutes when subsequent legislatures violate the entrenchment by enacting a contrary statute." This refusal to take a position on judicial enforcement renders incoherent both their constitutional argument and their normative argument.

Consider first their constitutional position, which is that subsequent legislatures are bound by entrenching legislation, and that any contrary statutes are "straightforwardly illegal." That position can certainly be reconciled with judicial invalidation of any statute that contradicts the entrenching statute. More difficult to understand, however, is how the position can be squared with other potential judicial responses to entrenchment.

First, suppose the Supreme Court were to determine that controversies over entrenchment were not justiciable—an alternative Posner and Vermeule appear to suggest. While that position may be verbally consistent with their conclusion that entrenched statutes are binding on subsequent legislatures, the non-justiciability position, as a practical matter, is often equivalent to a position that rejects entrenchment. Examine the no-bicycles-in-the-park example offered by Posner and Vermeule. Suppose that, despite a provision in the initial legislation requiring a two-thirds majority to repeal the prohibition on bicycles, a subsequent legislature were, by a simple majority, to repeal the prohibition on bicycles in the park. A local prosecutor—a disciple of Posner and Vermeule—takes the entrenching statute seriously, and prosecutes a bicyclist. What would it mean for a court to conclude that the validity of the entrenchment statute was non-justiciable? Ordinarily, when courts determine that particular disputes are non-justiciable, they do so because the Constitution has allocated decision-making power to one of the other branches of government. In the context of an entrenching statute, concluding that

13 Id. at 1668.
14 Id. at 1670.
15 Id.
16 Id. (concluding that "arguments about the legality of entrenchment are analytically distinct from arguments about the justiciability of entrenchment").
17 See Baker v. Carr, 369 U.S. 186, 217 (1962). The Court in Baker noted that: Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a
courts should defer to the legislature begs the ultimate question: which legislature, the one that enacted the entrenching statute, or the one that has enacted inconsistent legislation? If non-justiciability means deference to the current legislature, then the prosecution of the bicyclist must be dismissed, and the entrenched legislation does not constrain the bicyclist's conduct. The other alternative is that the entrenched statute is judicially enforceable, permitting the prosecution to go forward. From the perspective of the prosecutor and the bicyclist, non-justiciability provides no middle ground.

The second alternative is that the Supreme Court determines that entrenchment is not binding on subsequent legislatures, either because entrenchment would infringe on the subsequent legislature's inalienable police power, or for some other reason. If the Supreme Court reaches that conclusion, it is difficult to see how a statute contrary to the entrenching statute could be "straightforwardly illegal." At that point, the Court would have rejected the Posner/Vermeule argument, holding either that the second legislature is universally free to ignore an entrenching statute, or free under some circumstances to ignore the entrenching statute. By what reference point, then, would the second legislature's action be illegal? Posner and Vermeule do not suggest an answer.

The analysis so far establishes that the illegality of a legislature's decision to ignore an entrenching statute cannot be evaluated without reference to judicial enforcement. But Posner and Vermeule's abstention from any discussion of judicial enforcement is equally troubling for their normative argument. Posner and Vermeule argue that a regime permitting entrenchment can provide a number of advantages. First among them is the increased ability of government to make credible commitments to persons and entities with whom the government deals. But the credibility of those commitments depends, to a considerable extent, on the government's accountability in judicial proceedings. Judicial enforcement may make entrenchment more attractive (because the legislature's commitment will be more credible) or political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. See generally John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Calif. L. Rev. 167, 182-88 (1996) (cataloguing judicial deference to the political branches, and particularly the President, when individuals challenge war-related activities conducted by the executive branch).

18 Cf. Kahn, supra note 2, at 198 (noting that "[t]he principle of respect for a coequal branch does not indicate which of two genuinely contradictory rules to follow ").

19 The situation is analogous to the one facing a soldier who challenges an order deploying him abroad in an action that he believes exceeds the President's war powers authority. If the court concludes that the controversy is non-justiciable, the President's decision stands, and the soldier is afforded no relief. See, e.g., Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (dismissing, as non-justiciable, a soldier's challenge to his deployment in the Persian Gulf War).

20 In the nineteenth century, the Supreme Court developed a doctrine that no legislature was empowered to bargain away the power of its successors to legislate for the public health and morals. See, e.g., Butcher's Union Slaughter-House v. Crescent City Livestock Landing Co., 111 U.S. 746 (1884). For a more extensive discussion, see Stewart E. Sterk, The Continuity of Legislatures: Of Contracts and the Contracts Clause, 88 Colum. L. Rev. 647, 675-85 (1988); Dana & Konik, supra note 2, at 488-95.

21 Posner & Vermeule, supra note 4, at 1671.
less attractive (because the inability to escape from prior commitments will impose more onerous costs on subsequent legislatures), but any normative argument for entrenchment must at least consider—as Posner and Vermeule’s does not—the impact of judicial enforcement.

C. What Does it Mean for a Statute to Be “Binding”?  

Posner and Vermeule define entrenchment to mean enactment of statutes binding against subsequent legislative action. Posner and Vermeule have an absolutist understanding of the word “binding”: if one legislature entrenches a statute, “any contrary statutes are straightforwardly illegal.” 22 Although their conception of what it means for a commitment to be binding is certainly plausible, their conception is not inevitable, and it differs significantly from the conception of a binding obligation in private law.

First, Posner and Vermeule’s position appears to be that by making a verbal promise, the legislature has conferred legal rights on one or more promisees. By contrast, if I promise to give my daughter $20,000 when she reaches age 21, and I promise that I will not change my mind before making the payment, my promise may not confer legal rights on my daughter in the absence of consideration or reliance.

Moreover, even when our legal system acknowledges the existence of a binding legal obligation, the word “binding” is not free from complication. For instance, courts and scholars often speak of binding contracts, but courts do not generally require performance from parties who undertake binding contract obligations; instead, courts require the obligor to pay money damages caused by the breach. 23 And our legal system has routinely refused to enforce entrenching provisions in contracts. When the parties agree to a provision requiring a breaching party to pay money damages out of proportion to actual damages, courts typically invalidate the provision as an unenforceable “penalty;” they conclude that parties may not include a damage provision as a club to assure performance, rather than just as compensation for failure to perform. 24

22 Id. at 1670.
23 As Holmes put it, “[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else.” Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).

Moreover, the measure of damages itself may be controversial. As Professor Hadfield explained: “In contract law... the promisor’s obligation and the promisee’s entitlement are separable, and the binding nature of promises still does not tell us whether it is just to consider that the promisee, at the moment of contracting, gains a right to the promised act or article, or its equivalent in money.”


24 See, e.g., Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018 (N.Y. 1977). This case stated: A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. ... If ... the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.
Finally, private law includes a set of built-in excuses to the performance of "binding" obligations. The most obvious is the law of bankruptcy, which permits individuals and entities facing dire emergency to avoid otherwise binding obligations. In addition, the doctrines of commercial impracticability, mistake, and even capacity, often operate to excuse parties from obligations that appear binding.

