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Kevin Olson

Department of Political Science
3151 Social Science Plaza
University of California, Irvine
Irvine CA 92697-5100

olsonke@uci.edu

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abstract: Drawing on the work of Frank Michelman and Jürgen Habermas, I outline two interconnected paradoxes of constitutional democracy. *The paradox of the founding* prevents a purely democratic constitution from being founded, because the procedures needed to secure its legitimacy cannot be spontaneously self-generated. It displays an infinite regression of procedures presupposing procedures. *The paradox of dynamic indeterminacy* heads off any attempt to resolve this problem through constitutional amendment. It shows that a developing constitution needs some standard to guide it towards legitimacy. Without such a standard, constitutional reform will be aimlessly indeterminate. After rejecting proposed solutions to these paradoxes based on political contestation, culture, and “constitutional patriotism,” I outline an alternative based on the ideas of *dynamic constitutionalism* and *reflexive citizenship*. This solution draws on material, structural, positive characteristics of the law to show how a dynamically evolving constitution can promote its own legitimacy from within, resolving both paradoxes in one stroke.

Paradoxes of Constitutional Democracy

Kevin Olson

The idea of a democratically self-constituting people has a singular grasp on our imagination. A new nation boldly asserts its independence from a dominating dictator, colonial power, or occupying force. It declares itself sovereign and performatively constitutes itself as such by democratically ratifying a constitution. In this favorite story, democratic constitution is both an act whereby a nation is founded and a legal document resulting from that act. It is, we believe, the ultimate expression of popular sovereignty and national self-determination.

Although the births of the developed Western democracies have long ago passed into history, there have been several significant waves of national self-creation during the past half-century. The end of colonialism brought a host of new nations into the world and freed many others from domination. Nineteen eighty-nine saw a wave of democratization following the breakup of the Eastern Bloc. The new century has similarly witnessed the infant steps of several Islamic regimes under the anxious watch of Western powers.

In an era of democratization, nation-building, and “democratic transitions,” it is all the more pressing to ask how a people can best constitute itself democratically. Recent experience in Eastern Europe and the Middle East cautions that it is particularly important to investigate the problems that might be encountered along the way. The idea of a people constituting itself through democratic means is rife with contradictions. It is subject to an inherent bootstrapping problem: democracy is both a necessary feature of such a project and its intended result. This reveals a circularity at the heart of

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constitutional democracy. Democratic citizens cannot create the same procedures that are required to institutionalize democracy itself. Legitimate procedures structuring democracy cannot, in short, be a *prerequisite* for legitimate procedures structuring democracy. Constitutional democracy – in its pure form at least – is self-referential and inherently paradoxical.

The paradoxes of constitutional democracy can seem so troubling that proposed solutions pale in comparison. In this essay I will outline two such paradoxes and search for a way around them. Particularly useful for this task are Frank Michelman's acute diagnoses of the problems of constitutional democracy and Jürgen Habermas' persuasive attempts to redeem it. Drawing on recent debates between them, I will frame the paradoxes as a useful challenge rather than a reason for retreat. These problems have a great deal to say about how law can be made democratically and, more importantly, under what conditions this can occur. They provide an important standard for choosing amongst various combinations of democracy and law. Paradox gives us reasons to reject some such combinations while providing justification for others. After setting aside proposed solutions based on political contestation, culture, or "constitutional patriotism," I will outline a preferred alternative. It centers around two traits of constitutional democracy that I will call *dynamic constitutionalism* and *reflexive citizenship*. This solution emphasizes the material, positive character of the law, particularly the sense in which its development is a *path dependent* historical process.

1. The paradox of the founding

The paradoxes of constitutional democracy arise precisely from the conjunction of democracy and law. Following a principle of popular sovereignty that has a long history in the Western tradition, democratic law-making holds that people ought to be able to consent to the laws under which they live (e.g. National Assembly of France 1789). Democratic citizens encounter problems, however, when they must rely on law to

constitute themselves as a law-making body. Democratic law-making becomes paradoxical when it must establish the very conditions for its own institutionalization.

Frank Michelman has identified one such paradox, which we can call *the paradox of the founding* (Michelman 1996; 1997; 1998, 91; 1999, 4-11, 33-4). It shows that a legal and political order cannot be democratically founded, at least not in a procedurally legitimate sense. Imagine that a people comes together to establish a democratic constitution. For the sake of convenience, call them the Founders. In order to undertake this task, the Founders must first have some understanding of what it means to be a people who will form a constitution. They must constitute themselves as a group, deciding who is entitled to participate in the constitution-forming process and who is excluded. Further, the Founders must agree on the process they will use to establish laws and what form the constitution will take. Such an understanding is necessary to coordinate action, to make sure that everyone agrees about who has a say in the new constitution, what the outcome of the constitution-forming process should look like, and so on. The Founders' task, in other words, requires a set of procedures to regulate the process of becoming a people and forming laws. Since this project is a democratic one — the project of an entire people — the understanding they have of their joint undertaking must be shared and public.

To form a public understanding of their communal project, the Founders must first develop procedures that will allow them to accomplish the preliminary, ground-clearing task of setting up an understanding about how to proceed. Their deliberations must themselves be guided by some idea about what is to be decided and who may decide it. The Founders must, in other words, devise ground rules that will allow them to set up ground rules for constitution-founding. Such an understanding will in turn have to be politically produced.

At this point, the paradoxical nature of the Founders' project becomes apparent. Any democratic attempt to create a constitution requires a previous constitution that has

already established democratic procedures. There is an infinite regression of procedures presupposing procedures, each necessary to form the procedures following it. The Founders will therefore be paralyzed in the position of needing a set of procedures that explains how to go about forming procedures. The process of founding a constitution therefore can never start.

Structurally speaking, the paradox of the founding is *regressive* in nature. Starting in the present, we pick some arbitrary point in the future at which we would establish a legitimate system of constitutional democracy. It rapidly becomes clear that to get to that future some intermediate steps must first be traversed. None of these steps is possible without still earlier ones, however, and so on. In the end we are forced to conclude that a purely constitutional-democratic future is not possible. The attempted project regresses back to its starting point, from which it cannot depart.