My point is simple. A variety of understandings of the word "binding" are possible. To be complete, a normative or constitutional discussion of entrenchment must consider alternative conceptions of binding obligations. The Posner/Vermeule discussion does not.

II. The Normative Case for Entrenchment

A. The Promise of Entrenchment

Posner and Vermeule correctly identify a number of attractions generated by a regime that permits entrenchment of legislation. When a legislature targets problems that have a potential long-term impact, the opportunity to entrench legislation adds an arrow to the legislative quiver. Suppose Congress wants constituents to save more money for retirement. Congress can create tax incentives for increased saving, but those incentives might be even more effective if Congress could ensure that those savings would not be eroded by a subsequent change in the tax structure. Conversely, if Congress wants constituents to spend more, Congress might pursue that objective by providing more generous retirement benefits, but the strategy might be more successful if Congress could assure current workers that those generous benefits will not be reduced in the future. That is, if government has the power to reassure constituents that legal rights will remain stable, government will find it easier to induce reliance by those constituents. Moreover, as Posner and Vermeule also point out, government's need to induce reliance is not limited to constituents; government may also find it useful to induce reliance in foreign adversaries or potential adversaries.

Government has a number of mechanisms for providing this kind of reassurance. For instance, it can take steps that would make it politically very unpopular for a future government to undo legislation enacted today. But, as

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25 Anthony Kronman has justified the "fresh start" in bankruptcy as a mechanism for releasing an individual from "a series of past decisions he now regrets." Anthony Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 785 (1983). In particular, Kronman concluded that promisors should be protected against enforcement of agreements that proceed on mistaken assumptions about future goals. Id. at 780-81; see also THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 235, 241 (1986).

26 For further discussion, see Sterk, supra note 20, at 693-94.

27 Posner & Vermeule, supra note 4, at 1670-73.

28 Posner and Vermeule suggest welfare reform legislation as another example. If the government seeks to induce persons on welfare to seek employment, the incentive structure will be less effective if the government cannot "commit itself to withhold transfers from people who fail to obtain employment within the designated period of time." Id. at 1671.

29 Id. at 1672.
Posner and Vermeule point out, both the current legislature and the future legislature might prefer entrenchment to some of these alternative mechanisms. In these circumstances, entrenchment is a more attractive option.

B. The Problems with Entrenchment

Much as entrenchment adds an arrow to the quiver of each legislature, it also removes one: each legislature is barred from solving current problems by undoing the work of a predecessor. Entrenchment, then, raises issues of intergenerational equity, of foresight, and of agency costs. This section explores these issues.

1. Intergenerational Equity

Consider an extreme example of entrenchment. Congress enacts a statute entrenching all existing legislation against modification, repeal, or supplementation. Under the Posner/Vermeule scheme, this sort of entrenchment would be binding on future Congresses. But the hypothetical statute, if binding, would permit a current majority to trump the wishes of future majorities forever, and would conflict with the principle that popular sovereignty remains constant through time. The resulting intertemporal distribution of sovereign power is difficult to justify on any principled basis.

From a practical standpoint, political pressures would make it highly unlikely that any Congress would enact such an extreme statute. But it is certainly possible to imagine a last-gasp Congress entrenching much legislation that it believes its successors would otherwise repeal. Imagine how attractive entrenchment would be to a Democratic Congress facing the prospect of a new Republican Congress and President. Indeed, long experience—from Marbury v. Madison onward—teaches that outgoing administrations do as much as they can to extend the tenure of both their policies and their cronies, whether or not the extensions can be justified on any principled basis.

Posner and Vermeule defend entrenchment from intergenerational equity criticisms on the ground that entrenchment is not fundamentally different from existing practices that subjugate future legislatures to the wishes of their predecessors. They emphasize that “a Congress will inevitably burden future Congresses, for the simple reason that the earlier Congress comes first and cannot avoid actions that will turn out to hinder the later Congress.”

30 Id.
31 See Kahn, supra note 2, at 199; Klarman, supra note 2, at 507-09.
32 Marbury v. Madison, 5 U.S. 137 (1803). Marbury was one of a group of persons who secured last-minute appointments from President John Adams. Marbury successfully challenged the power of the new administration's secretary of state to withhold his commission as a justice of the peace in the District of Columbia.
33 See Peter Raven-Hansen, Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291, 1983 D U K E L.J. 285, 295 n.48 (describing President Reagan's postponement of 172 "midnight" regulations promulgated by previous administration); see also Deirdre Davidson & Jenna Greene, Clinton Regulators: Getting the Last Laugh, L E G A L T I M E S, December 4, 2000, at 24 (detailing scramble of Clinton appointees to "leave their mark" in the face of a probable Republican administration; they placed particular emphasis on regulations that could not easily be undone by the successor administration).
34 Posner & Vermeule, supra note 4, at 1687.
By way of example, they note, correctly, that a decision by a current legislature to replace concrete with gravel on park walkways makes it more expensive for future legislatures to permit or encourage use of bicycles in the park.\footnote{Id. at 1687-89.}

Virtually no decision a legislature makes today is without implications for the future. A rule that prohibited legislatures from taking actions that affect the choices available to their successors would paralyze every legislature—present and future.\footnote{As Dana and Koniak put it, “Majority rule would be meaningless without the ability to decide matters that have future consequences on the physical world or mental perceptions.” Dana & Koniak, supra note 2, at 530-31.} Posner and Vermeule therefore start with the sensible premise that each legislature has authority to act in ways that constrain their successors. But it requires a significant jump to move from that premise—that legislatures must be authorized to take some actions that affect the future—to the Posner/Vermeule conclusion that a current legislature should be permitted to bind the future in any way the legislature sees fit, subject only to express constitutional constraints. Yet it is that jump that Posner and Vermeule make—without justification—in staking out their position on entrenchment.

Put another way, let us assume that every generation, whatever its temporal position, would endorse a rule permitting each generation to take various actions, even if those actions constrain the choices available to future generations. Among those would be paving roads in parks—the example Posner and Vermeule use. So long as a generation has the power to build schools, roads, and aircraft carriers, the power to regulate securities transactions and pre-school education, let us assume that generation would readily concede the same power to its successors and predecessors, recognizing that each decision made by one generation would affect the range of decisions available to its successors. This assumption does not establish that each generation would endorse a rule permitting a legislative majority in one generation to preclude its successors from taking action on matters of contemporary concern. Consider an issue as significant as wealth distribution. Would any generation support a regime in which one generation—acting through ordinary legislation—could entrench a wealth tax of 75%, or of zero, for all subsequent generations? Perhaps an instrumental case could be made for permitting such entrenchment, but the case for permitting entrenchment does not follow inevitably from the fact that much ordinary legislative action constrains future choices.