Legitimacy is clearly central to the paradox of the founding. A first step in founding a constitution is impossible because it cannot be legitimately accomplished. A legitimate first step would need to be formed through normatively acceptable procedures. Such procedures cannot exist, however, because by definition the first step in law-making is not preceded by a normatively acceptable procedure. If there *is* no such procedure, however, law-making cannot be judged legitimate. Properly speaking, then, the paradox of the founding is all about legitimacy. It would not be a problem to create an illegitimate system of laws *de novo*. This could simply be done by force: “obey these laws or suffer the consequences.” Such laws would be formed without procedural guidance; they would depend on someone’s unilateral, procedurally unregulated will (Keenan 2003, 41-54; Rousseau [1762] 1987, bk. 2, chap. 7). They would not, therefore, be *legitimate* laws.

2. Dynamic constitutionalism

To find a way around the paradox of the founding, we need a boot-strapping process that can create legitimate law where none existed before. Suppose we bracket the key assumption outlined above, that legitimate laws must be preceded by normatively acceptable procedures. In this case, we are no longer assuming that illegitimate law-making now necessarily prevents legitimacy in the future. It would allow us to take an *illegitimate* first step, with hope that things could be worked out as time goes on.

I will refer to this kind of open ended, evolutionary approach as *dynamic constitutionalism*. It tries to resolve the paradox of the founding in a gradual, stepwise fashion by promoting ever more inclusion and political equality. A dynamic constitution evolves towards the kind of end state that was taken as a preliminary condition of any legitimate constitutional democracy in the paradox of the founding. As the constitution is amended and developed, more and more people are included in the polity, and those already included are made more equal in their participatory capabilities. Dynamic constitutions attempt to overcome the challenge of political inclusion *in process*, allowing the people to formulate the laws that proceduralize democracy even while the very definition of “the people” is under ongoing revision.

Jürgen Habermas elaborates such a view. He sees constitutions as unfinished projects that are constantly amended and revised (1996a, 129, 223, 384, 444-445, 454-455, 488-489). They are part of a “self-correcting learning process” in which a society further develops commitments made by earlier generations. In Habermas’ case, these commitments are implicit within a discursive conception of democratic lawmaking. They are guarantees of autonomy for all citizens, both in the public, political realm and the private, personal one (1996a, 104-131). Autonomy is elaborated, interpreted, fleshed out, and more fully realized as time goes by. This unfolding of basic commitments takes the form, in Habermas’ view, of an increasingly sophisticated system of constitutional rights.

The revisable, process-oriented character of dynamic constitutions allows them to get underway politically while *not* being completely legitimate in the sense outlined above. In particular, dynamic constitutions are characterized by political marginalization and exclusion. While they are formulated by “the people,” that entity itself is exclusionistic in two principal ways. A dynamic constitution must set boundaries on political membership at any given time in order to specify who can participate. It thus includes some people as full citizens while excluding others. Constitutional regimes also tend to promote different kinds of opportunities for political participation for people who are already members of the polity. Those differing opportunities are frequently allocated on the basis of identity, and they tend to marginalize certain kinds of people. Dynamic constitutions are thus characterized by formal exclusions based on the *boundaries* of citizenship and by informal exclusions based on the differing *qualities of opportunity* available to different kinds of citizen.

Such constitutions have an ambiguous legitimacy when evaluated by the standard we considered above. On one hand, they are products of popular sovereignty and thus enjoy the legitimacy conferred on them by their own citizens. On the other hand, they exclude or marginalize many people from participation and are thus illegitimate in an important sense. Not all of the people who live under such a constitutional regime have the political opportunity to author or modify the laws they live under. Because of their departure from this basic notion of legitimacy, it is unclear how we should evaluate such constitutions from a normative perspective.

The ambiguities in the case show the need for a revised conception of legitimacy. The conception we used to characterize the paradox of the founding was a *backward* looking one: it evaluates the present state of a system of laws based on that system’s political history. Problems result when we try to apply such a conception to a constitution whose normative content develops through time. Such a conception cannot take account of the senses in which a evolving constitution satisfies important normative

desiderata *now* by attempting to achieve them in the *future*. Dynamic constitutionalism thus requires an equally dynamic, temporal notion of legitimacy. When we extend the constitution-building process through time, a regime must be able to form legitimate laws *now* through procedures that are *not* now, strictly speaking, up to snuff. (Otherwise we would simply be back in the paradox of the founding again.) This implies a different conception of normative acceptability for the procedures that structure law-making.

The view of normative acceptability implicit in dynamic constitutionalism must above all be a *forward-looking* one. Legitimacy must be based on an evaluation of the constitution's current ability to produce conditions allowing full, ideal consent to the laws at some point in the future. Here democratic law-making is not a practice that must be conducted under ideal circumstances to produce legitimacy. Rather, it must only be oriented toward *promoting* such circumstances. This is the real meaning of dynamic constitutionalism: the procedures guiding it are aimed at an idealized standard. The constitution is dynamic precisely because it pursues this standard in real time and actual history. A constitution that looks forward in the proper way is legitimate because it commits to progressively realizing abstractly considered normative ideals.

In a dynamic constitution, then, legitimacy does not consist in a thoroughly ideal, impossibly counterfactual state of affairs. Nor need it be permanently deferred to the future (*pace* Honig 2001, 794). Rather, legitimacy is a judgment that the constitution is procedurally formulated to pursue the proper direction. It is secured in the present by traits of present law. These traits are evaluated through reference to a hypothetical future state, but they are very much an assessment of current law (Olson 2003b, 113-6).

A forward-looking view of legitimacy is a substantial departure from the one implicit in the paradox of the founding. That problem is based, as I noted, on a particular idea of normative acceptability. It stipulates, in a fairly straightforward fashion, that all people must be able to give their consent to the laws under which they live.