Indeed, a regime that permits unconstrained legislative entrenchment permits one generation to control the destiny of the next in ways that are significantly different from ordinary legislative decisions. When the legislature decides to build a bridge or a canal, it imposes significant constraints on future legislatures. If a future legislature would prefer a different location for the bridge or canal, the future legislature’s preferences will not prevail unless the perceived advantages of a new location justify the cost of building the new bridge, tearing out the old one, and replacing the existing infrastructure.
that developed around the location of the old bridge. If, however, the advantages of the new bridge are significant enough, the legislature can authorize the new bridge, and assess the costs of the new bridge among its constituents as it sees fit. The prior legislature imposed a cost on its successors; how each subsequent legislature deals with the cost is for the subsequent legislature to decide.\footnote{For example, New York City has long contemplated construction of a subway beneath Second Avenue. Portions of the subway were built, at considerable expense, before construction was abandoned in the 1970s when the City's priorities shifted. \textit{See} Edward C. Burks, \textit{Work Is Stopped on Subway Line}, \textit{N.Y. Times}, September 26, 1975, at 41.} Entrenchment, however, has the potential not only to impose costs, but to preclude the subsequent legislature from engaging in any cost-benefit analysis ("no future legislature may ever permit bicycles in the park"), or to mandate that the costs of reversing the earlier action be borne by particular members of a future generation ("all taxation shall be levied on a per capita basis"). These constraints have the potential to limit a future legislature’s power over the destiny of its constituents in ways that the constituents are likely to find far less acceptable than the mere imposition of cost.

Moreover, a variety of provisions in current law embody concerns about intergenerational equity. Within the Federal Constitution, Congress is authorized to create patent and copyright monopolies, but only for a limited time.\footnote{U.S. Const. art. I, § 8. The Supreme Court recently upheld the constitutionality of the recent copyright term extension act. \textit{Eldred} v. \textit{Ashcroft}, 123 S. Ct. 769 (2003). In that context, Justice Breyer observed in his dissent that “the express grant of a perpetual copyright would unquestioningly violate the textual requirement that the authors’ rights be only ‘for limited time.’” \textit{Id.} (Breyer, J., dissenting).} In addition, many state constitutions limit the power of state legislatures to borrow money.\footnote{These limitations take a variety of forms. A number of state constitutions impose absolute limits on state debt. \textit{See}, e.g., \textit{Ariz. Const.} art. IX, § 5 (placing a $350,000 limit on state debt). Others require a referendum before a state may incur debt. \textit{See}, e.g., \textit{N.Y. Const.} art. VII, § 11. Still others require a legislative supermajority. \textit{See}, e.g., \textit{Del. Const.} art VIII, § III. For further discussion, and for examination of these limitations in practice, see Stewart E. Sterk & Elizabeth S. Goldman, \textit{Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations}, 1991 Wis. L. Rev. 1301, 1315-17, 1329-58 (1991).} Similarly, environmental statutes, such as the National Environmental Policy Act ("NEPA")\footnote{See, e.g., \textit{N.Y. Envtl. Conserv. Law} § 8-0101-0117 (McKinney 2000).} and a number of little NEPAs enacted by the states,\footnote{\textit{See} Dana & Koniat, \textit{supra} note 2, at 541 ("Our claim is that the power to change the law... is critical to sovereignty in our political system and should not be transferred to private entities."); Eule, \textit{supra} note 2, at 405 ("The fundamental, albeit admittedly often suspect, assumption of American political life—that legislative action reflects current majoritarian preferences—could be finally laid to rest if shifting majorities were unable to alter prior majoritarian choices.").} implement procedures requiring agencies to account for long-term environmental harms that might result from government action. Although none of these provisions deal with formal entrenchment, they reflect a concern that even when ordinary legislative action may be required, intergenerational equity concerns should not be ignored.

My argument here is not that intergenerational equity concerns, by themselves, defeat any normative argument for legislative entrenchment, although others have made that argument.\footnote{\textit{See} Dana & Koniat, \textit{supra} note 2, at 541 ("Our claim is that the power to change the law... is critical to sovereignty in our political system and should not be transferred to private entities."); Eule, \textit{supra} note 2, at 405 ("The fundamental, albeit admittedly often suspect, assumption of American political life—that legislative action reflects current majoritarian preferences—could be finally laid to rest if shifting majorities were unable to alter prior majoritarian choices.").} Instead, my argument is that in-
tergenerational equity concerns cannot be dismissed simply because many actions taken by one legislature will inevitably constrain future choices. Proponents of legislative entrenchment must make a positive case for permitting one legislature to bar subsequent legislation of the same kind; they cannot rest on the truism that the present always affects the future.

2. The Problem of Foresight

Neither individuals nor collective entities are blessed with perfect foresight. As a result, when individuals and collective entities make future-regarding decisions, they make mistakes. These mistakes may be of different types—the decision-maker may make mistakes in predicting events that occur in the world, or in predicting future preferences. Despite the risks of error, both individuals and collective entities, including legislatures, routinely make decisions with future impacts. There is no practical alternative: doing nothing also has a future impact. As a result, we typically permit each current legislature to make future-regarding decisions because no other contemporary individual or institution is in a better position to make those decisions.

As time passes, however, subsequent legislatures acquire information not available to its predecessors. Because of that additional information, a legislature sitting in 2020 would be in a better position to perceive the preferences and interests of 2020 constituents than would the legislature sitting in 2002. Why, then, permit the 2002 legislature, with its imperfect foresight, to bind the 2020 legislature? The Posner/Vermeule answer rests on the premise that entrenchment increases the power of government to induce reliance, which in turn will make it easier for the government to realize its policy objectives.

The corollary to that response is that if the earlier legislature’s action generates no reliance and no change of position, then there is no reason for a subsequent legislature to be bound to the entrenchment decision made by its predecessor. Suppose, for instance, Congress were to enact a statute entrenching the one-year repeal of the estate tax scheduled for 2010. In 2009, Congress chooses to re-enact the estate tax for 2010. Why should today’s

43 Anthony Kronman has identified, and distinguished, these two types of error. Kronman, supra note 25, at 780-81.
44 As Robert Ellickson has observed in a different context, “Because no one can predict the future, . . . covenants that were originally well-tailored tend to become ill-fitting.” Robert C. Ellickson, Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights, 64 WASH. U. L.Q. 723, 736 (1986).
45 For instance, Posner and Vermeule argue that welfare reforms “depend on the government being able to commit itself to withhold transfers from people who fail to obtain employment within the designated period of time.” Posner & Vermeule, supra note 4, at 1671. In other words, government must induce potential recipients to seek work in reliance on the government commitment that further transfers will not be available if the recipients do not find work.
46 See also Hadfield, supra note 23, at 526-37 (arguing that even when the government enters into a contract, the government’s contract partner should be entitled to damages only when the partner can prove reliance).
statute bind the 2009 Congress? No one has relied on today’s statute, because no one has planned to die in 2010. If the 2009 Congress, reflecting 2009 preferences, together with more current information about the country’s fiscal state, chooses to reinstate the tax, there is little normative reason for the earlier statute—however entrenched—to stand in the way.

This corollary finds an analogy in ordinary contract law. If I make a promise, and no one else changes position in reliance on my promise, no one has a right to enforce the promise. When the time for performance comes, I am not bound by my earlier promise.

Return now to the situation in which the legislature’s entrenching statute is intended to, and does, induce reliance by someone. The Posner/Vermeule argument suggests that if a subsequent legislature is not bound by the entrenchment position, the subsequent legislature has unilateral power to impose external costs on those parties that relied on the entrenching statute. That potential for externalities would make it inefficient to permit repudiation of the entrenching statute.