Correspondingly, it frames the acceptability of procedures as a fairly cut-and-dry

assessment of the current state of politics: if procedures allow the participation of all, the resulting laws are legitimate; if they fail to promote political equality, the resulting laws are illegitimate. Things become more complex when we think of constitutions as dynamic. Legitimacy is now based on a forward-looking, intentional assessment of the procedures themselves. This characteristic relieves constitutional democracy of an overly demanding notion of legitimacy. Legitimacy no longer requires ideal democratic law-making in the present. Instead it is premised on having the procedural means to progressively pursue such an ideal into the future.

When legitimacy is construed as a forward-looking assessment of present laws, its character changes in other important ways as well. Because the future cannot be discerned with any certainty, the future state of a constitutional regime is also unclear. When we evaluate current laws, we cannot know what future effects those laws will have. We cannot know, in particular, whether the conditions that would confer legitimacy on a set of laws have in fact been met. A degree of epistemological uncertainty is introduced into future-oriented assessments of legitimacy. We must therefore make a provisional, revisable judgment about the legitimacy of current laws. That judgment is a prediction that present laws are configured in a way likely to promote full inclusion in the future. Legitimacy is thus a probabilistic and fallible assessment that we make about the character of present laws as they relate to future outcomes.

Although Jürgen Habermas does not articulate such insights explicitly, he seems to share their general ethos. Because he sees constitutions as unfinished projects, Habermas' view of legitimacy must implicitly be a forward-looking one. He writes about legitimacy as a "presumption" or "expectation" that people have about the laws under which they live (1996a, 447; 2001b, 115; 2003b, 265). Describing the principle of popular sovereignty, for instance, Habermas says that it "lays down a procedure that, because of its democratic features, justifies the presumption [*Vermutung*] of legitimate outcomes" (2001b, 115). Habermas never clarifies the meaning of "presumption" or

“expectation” with regard to legitimacy, but it seems to frame a conception in which legitimacy is based on forward-looking, fallibilistic, and epistemologically nuanced judgment. In the passage just cited, for instance, it consists in a judgment about the character of democratic procedures. As Bonnie Honig perceptively notes, Habermas seems to recast legitimacy as a horizon rather than a ground in this sense (Honig 2001, 796; cf. Habermas 2001a, 774). This is an evocative metaphor for future-oriented judgments of legitimacy. The sense in which legitimacy is a horizon or is based on presumptions or expectations is not clear in Habermas’s work, however.

Dynamic constitutionalism is a promising strategy to resolve the paradox of the founding. It provides a plausible revision of the classic democratic conception of legitimacy. In this view a legitimate constitution need not be fully satisfactory from the start. A set of procedures could be exclusionary in the beginning, but develop in the direction of full inclusion. By adopting this more process-oriented conception of legitimacy, dynamic constitutionalism avoids the stasis of the paradox of the founding. It takes advantage of the fact that constitutions are meant to be amended. This view adds a temporal dimension to constitutional democracy, showing that we need not focus on the first step of forming a constitution as long as subsequent steps increase its democratic inclusiveness.

3. The paradox of dynamic indeterminacy

To resolve the paradox of the founding, dynamic constitutionalism must make it possible for citizens to develop a legitimate form of democracy through democratic means. The people themselves must formulate their own democratic practice “from within,” developing progressively more inclusive procedures as they go along. This is the challenge posed at the beginning of this essay: can a democratic polity generate a political system, through its own action within that system, that we would judge legitimate by philosophical standards of popular sovereignty?

As I argued in the last section, a dynamic constitution should be evaluated according to a forward-looking conception of legitimacy. We can forgive it for not providing all citizens the ability to author the laws under which they live *now*, in exchange for the promise that it will do so in the future. For a dynamic constitution to satisfy this standard, the people revising it must consistently promote inclusion as the constitution is amended. If they do not, reform could equally well result in greater inequality and marginalization, or random drift with no direction at all. This would in turn fail the criteria for a future-oriented conception of legitimacy: we cannot consider the constitution legitimate *now* if it is not making steady progress towards full inclusion.

Unfortunately, we have little reason to expect this kind of directionality from a self-forming political regime. An evolving constitution is likely to evolve in complex, difficult to predict ways. *Ex hypothesi*, such a regime is not structured in advance to achieve any particular result, “outside” and prior to the sovereign political decisions of its own citizens. Norms of all kinds can result from political deliberation: tolerant, inclusive, and egalitarian ones as well as xenophobic, exclusionistic, and differentiating ones. In one era, the sphere of political equality may expand and new groups be included. In another era, groups may be marginalized from politics, most likely without their consent. Those who are currently citizens may define citizenship narrowly at one time and expansively at another. Or inclusion may be an ongoing source of controversy, with no principled basis for deciding one way or another. Opinion on this topic would then drift without direction. There is no reason to suppose that the process of constitutional amendment itself, absent some other normative influence, would promote inclusion over exclusion. We cannot conclude, then, that progressive development towards full inclusion is any more likely than the myriad other directions that constitutional development could take.

If the direction of the amendment process is indeterminate, there will be no onward progress towards idealized notions of political inclusion. Without some *telos* to

guide them, the procedures structuring law-making would not be likely to move ever closer to normative acceptability. Lack of steady progress towards some normative goal in turn undermines the expectation that democracy could fulfill the preconditions of legitimacy. There is no probabilistic basis *now* for expecting that the constitution will pursue a course towards inclusion in the future. Because it results from the open-ended character of a dynamic constitution, this problem is best referred to as *the paradox of dynamic indeterminacy*. It is endemic to evolving forms of constitutional democracy that base legitimacy on a projection of full inclusion at a future date. This paradox undermines the probabilistic expectation that such inclusion will be achieved. As a result, it throws legitimacy into doubt as well: there is no particular reason for expecting political processes to produce the kind of directionality that we would require to make the preconditions of legitimacy likely.

Dynamic indeterminacy is not paradoxical in itself. It is in fact a common characteristic of most political processes. The paradox in this case is found within the project of trying to create the legitimacy of a political regime “from within” that same regime. The paradox lies in the attempt of citizens to rely solely on the resources of a political regime to achieve that regime’s legitimacy. Such a regime’s legitimacy is based on future conditions that it has no power to make probable in the present. At core, it is the project of self-achieved legitimacy that is paradoxical. In this sense, the paradox of the founding and the paradox of dynamic indeterminacy are really just different manifestations of the same underlying problem. The two different forms are created by attempting the same paradoxical project through two structurally different procedural strategies, each evaluated according to a conception of legitimacy appropriate to it. The form I have called the paradox of the founding crops up when political regimes try to generate their own legitimacy according to *backward-looking* standards. The form I have called the paradox of dynamic indeterminacy crops up when political regimes try to generate their own legitimacy according to *forward-looking* standards. Both paradoxes

have a common source. They are internal to the project of democratically self-generating legitimacy. They show us that citizens cannot refashion democratic political processes as legitimate using only the resources *within* such processes, according to two distinct notions of legitimacy.

The two paradoxes I have outlined are structurally quite different. The paradox of the founding involves a *regression* of necessary first steps: each exercise of democracy presupposes one before it. In contrast, the paradox of dynamic indeterminacy provokes a potentially endless *progression* of steps, none of which necessarily gets it closer to the goal of full inclusion. The paradox of the founding is *static*. It predicts that constitutional democracy cannot begin. In contrast, the paradox of dynamic indeterminacy is *dynamic*. It forces one to conclude that constitutional democracy cannot be completed. Such a project cannot legitimately reach its normative goals.

A future-oriented notion of legitimacy was the key change that allowed us to resolve the paradox of the founding. It softened the more demanding and inflexible requirement that ideal, normative standards of legitimacy must be achieved in the present. By shifting our view of legitimacy towards the future, we were able to step around the paradox that threatened to stop democratic law-making in its tracks. Now, however, the paradox of dynamic indeterminacy blocks that move. It shows that future-oriented notions of legitimacy are also problematic. The paradox of dynamic indeterminacy seems to spoil our attempts to resolve the paradox of the founding. We had been willing to accept temporary departures from full inclusion when we thought it could be guaranteed in the future. Now, however, that project is in doubt.

4. Pursuing legitimacy

Because the paradox of dynamic indeterminacy is a structurally different kind of problem, it calls for a different kind of solution. Above all, it requires some guideline for constitutional reform, some basis for assuming that the constitution will become ever

more inclusive as it is amended. The key problem, however, is to identify a set of conditions, norms, or principles that could promote this tendency. In what follows I will examine a handful of ideas that try to account in some way for the teleology we need to resolve the paradox of dynamic indeterminacy. They span a wide range of concerns, from politics to culture to what Jürgen Habermas calls “constitutional patriotism.”

politics Because constitutions are politically authored and ratified, the most straightforward solution would turn to politics itself. The boundaries of inclusion and exclusion are, after all, politically determined. In an attempt to shift these boundaries, people marginalized from politics could make claims about the injustice of their own marginalization. They could win concessions from ruling elites, extend the rights and benefits of citizenship, and put the constitution on track towards greater inclusion. We might suspect that this kind of tactic has been behind some of the waves of inclusion in our own constitutional tradition. Wage-earners and women presumably mobilized to fight their own exclusion, using political pressure to demand rights not previously granted to them.

Generalizing from these past experiences, we could identify traits that seem to support movement towards inclusion. The existence of a healthy civil sector with many voluntary associations, trade unions, and interest groups, for instance, is likely to foster subaltern political activity. Such intermediate institutions are well known to build grassroots political activity. Their existence supports an expectation that a given regime is conducive to promoting inclusion. On this basis, we could make a probabilistic assessment of the regime’s current legitimacy.

Although we can undoubtedly find many examples in history in which insurgency helped to increase political inclusion, it is not a sufficient solution in a conceptual sense. Epistemologically, we have no particular warrant for projecting the continuation of such organizations or their activities into the future. We do not know what turns of events might conspire to change the political landscape and reverse gains in political

organization amongst the marginalized. To make a decent probabilistic inference in such circumstances, we would need a more particular argument about the connection between past and future. Unfortunately we cannot develop one merely from the facts I have narrated so far. To remedy this lapse, I will turn in section 5 to the task of devising such an argument.

Moreover, norms of inclusion face structural difficulties surfacing in political deliberation. The people with the greatest situational sensitivity to marginalization—those marginalized—are by definition poorly equipped to participate in politics. A person needs political agency to participate in the formal, binding politics that lead to the formation of laws and constitutions. People who are marginalized from politics lack this and are not able to lodge the kinds of political claims that could result in legal changes. They are locked in a paradoxical position of their own: they are hindered from making political claims, thus they cannot effectively protest their exclusion from the political sphere (Olson 2006, chap. 5). The particular irony of this situation is that people marginalized from politics have by definition fewer means to demand their own inclusion. They are much less capable of making claims about the wrongness of marginalization, because they are marginalized from the arena in which such claims would need to be made.

This situation is particularly exacerbated by the fact that political agency is not simply a matter of having a formal opportunity to participate. Any person hoping to make political claims must also have the requisite means to participate effectively. She must be able to introduce claims into the public sphere and have those claims taken up and considered by others. This ability depends on more than simply having the right to participate. It also requires the necessary capabilities to do so (Bohman 1996, chap. 3). Such capabilities are not equally distributed, however. They are enhanced or diminished by other social, cultural, and economic factors (Olson 2006, section 6.2; Verba, Schlozman, and Brady 1995). Under such circumstances, people participate at different

rates and different levels of capability. Subtle forms of marginalization and silence thus produce effects similar to formal, *de jure* exclusion.