The Posner/Vermeule conclusion is true, but exaggerated. The subsequent legislature may believe repudiation of its predecessor’s commitment is in its current interest, but the subsequent legislature will also recognize that a decision to repudiate will reduce its own ability to make commitments about the future. If parties whose behavior the government seeks to change learn that the government blithely repudiates its commitments, those parties will be less likely to rely on government commitments. Hence, even in a regime

48 Restatement (Second) of Contracts § 17 (1988) (providing that formation of a contract requires consideration); id. § 90 (providing that even if a contract lacks consideration, the contract may be enforceable if: 1) the promisor should reasonably expect the promise to induce reliance; 2) the promise does induce reliance; and 3) enforcement is necessary to avoid injustice). For a recent study concluding that reliance remains critical to enforcement of promises not supported by consideration, see Robert A. Hillman, Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study, 98 Colum. L. Rev. 580 (1998).

49 Thus, Posner and Vermeule note that a “creditor might charge a government a lower interest rate if it knows that a future government cannot repudiate the contract without a supermajority vote.” Posner & Vermeule, supra note 4, at 1671. In effect, they are arguing that if the future government could repudiate, potential creditors would fear this ability to impose externalities on them, leading them to charge an inefficiently high interest rate.

50 Indeed, because of widespread information about a government decision to repudiate a promise previously made, nonlegal sanctions for breach of promise may be relatively more effective as a constraint against government breach than as a constraint against private breach. See Sterk, supra note 20, at 663.

51 See William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 877 (1975) (suggesting that when Congress repeals legislation that a sponsoring interest group expects will endure, Congress will be able to extract less for similar legislation in the future).

The Supreme Court, in the Winstar case, recognized the cost to the government when it abrogates its contracts, arguing that expanding the opportunities for abrogation of government contracts would have “the certain result of undermining the Government’s credibility at the bargaining table and increasing the cost of its engagements.” United States v. Winstar Corp., 518 U.S. 839, 884 (1996). As Professor Hadfield has noted, however, the government frequently includes a “termination for convenience” clause in ordinary government contracts, with no apparent loss of credibility. Hadfield, supra note 23, at 494-95. Even though contract partners know the government retains the legal right to terminate, those partners know that government
that does not permit one legislature to bind its successor through entrenchment, a legislature that seeks to repudiate a commitment made by one of its predecessors will bear many of the costs of the repudiation.\footnote{As Professor Hadfield has put it, "citizens feel morally outraged when governments walk away from contracts because they condemn opportunistic political actions that shift the costs of policy changes onto contracting parties." Hadfield, supra note 23, at 487.} It is this fact that has permitted states to sell "moral obligation bonds"—those that the state has no binding legal obligation to repay.\footnote{See, e.g., Schultz v. State, 639 N.E.2d 1140, 1145-46 (N.Y. 1994) (discussing moral obligation bonds); see also Peter W. Salsich, Jr., Urban Housing: A Strategic Role for the States, 12 YALE L. \\& POL'Y. REV. 93, 102 n.42 (1994) (describing a moral obligation bond as "a legally unenforceable, but politically enforceable pledge").}

In evaluating, from a normative perspective, whether a previous legislature’s entrenchment provisions should bind a current legislature, one must balance the incremental ability to induce reliance that would be generated by binding entrenchment statutes against the inefficiencies generated by inadequate foresight. This tradeoff is not unique to entrenchment provisions. Indeed, it is a central feature of contract law. Whenever parties make contracts, they do so with incomplete knowledge of future events and preferences.\footnote{See E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 24 (1998) (noting that "[p]romises are made in the face of an uncertain future" and that "[c]ontracts are devices for dealing with uncertainty by allocating risks of future changes").} Contract law generally handles the problem by enforcing bargains (at least when accompanied by consideration or reliance), but by providing safety valves when enforcement would appear particularly inefficient. Bankruptcy,\footnote{11 U.S.C. § 727 provides for a discharge of individual debtors in bankruptcy proceedings. See Kronman, supra note 25 at 785 (discussing fresh start in bankruptcy as a protection against regretted decisions).} commercial impracticability,\footnote{See Aluminum Co. of America v. Essex Group, 499 F. Supp. 53, 76, 91 (W.D. Pa. 1980) (invoking the doctrines of commercial impracticability, frustration of purpose, and mistake, and candidly admitting that it was compensating for the parties’ inability to foresee the future).} frustration of purpose,\footnote{FARNSWORTH, supra note 54 at 25 (discussing frustration of purpose and impracticability of performance as doctrines designed to protect contracting parties against events “sufficiently extraordinary to be regarded as beyond the risks assumed by the parties”).} and mistake are all doctrines that excuse a party from performance of “binding” obligations when the parties did not foresee the events that actually unfolded. With respect to state and municipal government contracts, the Supreme Court has interpreted the Contracts Clause of the Constitution to provide similar safety valves that relieve subsequent legislatures from contracts made by their predecessors in times when the events that have unfolded vary markedly from the ones the parties anticipated.\footnote{See, e.g., Faitoute Iron \\& Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942) (upholding state legislation restructuring municipal debt in light of the great depression). See generally Sterk, supra note 20, at 675-86.}

Although the contract analogy illustrates our legal system’s hesitation to make long-term promises binding when foresight proves to have been particularly poor, routine contract enforcement would not be nearly as problematic as routine enforcement of entrenching provisions. Built in to contract law is will not lightly terminate, because of the impact termination would have on its future ability to contract.
a significant safety valve: the parties to the contract can always renegotiate.59 Thus, when one or more creditors threaten to enforce their contracts against a troubled debtor, the parties may—even without the auspices of a bankruptcy court—negotiate a workout that relieves the debtor of some of its obligations in order to preserve the debtor as a going concern, and to increase the chance that the creditors will be paid.60 The workout alternative also exists with government contracts.61 But when a legislature entrenches a statutory provision, there is no one with whom the subsequent legislature can negotiate. Posner and Vermeule appear to treat the prior legislature as an independent entity with power to bind its successors. But because the prior legislature no longer exists as a body, that legislature would be powerless to release the subsequent legislature from the obligations imposed by the entrenching legislation.62

To summarize, old legislation cannot take account of the facts and preferences that have changed since enactment of the legislation. A current leg-

59 In the words of Judge Cardozo, "Those who make a contract, may unmake it." Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919); see also Christine Jolls, Contracts and Bilateral Commitments: A New Perspective on Contract Modification, 26 J. LEG. STUD. 203 (1997). In her effort to identify efficiency gains that might be realized if parties were free to restrict their own ability to modify, Jolls concedes that: "The prerogative of contractors to modify their original contract by mutual agreement is an article of faith for contract law. As between two competing expressions of consent—the original contract and the modification—the latter is chosen." Jolls, supra, at 204. Modification is generally permitted so long as the modification was prompted by some change in circumstance that would make performance unprofitable by the party seeking modification. By contrast, if no such reason accompanied the request for modification, the modification will not generally be enforced, largely out of fear that the request for modification is simply an exercise of coercion by one party. See Jason Scott Johnston, Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem, 3 S. CAL. INTERDISC. L.J. 335, 339-40 (1993).

60 Cf. Goebel v. Linn, 11 N.W. 284, 285 (1882). Justice Cooley explicitly noted the importance of modification to a promisee if the alternative is the promisor's insolvency:

Suppose, for example, the defendants had satisfied themselves that the ice company under the very extraordinary circumstances of the entire failure of the local crop of ice must be ruined if their existing contracts were to be insisted upon, and must be utterly unable to respond in damages, it is plain that then, whether they chose to rely upon their contract or not, it could have been of little or no value to them. Unexpected and extraordinary circumstances had rendered the contract worthless, and they must either make a new arrangement, or, in insisting on holding the ice company to the existing contract, they would ruin the ice company and thereby at the same time ruin themselves.

Id.

61 Holdout problems may make it difficult for government entities to renegotiate debt contracts with large numbers of creditors, even when most of the creditors would find renegotiation advantageous. This fact led to development of a municipal bankruptcy statute. See Michael W. McConnell & Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. CHI. L. REV. 425, 449-50 (1993).

62 Limiting "dead hand control" has been a pervasive theme in property law. The rule against perpetuities, prohibitions against novel estates and a variety of other property law rules reflect, in part, the inability of subsequent generations to negotiate out of restrictions created by dead property owners. As Robert Ellickson has put it, "Consensual escapes from the grip of old restrictions are impossible because the dead are highly inflexible negotiators." Ellickson, supra note 44, at 736. Consensual escape from legislative entrenchment is similarly impossible if the entrenching legislature no longer exists.
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3. **Agency Costs**

Posner and Vermeule’s principal normative argument for permitting legislative entrenchment rests on the premise that entrenchment enables government to achieve long-term objectives more effectively than would be possible without entrenchment. Even if their premise is correct, however, a regime permitting entrenchment would be desirable only if legislative decisions to entrench account adequately for future preferences and interests.

What does it mean for a legislative decision to account adequately for future preferences and interests? How a legislature should aggregate the preferences of its current constituents presents a serious theoretical problem. Introduction of future interests and preferences exacerbates the aggregation problem. No convenient reference point (such as one person, one vote) suggests itself as a fulcrum for balancing the interests of present and future constituents.63

Moreover, even if the aggregation problem were theoretically soluble, no ready mechanism exists to hold current legislatures accountable to future constituents. Future persons do not have chips they can play in interest group politics, nor do they have votes they can register in the polling booth.64

When a current legislature makes any future-regarding decision, including a decision about entrenchment, it evaluates future interests and preferences through the lens of current constituents. Those constituents are inevitably concerned about their own futures and those of their descendants. But if they treat their public decisions the way they treat their private decisions, they will generally discount the future benefits and costs associated with any significant decision.65 Indeed, important provisions in existing

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63 Cf. Hadfield, supra note 23, at 525-26. Hadfield discusses similar efficiency problems in the context of government contracts:

How should one electorate be entitled to create costs and benefits for those who will form another electorate? How should one electorate be entitled to change the distribution of costs and benefits created by an earlier electorate? To conduct an efficiency analysis it is necessary to decide, first, who is in the welfare function—whose preferences and endowments count. To the extent that one chooses as the efficiency benchmark the welfare of the currently represented population one resolves, a priori, the conflict between sovereignty and contract in favor of contract. Hence “efficiency” cannot be the criterion for resolving the conflict because it assumes a particular resolution before the analysis starts.

64 Cf. E. Donald Elliott, Constitutional Conventions and the Deficit, 1985 D uke L.J. 1077, 1091-92 (1985) (observing that the unborn are impossible to organize, and therefore easy prey for politicians).

65 See Ellickson, supra note 44, at 735-36 (noting that individuals typically care more about
law—mandatory social security, tax incentives to create IRAs—rest on the premise that individuals discount the future too heavily. Hence, it would be reasonable to expect legislatures to entrench statutes too quickly, at least if entrenchment generates present benefit at future cost.

Perhaps more significant, a regime that authorizes entrenchment creates new opportunities for organized interest groups to secure benefits at public expense. Imagine, for instance, an industry seeking a tax preference. If entrenchment were not available, the industry's willingness to lobby for the preference would be constrained by recognition that the legislature could withdraw the preference during the next election year if the preference proved unpopular with voters, or with competing industries. But if the industry could secure a promise that the preference would remain in effect (either permanently or for a defined period) the industry would be more willing to expend money lobbying for the preference, increasing the likelihood of its enactment.

The Posner/Vermeule response to these concerns is the standard response they offer to every criticism of entrenchment. They argue that "entrenchment is only one of many devices that the present can use to ruin the future if it so wishes." Because we trust legislative majorities not to ruin the future with these other devices, we should also trust majorities not to use entrenchment inappropriately. In their words, "The parade of horribles provoked by thinking about entrenchment statutes is no different from the parade of horribles provoked by thinking about democracy in general."

As usual, however, their response is over-simple. First, our legal system tolerates current legislative decisions that constrain future legislative decisions because there is no practical alternative; without the power to affect future choices, no legislature could function. By contrast, entrenchment power is not necessary to legislative functioning—as two centuries of our own history have demonstrated. Second, our legal system has historically incorporated a number of institutional constraints on the power of one legisla-

the near future than the far future and have deeper affections for living descendants than for unborn ones).

66 The public choice literature suggests that the political process generally favors the agenda of concentrated and organized interest groups at the expense of the more diffuse interests of the public at large. See generally JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT 287-89 (1962); MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 91 (1981); McGinnis & Rappaport, supra note 2, at 509.

67 Posner & Vermeule argue that an entrenchment regime will not necessarily increase the total amount invested in lobbying efforts. They conceded that the prospect of entrenchment may increase the initial investment in enacting legislation, but contend that this increase might be offset by a reduction in lobbying to protect legislation against repeal. Posner & Vermeule, supra note 4, at 1690-91. Their calculus, however, focuses only on lobbying expenditures—not on the long-term harm that might be generated by the legislation itself. A regime that permits entrenchment is likely to generate special interest legislation that would never be enacted in a regime that prohibits entrenchment simply because, without entrenchment, the special interests will find the total cost of the legislation (measured by initial lobbying costs and the future cost of defending their benefits against future attack) will exceed the expected benefit of the legislation, especially because repeal efforts might prove successful.

68 Id. at 1691.

69 Id. at 1692.
ture to bind future constituents. State constitutional limits on the power to incur debt\textsuperscript{70} and judicial review of the enforceability of government contracts\textsuperscript{71} furnish two examples. That is, our existing legal system regularly exhibits heightened concern about legislation with potentially significant impact on the future. Against this background, the case for untrammeled legislative power to entrench statutes is far from self-evident.

C. Evaluating the Alternatives

1. The Alternatives

Legislative entrenchment can take several forms. Both the advantages entrenchment offers and the problems it creates vary with the form of entrenchment. This section explores alternative forms of entrenchment, and suggests that alternatives largely ignored by Posner and Vermeule are normatively superior to the regime they apparently favor.