The vicious circle of marginalization reinforcing marginalization deprives politics of an important source of normative claims about inclusion. Differential marginalization mutes the one voice that would assuredly make strong normative claims for greater inclusion: the demands of the marginalized. This does not imply that politically marginalized people can never achieve agency or gain a voice, of course. Indeed, history provides many examples of social movements, subaltern groups, and courageous individuals who managed to make political claims in spite of their marginalization from the official public sphere. Political insurgency is not impossible in this situation, but it fights an uphill battle against structural paradox. Structural circumstances conspire against marginalized people's claims to political equality. In the calculus of probabilities that go into a future-oriented assessment of legitimacy, this means that we cannot rely on political insurgency itself, absent normative supplementation, to promote ever-greater inclusion.

culture Another strategy would draw on cultural norms to promote political inclusion. There is much to support the idea that democracy requires the guidance of a certain kind of political culture (Ferrara 2001). Such a culture would contain deeply embedded norms that would orient constitutional reform. It would provide a direction for reform by specifying values to be pursued and critical standards for judging their achievement. For instance, a society with a long-standing tradition of respecting the basic equality of all people would seem a likely bet for promoting inclusion in the future. Over time, such an abstract ideal of equal respect might take on more tangible and substantive meaning as it is politically elaborated. It could motivate the slow equalization of political capabilities, simply because it is "the right thing to do." This would be the joint product of abstract cultural norms and generations of political deliberation. Such norms would provide the motive force to expand inclusion. This line

of evolution could be expected to continue, providing a consistent direction for constitutional reform. It would thus satisfy the criteria for a future-oriented notion of legitimacy and resolve the paradox of dynamic indeterminacy.

Unfortunately culture is as contingent as politics. The existence of norms of inclusion and equality creates some probability of future achievements, but it is also subject to the same contingency just discussed. We have no way of seeing into the future to assess the likelihood that such a culture will *continue* to exert a beneficial influence. As with politics, however, the argument I will develop in section 5 is designed to address this problem of clairvoyance to some extent.

Even if a probabilistic basis could be derived to project cultural development into the future, such a solution would be philosophically unsatisfactory. It would report the existence of a set of conditions that has some probability of resolving the paradox, but would not tell us how or why a culture of inclusion and equality arose. It thus would leave open the conceptual question of what conditions and historical circumstances are needed to resolve the paradoxes of constitutional democracy in a more general sense. As Jürgen Habermas notes, such a solution begs the question because “it builds into the history of ideas and political culture of the polity precisely those liberal value orientations” needed to solve the problem (2001a, 771). So while we may have some basis for believing that particular cultures have the resources to overcome the paradoxes, we need to dig deeper into the normative content of culture in general to provide a satisfying philosophical answer to questions about constitutional democracy.

Even if we assume that a given culture is sufficient to guide democracy towards inclusion and equality, there are still problems along the way. This kind of solution makes dubious assumptions about the political character of morality in modernized, post-conventional societies. The tradition in question would have to be universally accepted to be effective: there could not be significant disagreement about the meaning, application, or obligatory character of its key political principles. Given the value

pluralism of modern, differentiated, complex societies and the substantial monetary and financial interests that can be jeopardized by political equality (Ireton [1647] 1992), it is unlikely that a strong enough consensus could be obtained to give us faith in its durability through time. The normative content of modern cultures is always to some extent variable, indeterminate, and contested. There is always diversity of opinion about what a group believes or values, all the more so in a society characterized by value pluralism in a broad sense. Moreover, cultures are continually modified by their inhabitants. They are constructed and reconstructed, debated, contested, dynamic not static. Sometimes cultures emphasize unity and inclusion; sometimes differences are forcefully maintained (Anderson 1991, Bourdieu 1984, Markell 2000, 52). As a result, culture is not something that stands outside of politics to guide it. It is, rather, a principal stake and product of politics.

Even worse, culture is subject to many of the same problems as politics when it comes to issues of constitutional reform. To the extent that culture is politically contested, the vicious circularity of marginalization arises there as well. People who are marginalized by specific, culturally embedded norms of membership have fewer means to contest their own marginalization. The same circularity that shows up in politics *simpliciter* crops up here as well. For all of these reasons, culture by itself cannot provide a consistent direction for constitutional reform. It requires some supplementary account of how the right kind of normative content can be developed within a given culture, and how that content can be deployed in a mutually agreeable, non-paternalistic, non-paradoxical way to promote inclusion.

constitutional patriotism (culture + language) Jürgen Habermas has thoughtfully attempted to work around such problems. He recognizes both culture's drawbacks and its promise for promoting democratic equality. Noting the cultural embeddedness of constitutional politics, Habermas writes that "Law is not a narcissistically self-enclosed system, but is nourished by the 'democratic *Sittlichkeit*' of

enfranchised citizens and a liberal political culture that meets it halfway” (Habermas 1996d, 461; cf. 1996c, 471). He refers to constitutionalism as a “tradition-building project” (2001a, 774). He also says that democratic citizenship “does require that every citizen be socialized into a common political culture” (1996b, 500). Habermas is well aware of the problems entailed by a straightforward reliance on political culture, however. While he invokes the notion of a “democratic *Sittlichkeit*,” he is also careful to drain it of as many substantive elements as possible (1996b, 500; 2003a, 192-3). The result is a normatively informed culture of allegiance to core democratic values, which Habermas refers to as a form of “constitutional patriotism.”

Language provides the normative core of constitutional patriotism. For Habermas language is both a medium for conducting politics and a normative basis for particular political regimes. Thus he states that “the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected” (Habermas 1996a, 104). When legitimacy is based on consent to the laws, language is implied as the medium of consent. This in turn engages normative presuppositions that inhere within language. When people use language as a means of communication, they aim at creating understanding between themselves and others. They must treat one another as rational, reason-giving equals in order to make claims and have them understood. To be consistent in their intentions of communicating with one another, then, they must treat one another as mutually autonomous individuals.

Large scale constitutional politics could be seen in a similar light. Law-making requires political justification. Justification practices are communicative in a way that demands reciprocity and equality between speaker and hearer. The political use of language thus translates the implicit norms of face-to-face communication onto a political level. Citizens, as political communication partners, must treat one another as equals.

The normative basis for political equality could be seen therefore as implicit in the law-making process itself. When people treat one another as partners in political communication, they implicitly commit themselves to provide those others with rights and measures guaranteeing political equality. The communicative character of constitutional reform thus orients it in the direction of greater and greater inclusion, requiring procedural guarantees to ensure that each citizen can function as an effective political communicator.