The regime that serves as the target for Posner and Vermeule is one in which any entrenching statute would be invalid and of no effect. Presumably, in such a regime, any person with standing to challenge the entrenching statute could obtain a declaration of the statute’s invalidity. Once such a position became embedded in doctrine, legislators would be reluctant to support entrenchment, because to do so would be to support unconstitutional legislation. Moreover, if any subsequent legislature could disavow previously enacted entrenching legislation as void, no one would have reason to rely on entrenchment provisions, and no legislature could realize any of the advantages of entrenching legislation.

In reaction to this target regime, Posner and Vermeule appear to endorse the regime’s polar opposite: a subsequent legislature would be acting illegally if it chose to modify or repeal entrenching legislation. Posner and Vermeule waffle on whether an entrenchment provision should be judicially enforceable, but nowhere in their article do they suggest a reason why courts should not enforce entrenchment provisions against “illegal” contradictory legislation.

What Posner and Vermeule do not consider are intermediate alternatives. One such alternative would be to treat entrenchment statutes as valid, but subject to repeal by subsequent legislation. At first glance, this alternative appears similar to the “no entrenchment” regime. In fact, however, there are significant differences. First, when entrenchment is procedural—e.g., “no new taxes shall be enacted without the affirmative vote of two-thirds of the members of each house of the legislature”—the entrenched statute would remain in full effect unless and until a subsequent legislature, by majority vote, repealed the entrenching legislation.\textsuperscript{72} That is, in this regime, tax legislation enacted without two-thirds majorities, and before repeal, would simply be ineffective. Second, even when entrenchment is absolute on its face—e.g., “no import tariffs shall ever be enacted”—the statute would serve

\textsuperscript{70} See supra note 39 and accompanying text.

\textsuperscript{71} See infra note 73 and accompanying text.

\textsuperscript{72} Cf. McGinnis & Rappaport, supra note 2, at 500-07 (1995) (explaining why a supermajority rule promulgated by the House would be subject to repeal by majority vote).
as a valid promise by the legislature, much like a promise made by an individual: the promise would not be judicially enforceable, but breaking the promise would visit reputational disadvantages on the promisor. That is, whenever a legislature broke a promise made by its legislative predecessors, the legislature would make it more difficult to convince parties to rely on its current promises.

A second intermediate alternative would be to hold entrenchment statutes valid and enforceable, but to permit subsequent legislatures to repeal those statutes when the subsequent legislature can demonstrate—to the satisfaction of a court—that adherence to the statute would interfere with its exercise of sovereign power. This model would, in many ways, be similar to the Supreme Court’s Contracts Clause jurisprudence: government contracts are enforceable, but the government is excused from performance if it can demonstrate a pressing need.73

Both of these alternative entrenchment models would avoid the most problematic features of the Posner/Vermeule model. Both models provide subsequent legislatures with “escape valves” from the straitjacket of absolute entrenchment. Which model is superior depends in part on one’s assessment of the capacity of legislatures to account for future events. The following subsections demonstrate that the absolute entrenchment model is difficult to justify in the face of these alternatives.

2. Entrenchment in Legislatures that Account Well for Future Events

Consider a hypothetical legislature that accounts perfectly for future preferences and interests. That is, suppose the legislature predicts the future accurately, understands future preferences, and does not unduly discount the future. With this sort of enlightened and omniscient legislature, the Posner/Vermeule model would appear ideal: the current legislature would only entrench statutes in circumstances when even its successors would agree that entrenchment is warranted.

In fact, however, if legislatures were generally omniscient and appropriately solicitous of future interests, a regime permitting repeal of entrenched statutes would be almost as attractive. First, a subsequent legislature would almost never have any reason to repeal, because its predecessor, by virtue of its omniscience and solicitude, would not have entrenched the statute unless entrenchment was helpful to its successor. So long as the entrenching legislature was not shifting costs from the present to the future, any subsequent legislature would want to keep the entrenched legislation.

Second, even if entrenching a particular statute did shift costs from the present to the future, a subsequent legislature would be hesitant to repeal

73 See Sterk, supra note 20, at 675-85 (detailing history of “police power” justification for refusing to enforce state government contracts); Barton H. Thompson, Jr., The History of the Judicial Impairment “Doctrine” and its Lessons for the Contract Clause, 44 STAN. L. REV. 1373, 1402-12 (1992) (detailing fears that led to judicial willingness to excuse states from performing contracts).

74 Cost-shifting is not inconsistent with the hypothesis of omniscience and appropriate discount of the future; sometimes, imposing small costs on the future will generate large immediate benefits.
the entrenched statute because repeal would inhibit its own ability to induce reliance by entrenching new statutes. Moreover, the subsequent legislature (which, by hypothesis, accounts for future preferences and interests) would want to preserve the ability of its own successors to entrench legislation, and repeal would make it more difficult for future legislatures to entrench statutes. Hence, only when an entrenched statute imposes a particularly onerous burden on a subsequent legislature would that legislature be likely to repeal the statute. And, given the hypothesis that each legislature accounts perfectly for future interests and preferences, a legislature would almost never entrench a statute that imposes onerous burdens on its successors. As a result, if we assume that legislatures account perfectly for future preferences and interests, either of two regimes—the Posner/Vermeule regime or a regime that permits subsequent legislatures to repeal entrenched statutes—would accomplish nearly the same objectives.

Of course, the hypothesis of legislatures that account perfectly for future interests and preferences is unrealistic. Suppose, however, we hypothesize a legislature whose decisions account for future interests and preferences a high percentage of the time, but not always. If each legislature attempts to discount future interests fairly, but each legislature has less-than-perfect foresight, a subsequent legislature’s decisions will generally be better than the decisions of its predecessors, simply because the subsequent legislature has more information at its disposal. The subsequent legislature can base its decision on facts not available at the time of the initial decision. From the perspective at $T_2$, the time at which the subsequent legislature considers repeal, a regime permitting repeal is clearly preferable to one that proscribes repeal of entrenched statutes.

In the Posner/Vermeule model, the subsequent legislature would be bound to a statute entrenched by a prior legislature, even if facts that subsequently come to light reveal the folly of that statute. The normative argument for their position must focus on $T_1$, the time at which the initial legislature decides whether to entrench. Posner and Vermeule do not develop this argument, but the argument must rest on the premise that the initial legislature is in the best position to evaluate the benefits and costs of entrenchment. Assuming the initial legislature fairly discounts future costs and benefits, a decision to entrench reflects a judgment that the benefits of entrenchment exceed its costs—including the cost of error resulting from the legislature’s own imperfect foresight. Just as individual and corporate decision-makers have power to make binding commitments, legislative decision-makers should have power to make such commitments, even if some of them turn out badly because, over time, the public will be better served by a regime in which commitments are possible.

Put in other terms, suppose the legislature has available two alternatives: (1) full entrenchment of a statute, which would bind subsequent legislatures and prevent repeal of the original statute; and (2) a non-binding promise that current legislation will not be repealed. Let $B$ represent the expected benefit, over time, associated with full entrenchment. Let $C$ represent the cost of full entrenchment—including the cost of error resulting from defective foresight. Let $B'$ represent the expected benefit associated with a non-binding...
promise. B' will often be less than B because the lesser commitment may induce less reliance than a binding commitment. Finally, let C' represent the cost associated with a non-binding promise. C' will always be smaller than C because C' reduces the costs of potential error in foresight; a successor legislature has power to repeal all legislation. Under these circumstances, a legislature will entrench legislation if and only if B-C > B'-C'. The circumstances justifying entrenchment may be rare, but when a legislature does entrench, the argument runs, the legislature's decision should govern.

The problem with this argument is that structuring the legal regime to permit full entrenchment changes the value of other alternatives. When full entrenchment is available, any commitment short of full entrenchment will appear to be a half measure, signaling to parties whose reliance is sought that the legislature half expects future repeal. In addition, a commitment short of full entrenchment will make it easier for a subsequent legislature to escape its promise; the subsequent legislature will be free to explain that if its predecessor had really meant its promise, it would have fully entrenched the statute. Hence, the subsequent legislature will find it easier to repudiate without negatively affecting its own ability to make commitments in the future. As a result, parties might be reluctant to rely on a non-binding promise, or on a procedural entrenchment such as a supermajority voting rule. By contrast, if full entrenchment is not available, a statute that makes a non-binding promise that the statute will not be repealed is likely to induce more reliance than the same promise in a regime that permits full entrenchment. First, the legislature can honestly represent that the non-binding promise represents the strongest commitment it has legal power to make. Second, subsequent legislatures are likely to find it more difficult to repudiate such a promise without negatively affecting their own ability to induce reliance on promises. Hence, the same non-binding promise will be more valuable than in a regime that permits binding promises. Similarly, procedural entrenchment—such as a supermajority-voting rule for taking certain actions—will be more valuable in a regime that prohibits binding promises.

Algebraically, let B" represent the benefit associated with a non-binding promise in a regime that does not permit full entrenchment. B" will be significantly greater than B'. If C" represents the cost of a non-binding promise in this regime, C" may also be greater than C', because future legislatures will find it more difficult to repudiate an unwise promise. Even if B-C > B'-C', there is no reason to believe that B-C > B"-C". Indeed, sometimes, B" will be greater than B. In some cases, knowledge that a subsequent legislature is entitled to repeal entrenched statutes makes the legislature's commitment worth more, not less, than a commitment without power to repeal. When the initial legislature's decision to entrench becomes, with the benefit of hindsight, a clear error, the harm of adhering to the entrenched statute may be visited not merely on the government, but also on the parties induced to rely on entrenchment. But, if a subsequent legislature has no power to repeal, there is no escape hatch for either party. Moreover, because the government may be seeking to induce reliance in a large number of unidentified parties, the government cannot contract with those parties to undo the entrenched legislation. Only a power to repeal the entrenched legislation
will rescue the parties whose reliance the government seeks to induce. Hence, giving subsequent legislatures power to repeal entrenched legislation would be of benefit to those parties as well as to the government itself.

The following example illustrates this benefit. In order to promote economic development on an island site, a state legislature pays for and builds a bridge. Building the bridge does not generate enough new development because businesses and residents fear that the state will restrict access or impose heavy tolls. In response, the legislature enacts a statute promising that the state will never restrict access to the bridge or collect tolls on the bridge. Posner and Vermeule recognize that such entrenching legislation may induce businesses and individuals to relocate to the island. But once the legislature makes the promise of perpetual free access, will individuals and businesses rely less on the promise if subsequent legislatures have power to repeal the statute? The Posner/Vermeule model suggests that the answer is yes; unless subsequent legislatures are bound, entrenchment will be less effective in inducing reliance.

In fact, however, it is possible (if not likely) that permitting future legislatures to repeal the statute will generate more reliance on the original promise. The future might bring overcrowding rather than underdevelopment, or the bridge construction might not hold up under long-term use, requiring a greater-than-anticipated maintenance investment. Potential island residents and businesses might be better off if they know that the legislature will be able to repeal its commitment in circumstances like these. That is, $B''$ might be greater than $B$ in this circumstance, but a regime that permits full entrenchment might never permit the original legislature to realize $B''$.

Even if there are circumstances in which absolute entrenchment would induce greater reliance than any other alternative, a regime permitting absolute entrenchment would still be undesirable if a legislature acting in that regime would rarely use its power to entrench legislation. That is, suppose there are few cases in which $B-C > B'-C'$. In this circumstance, the costs of absolute entrenchment, particularly the inability of future legislatures to adjust in case of error, generally deters legislatures from absolute entrenchment. If there are few cases in which $B-C > B'-C'$, there will be fewer still where $B-C > B''-C''$. Yet the cases in which $B-C$ is greater than both $B'-C'$ and $B''-C''$ are the only cases in which a regime permitting absolute entrenchment will generate benefits not available in a regime that does not permit absolute entrenchment. Far more common will be the cases in which $B'-C' > B-C$—the cases in which a legislature would not absolutely entrench even if given the opportunity. Suppose, however, that in a significant subset of these cases, $B''-C'' > B'-C'$. That is, suppose that in this subset of cases, the optimal legislative commitment is a promise by a legislature that lacks power to make the promise absolutely binding. For this subset of cases, a regime that permits absolute entrenchment will generate losses because the legislature will not be able to generate $B''-C''$.

In summary, even if we assume that legislatures generally account well for future events, whether a regime that permits full entrenchment is more efficient than a regime that prohibits full entrenchment—even from the perspective of $T_1$, the time at which a legislature considers entrenchment—is
indeterminate at best. From the perspective of T₂, a regime that prohibits entrenchment is clearly more efficient. As a result, from a normative perspective, a regime that prohibits full entrenchment appears preferable, even apart from intergenerational equity concerns.

3. Entrenchment in Legislatures that Account Poorly for Future Events

Suppose now that legislatures do not account well for future preferences and interests—that they are generally unable to anticipate future preferences and that they systematically discount future benefits and costs. Suppose, for instance, that agency costs stand in the way of efficient legislative decisions. On this assumption, any model of legislative supremacy, whether a model that permits each legislature to bind its successors or one that permits each legislature to avoid commitments by its predecessors, appears undesirable from a normative perspective.

In such a model, if legislatures enjoy the power to entrench statutes absolutely, they will exercise the power too freely. If a legislature can derive immediate benefit from entrenchment, the legislature is likely to entrench even if the long-run costs, which the legislature does not anticipate or does not care about, are likely to exceed the immediate benefits.

A regime that gives each legislature power to repeal any entrenched statute fares little better. Each legislature is likely to act too quickly to repudiate statutes entrenched by its predecessors if the legislature can derive immediate benefit from repudiation. The legislature will discount the future cost of repudiation—particularly the reduced ability of future legislatures to make commitments that will induce reliance.