Indeed, Habermas seems to think along these lines. He claims that communicative norms inform and are reproduced by constitutional patriotism itself. It is a shared political practice that sustains a constant set of norms across generations. Such a practice would be initiated by some founding generation. These founders would view one another as “a self-determining association of free and equal citizens” (Habermas 2001a, 778). Each subsequent generation would in turn “see themselves as heirs to a founding generation, carrying on with the common project” (2003a, 193). These later generations “have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution” (2001a, 774). In short, the founding generation initiates a shared project when they establish a democratic nation, and subsequent generations take that project on board as their own, continuing and fulfilling it. Implicit but crucial to this project is the idea of treating fellow citizens as equals in political communication. Political culture is no longer arbitrary and variable, in this account, but informed by norms of inclusion. Such a normatively informed culture orients the decisions of actual citizens in a progressive direction, resolving the paradox of dynamic indeterminacy through piecemeal constitutional reform.

This proposal is based on two crucial assumptions: (1) the idea that a core inclusive norms is planted from the beginning in the founders’ shared practice; and (2) the idea that this core is reproduced and expanded by subsequent generations of practitioners.

(1) When a founding group organizes itself to create a constitution, it undertakes a project in which discursive justification takes center stage. The need for justification presupposes reciprocity and equality between the various founders, just as it would for any discourse participants trying sincerely to understand one another. Thus the normative presuppositions of communication find their way into politics in the way we have already examined. Since the founders really do share an immediate, face-to-face practice, it is not problematic to say that they must see one another as communicative equals. Some sort of egalitarian political practice could be established, then, on norms implicit in communication. Thus the first assumption is not problematic.

(2) The crucial question, however, is whether this practice could be taken over and continued by subsequent generations. For this to occur, the constitution's inheritors must continue in the footsteps of its founders. Habermas writes that "citizens must see themselves as heirs to a founding generation, carrying on with the common project" (2003a, 193). Seeing oneself as an heir, in this case, involves seeing oneself as a participant in the same project undertaken by the founders. This presumably requires one to understand the normative principles that animated the founders' law-making and see oneself as bound by those same principles. Such felt allegiance to the founders' project helps bridge the gap between the founding generation and its successors. It motivates people to act on norms that could otherwise feel antique or foreign, providing normative continuity across generations. In this way the norms of inclusion established by the founders can continue to animate constitutional reform, providing a direction that promotes legitimacy.

According to Habermas, the normative principles of the founders were communicative ones. Thus subsequent generations must also understand their political praxis as a communicative project of justification. This basis in communication connects the founding with the practice of subsequent generations, providing an "implicit but stable point of reference" for understanding the constitution's normative content

(Habermas 2003a, 193). Such a basis would make it possible to see other citizens – who may not actually be dialogue partners in a constitutional sense – *as if* they were partners in a shared project of justifying constitutional laws. Such a stable point of reference would in turn provide a solid basis in probability for expecting norms of inclusion to animate political processes in the future. A political order built around such a normative core would give us good reasons to judge its present state as legitimate.

Unfortunately this proposal runs into problems, because the norms implicit in communication do not always translate cleanly into politics. Communication in face-to-face contexts invokes norms that large-scale politics does not often share (Olson 2003a, 281, 286-7). We can see this in the tentative character of the above scenario. It is clear enough how the founders could come to view one another as equals, since they are discursively engaged with one another in an immediate, face-to-face sense. When we try to extend the norms of their interaction to subsequent generations, however, things become much less clear.

The politics of a founding group of constitution writers is structurally different from that of later generations who amend the constitution. The drafters of a constitution meet face-to-face, as individuals, to deliberate over the document's details. In this sense they share what we could call a "tennis court" experience, just like the revolutionary French founders who met on an (indoor) tennis court in Versailles. The tennis court's walls did an important piece of work for those discourse participants. They defined the sphere of inclusion in discourse in both a symbolic and a literal sense. They separated inside from outside, literally enclosing those entitled to participate in discourse. In this situation, there is no ambiguity about who should be recognized as a participant. In turn, the immediate, discursive relationship of these participants brings into play all of the normative presuppositions of communication. Recognizing a person as a dialogue partner engages norms of reciprocal and equal treatment. These norms are pragmatically presupposed in actual communication: we could not sincerely attempt to communicate

with others in political dialogue if we did not see them as communicative equals. It gives the founding group persuasive reasons to write parliamentary rules that institutionalize these presuppositions. They must translate their attitude of reciprocity and equality towards one another into procedural guarantees of reciprocal and equal treatment. This ensures that each has the autonomy needed to participate as an equal.

Such forms of recognition are not problematic among a clearly defined group of constitutional founders, whether or not they are actually in the same room. The status of being a “founder” settles in advance the important question of who is entitled to recognition as an equal in discourse. Recognition becomes more tenuous, however, when we turn to discourses of constitutional amendment in large, complex, modernized societies. Formal politics in such societies is discursive in an abstract, anonymous, and “subjectless” sense. Arguments and ideas are divorced from individual subjects and their particular conditions. They circulate freely through public media in a disembodied and authorless sense. In addition, we no longer have the status of “founder” nor the boundaries of the tennis court to tell us who must be recognized. As a result, it is possible for some people to be politically silent and socially invisible in a way that would be impossible among the “founders” on their metaphorical (or literal) tennis court. Those not recognized as political agents—or not recognized as existing at all—fall outside of the normative order defined by communicative participation.

Habermas’s argument about the norms inherent in political justification shows that founding citizens would have grounds to view one another as equals. The communicative character of their political practices of justification would require them to treat *one another* with norms of reciprocity and equality. Such norms need not extend, however, to people who are not founding members and who are not included in its practices of justification. They do not govern the “spread” of full citizenship to excluded parties. An analysis of the discursive practices central to constitutional patriotism does not require that founders treat those *excluded* from politics with reciprocity or equality.

To assume that norms of inclusion are created by the founder's exclusive, bounded, limited discursive practice begs an important philosophical question: on what normative grounds can we say that marginalized people should be included?

The norms implicit in communication cannot provide a direct normative connection between the founders and their successors, then. It could do so only through a feat of imaginative projection – imagining all of humanity *as if* it were engaged in face-to-face debate on a tennis court in Versailles. Unfortunately, how such an attitude could be developed is exactly the mystery to be explained.

5. Rights, ratchets, and reflexive agency

None of the proposals I have examined so far can head off the paradox of dynamic indeterminacy. Neither politics, culture, nor constitutional patriotism can move a constitution steadily towards greater inclusion. This negative result is not the end of the story, however. I will take a different tack to solve the problem. It capitalizes on the tension between facts and norms – a Habermasian trademark – but divides the labor between them somewhat differently. It goes beyond politics, culture, and constitutional patriotism to focus on properties inherent in the positivity – “facticity” – of the law itself.

To solve this problem, we must be able to provide a reasonable likelihood that the constitution will encode more and more inclusive procedures over time. Such a tendency would fulfill the expectation of progress that is implicit in a dynamic, evolving constitution. The question is, what set of ideas or circumstances amongst the random, shifting political forces that guide the amendment of most constitutions might produce such an expectation? Further, how much of a likelihood is enough?

Most generally, inclusion means being able to participate as an equal in the political sphere. It requires equal opportunities for participation in a broad, substantive sense. Such opportunities must be *actually* equal, not just formally equal. They must ensure that people actually have the political agency needed to participate as equals. In a

modern, complex, institutionally differentiated political system, such equality can be effected only through law. Law allocates opportunities for participation and shapes the environment within which such opportunities are realized. It articulates the roles of political actors and determines who has political agency relative to whom, and what specific qualities that agency has. Law, in this sense, is the material structure of political agency in modern societies.

Because political agency is rooted in the law, the forms and quantities of agency that various people have are largely a matter of law as well. Agency is distributed by laws lying at the juncture of constitutionalism and democracy, at the point where the constitution provides a procedural framework for democratic practice. Most obvious among them are the laws that confer political rights. Such rights give citizens formal opportunities to participate in the political domain. These rights are only the most obvious factors promoting political participation, however. Equally important are the less visible measures that affect a person's ability to *use* political rights. Social and economic standing, for instance, can be crucial for equalizing the material bases of political equality (Olson 2006, chaps. 4 and 6). In order to promote greater inclusion, then, a given constitution would need to progressively eliminate political inequalities in both formal and actual senses. It would need to promote equal rights for political participation and back them up with the social and economic conditions that allow people to use such rights equally.

The laws articulating political agency are as complex and multifarious as the capabilities they distribute. There are many different ways to have political agency in a given society – discursive abilities, organizational skills, wealth (Verba, Scholzman, and Brady 1995) – and these capabilities are complex products of a given regime of laws. For the sake of compactness, I will refer to the laws articulating political agency as elements of *citizenship*. They all have the function of determining a person's political status as a member of the polity. Citizenship is not an all-or-nothing status in this

conception, but a quantitatively and qualitatively differentiated one. People can be citizens in many different ways in a given society, depending on their various capabilities to participate. Some people benefit from the rights of citizenship more than others. Some benefit from some aspects of these rights more than others. Being an *equal* citizen in Marshall's sense (1963), then, is only one idealized form of citizenship.

To figure out how well a given regime is doing with regards to inclusion, it is important to have some yardstick for defining and measuring progress. This requires us to investigate the relation between law and political agency in greater detail. As we have seen, the subtleties of agency's distribution are to a large extent determined by the fine, qualitative character of a given system of laws. The legal measures promoting political agency have unique structural properties not shared with other laws, however. When they constitute political agency, such measures also confer the ability to formulate the laws themselves. They give citizens limited, legally defined capabilities to determine the meaning and benefits of their own status. In this sense citizenship is *reflexive* (Olson 2006, chap. 6).¹ It provides people with the bases of political agency, allowing them in turn to define and rearticulate the very bases of that agency. The political activity of citizens thus reflects back on itself, formulating the laws that constitute the bases of that activity in the first place.

Reflexive citizenship is a property of political procedures and the other measures that support political agency. It is the prosaic, positive, material tendency of a body of laws to give citizens certain kinds of control over the law-making process. The more equally that marginalized citizens determine the benefits of their own citizenship, the more they can act to enhance their own agency. Reflexivity describes the extent to which

¹ This is a thoroughly materialist and legal-positivist conception of reflexivity. It is thus quite different from epistemic (Lynch 2000) or systems-theoretic conceptions (Christodoulidis 1998, Teubner 1983).

such people have the ability to control the bases of their own agency within any given regime of citizenship. It is not an all-or-nothing status, then, but a matter of degree. The greater a citizen's reflexivity, the more control she has over the legal measures that specify her own agency. Reflexivity is thus an important index of political inclusion. It describes both a person's political agency and the extent to which she can modify, refine, and enhance that agency.

Reflexive political agency gives a regime of citizenship unusual properties. The more reflexive a given regime is, the more its members can control the laws that establish their rights as citizens. The more control people have over their own rights, the more able they are to protect those rights. In such circumstances, people are much more difficult to marginalize or exclude. Political attack, changing economic circumstance, or cultural bias are all less likely to undermine a person's political agency when they can be actively opposed. As various groups of citizens acquire greater agency, they correspondingly acquire the ability to defend the bases of that agency against backsliding. This ability helps prevent retrograde motion in the kinds of agency a conception of citizenship provides. As a result, reflexive agency provides its beneficiaries with the means to resist disenfranchisement and marginalization.

To make these ideas more concrete, we can briefly survey our own constitutional tradition through the lens of reflexive agency. If we look at the history of Anglo-American constitutionalism since the 1640s, we find a gradual expansion of political agency for marginalized groups. In the American constitution's early years, for instance, its "Framers" enjoy a highly reflexive status because they have full political agency. Each of them, as a founder of the constitution, can participate as an equal in determining the benefits of citizenship. Many others, however, are subject to the law without being able to author it. Their status exhibits very little reflexivity – they have little ability to challenge the laws limiting their own agency. Later, participatory limitations along lines of wealth, occupation, sex, and race are removed. Small property owners, craftsmen,

laborers, and finally women enter the political sphere and become influential political actors alongside the landed aristocrats who had previously monopolized politics. This is an important but incomplete transformation: the franchise has been expanded but there are still substantial inequalities in political participation. Racial minorities, for instance, have a complex relation to this story as their political agency is alternately enhanced and diminished over the course of a century (Smith 1997).