On the assumption that legislatures are poorly suited to account for the future, then, it would be preferable to confer decision-making authority on another institution with better capacity to make long-run decisions. For instance, if courts do not face the same agency costs as legislatures, courts might be in a better position than any legislature—past or future—to determine whether particular entrenchment statutes should bind successor legislatures. That is, if one legislature entrenched a statute, and a subsequent legislature repealed the entrenched statute, a court could evaluate whether enforcing the repeal would generate greater benefits (both in correcting a past legislature's error and in making it more difficult for the current legislature to make binding, but unwise, promises) than costs (largely in making it more difficult for the current legislature to make valuable promises). If courts are institutionally better suited than legislatures to make such decisions, this regime would lead to better results than either a regime in which entrenched statutes were always binding on successors or never binding on successors.

As a doctrinal matter, such a regime would be possible to develop. For instance, courts could determine that entrenchment statutes bind subsequent legislatures unless the entrenchment interferes with the subsequent legislature’s sovereign police power. This kind of amorphous standard would permit courts to determine whether the original legislature's promise was sufficiently unwise to permit a successor legislature to escape from the promise. For a period in its history, the Supreme Court took this approach to the
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Federal Constitution's Contracts Clause. The Court's approach permitted a subsequent legislature to repudiate an obligation of its predecessors if the Court determined that the contract impinged upon the legislature's police power. The Court could take a similar approach to entrenchment statutes if it appeared that courts were better suited than legislatures to evaluate future preferences and interests.

For present purposes, the point is that if agency costs lead legislatures to account poorly for future preferences and interests, a regime that permits absolute entrenchment is inferior, from a normative perspective, to a regime that leaves the effect of entrenchment provisions to another institution less affected by agency cost problems. Rather than the Posner/Vermeule model, one would prefer a model in which courts exercised discretion over the enforceability of entrenchment provisions.

4. Summary

The preceding sections have demonstrated that whatever view one takes of legislative capacity to account for the future, a regime that permits absolute entrenchment is inferior, from a normative point of view, to alternatives that relieve subsequent legislatures from some of the commitments made by their predecessors. Which set of escape valves is preferable depends on one's general view of legislative capacity to account for future preferences and interests.

Nothing in this discussion, however, suggests that legislatures should be prevented from enacting entrenchments, so long as those entrenchments are subject to repeal by an ordinary statute enacted by a subsequent legislature. For instance, Professors McGinnis and Rappaport have demonstrated that supermajority rules, a form of procedural entrenchment, may be normatively attractive as a mechanism for overcoming agency costs, while at the same time leaving the powers of subsequent legislatures intact.

III. Entrenchment Within the Constitutional Scheme

Posner and Vermeule's article was written against a background in which many commentators had attacked legislative entrenchment as unconstitutional. As a result, their article attempts not only to make a normative case for entrenchment, but a constitutional case as well. Much of their constitutional discussion is devoted to rebutting the argument that the Federal Constitution prohibits legislative entrenchment. To that end, Posner and Vermeule address arguments that purport to establish that entrenchment is inconsistent with a variety of constitutional provisions.

75 See supra note 20 and accompanying text.
77 Posner & Vermeule, supra note 4, at 1673-85.
In their rebuttal of existing constitutional scholarship, however, Posner and Vermeule do not point to constitutional provisions that would affirmatively require subsequent legislatures to honor entrenchment provisions enacted by their predecessors. Instead, the Posner/Vermeule position appears to be that, in the absence of an explicit constitutional provision, the enforceability of entrenchment provisions should be determined by normative argument.\(^78\) Because, in their view, a regime permitting legislative entrenchment is normatively superior, the Constitution effectively authorizes entrenchment.

As a result, Posner and Vermeule’s constitutional argument rests entirely on their normative argument.\(^79\) If, as the previous section demonstrates, an entrenchment regime is not normatively superior, their argument collapses; with one minor exception, they advance no originalist or structural reason why one legislature should be bound by actions of its predecessor, and they reject arguments from tradition.\(^80\)

Posner and Vermeule do invoke one structural analogy to support their position that the Constitution authorizes absolute legislative entrenchment. They point out that Article V of the Federal Constitution entrenches several constitutional provisions against subsequent amendment,\(^81\) and they ask “[i]f constitutional framers may entrench constitutional provisions against later framers, why may not legislatures entrench statutory provisions against later legislatures?”\(^82\) Posner and Vermeule emphasize, in particular, Article V’s proviso that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”\(^83\)

The analogy, however, misses the mark. The objective of the Constitutional Convention was to develop governance principles and procedures that all states would accept.\(^84\) No state was bound to accept or abide by the Federal Constitution merely because a majority of states—or even all of the

\(^{78}\) Id. Posner and Vermeule argue explicitly that the normative argument trumps tradition in the debate over entrenchment rules, and they attempt to rebut claims “rooted in constitutional and political theory.” Id. at 1680.


\(^{80}\) They contend that “tradition is never a conclusive argument in American constitutional practice,” and observe that “[o]ur meta-tradition, the only one we invariably adhere to, is to dump traditional practices overboard when their claims on our rational or normative allegiance wear too thin.” Posner & Vermeule, *supra* note 4, at 1679.

\(^{81}\) U.S. Const. art. V., (the Amendment Clause), concludes with the following proviso: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the fist and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it’s equal Suffrage in the Senate.

\(^{82}\) Posner & Vermeule, *supra* note 4, at 1681.

\(^{83}\) Id. U.S. Const., art. V.

\(^{84}\) The Constitutional Convention arose out of the perceived inadequacies of the Articles of Confederation. For discussions of the Convention’s history, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475 (1995); Henry Paul Monaghan, *We the People[s],* Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 139-57 (1996).
other states—chose to ratify the Constitution. Viewed in this light, the “entrenchment” provision cited by Posner and Vermeule simply restates the rule to which the original Constitution was subject—no state may be bound without its consent. Those who would amend the Constitution to eliminate equal suffrage in the Senate would have the same freedom of action as the original framers. By contrast the absolute legislative entrenchment endorsed by Posner and Vermeule would leave subsequent legislatures with far less freedom of action than the legislature that enacted the entrenching statute. Article V, therefore, provides no affirmative constitutional basis for absolute entrenchment.

Conclusion

In their recent article, Professors Posner and Vermeule have made a mountain out of a molehill. As they candidly note, the academic literature and the courts have taken it as a given that legislative entrenchment is “constitutionally or normatively objectionable.” They concede that “there are not many examples of entrenchments currently in force.” The few examples of entrenchment they discuss—among them Gramm-Rudman—leave subsequent legislatures completely free to act, so long as they follow statutory procedures that may themselves be repealed by majority vote. Perhaps the absence of absolute legislative entrenchments reflects, at least in part, the general understanding that Posner and Vermeule attack. But the normative and constitutional arguments Posner and Vermeule advance do nothing to undermine that general understanding.

85 Indeed, the more pressing contemporary legal problem was whether the new Constitution could bind any state until all states had consented to amendment or abandonment of the Articles of Confederation, which, by their terms, could be amended only with the unanimous consent of the states. For discussion of contemporary treatment of this problem, see Ackerman & Katyal, supra note 84, at 539-68.

86 Posner & Vermeule, supra note 4, at 1665-66.

87 Id. at 1693.