Each of the waves of political equality resulting from constitutional reform brings more people into a reflexive relation with the bases of their own agency. They have better means to affect the laws structuring their own political agency, even though these means are incomplete and mediated by many other forces. As a result, such people are better able to specify the kinds of rights appropriate for them, and later to defend those rights against diminution. As this change occurs, it reshapes the political landscape. Issues of labor, gender equity, and racial equality become integral parts of the agenda. Newly enfranchised groups remake politics to an extent, establishing themselves firmly within it and entrenching their own status as rights-bearing individuals who are entitled to participate as equals in at least some, often controversial sense.

These examples illustrate an important point about the dynamics of agency and inclusion. The greater a marginalized group's degree of reflexive agency, the more likely they will be to preserve gains in inclusion. Reflexivity does this by introducing an asymmetry between gaining and losing agency. Once a group gains political agency – however that may occur – they are less likely to lose it. This asymmetry arises precisely because reflexive agency allows its possessors the means to defend it. We can refer to this as a legal-political *ratcheting effect*. A ratchet is a mechanical device that allows motion in one direction while preventing it in another. It is an apt metaphor for the function of reflexive agency. By creating a differential likelihood of inclusion versus exclusion, reflexive agency prevents backsliding and preserves gains made in the political process.

Political agency exhibits a ratcheting effect, I believe, because its institutionalization is a path dependent process. Path dependence characterizes sequences of events in which earlier ones establish the conditions of possibility for later ones, narrowing the scope of what can happen at a later stage (Arthur 1994, Pierson 2000a, 2000b, Mahoney 2000, 2004). Early occurrences in the path exercise causal or limiting influence on later ones. In path dependent processes, the sequence of events is important, an event's place in the sequence matters a great deal, and events early in a sequence have disproportionate importance in determining later ones. Further, path dependence sometimes creates a dynamic in which early events make ones similar to themselves more likely in the future. The early events may occur for relatively arbitrary and improbable reasons, but they establish conditions that make their reproduction increasingly likely. These cases set up a self-reinforcing process that makes a particular outcome increasingly probable. One could not predict from the start what the outcome would be, but it grows clearer and more likely as time goes on. As this happens, it also becomes increasingly difficult to change the direction of the developmental path.

The development of law is path dependent in many ways (Hathaway 2001, Orren 1991, e.g. 112). The doctrine of *stare decisis* in common law, for instance, obliges judges to articulate present decisions in light of past ones. Legal precedent thus exercises a strong influence on present decisions, narrowing the scope of judicial discretion and giving past decisions authority over present ones. Judges, as a result, do not have a free hand to decide interpretive questions as they see fit. They are expected to follow the path already laid out, or if not, they must draw on principles implicit in the path sequence to justify their departures from its case law (Dworkin 1977). Past decisions thus define a path dependent process of legal development that increases the impact of certain principles, ideas, and cases on the jurisprudence that follows them.

Legal instruments like contracts exhibit path dependence as well (Suchman 2003, 121-3). There are intangible advantages to using standardized forms of contract that have

already been used by many others: they are more extensively adjudicated, their implications are more clearly known, and their familiarity to lawyers and accountants reduces transaction costs. Already established forms of contract are thus more likely to be used in the future, even when they are less optimal than other possible forms not part of the present path.

Constitutions create similar forms of path dependence in legal development. Decisions made early in a polity's formation can be entrenched as constitutional essentials. This status makes them relatively difficult to amend and gives them trump authority over subsequent law making. The initial form of a constitution exercises particular importance, simply because of its pioneering status in a process of legal formation. It establishes political ground rules, institutional mechanisms, and terms of discourse for what comes after, increasing the likelihood of some later events and decreasing the likelihood of others. Because of their temporal and legal priority, constitutions have a disproportionate impact on what will develop at later times and thus have a strongly path dependent character.

Many of aspects of political agency are similarly path dependent. Current political agency gives people greater say in law making processes, allowing them to increase their political agency in the future. Initial procedural characteristics and relatively small scale changes early in the process have a large influence on its later states. Rights and measures promoting inclusion can have a path dependent, ratcheting effect early in a constitution's history. They may establish conditions of equality that will prevent any group or groups from dominating. If equal rights create a tendency towards equality in such a regime, it will reproduce itself through time. Conversely, a regime of rights creating inequalities in political agency can have a similarly path dependent, ratcheting effect. It would allow politically advantaged people to entrench and sustain their advantage. Path dependency thus predicts progressive, self-augmenting character of political agency.

There are many possible paths in any process of historical development. Other things being equal, however, the path dependent character of political agency makes two such paths particularly likely. One increasingly locks in inclusion and equality. In this scenario, a constitutional regime's initial characteristics tend to promote the agency of those who are excluded and marginalized. It creates a tendency towards equality in which previously marginalized people gain political voice and use it to sustain their own agency. Agency becomes reflexive for more and more people. When laws promote more-equal distribution of reflexive agency, the political sphere becomes more inclusive. At the same time, the present distribution of political agency has a path dependent effect on its *future* distribution. As the political agency of previously marginalized citizens increases, they acquire more control over the legal bases of their own agency. They are thus more able to promote and defend that agency by participating in the political process itself. Their reflexivity as citizens increases. Reflexivity in turn has the felicitous property of helping to sustain itself. It gives marginalized citizens greater capabilities to retain the gains they have made against exclusion. The ratchet clicks another notch and the constitution makes slow, unsystematic, but steady progress towards greater inclusion. The overall result is a progressive evolution towards full inclusion.

Another path moves in the opposite direction. This darker scenario locks in exclusion and inequality. Here the early moments in a constitutional regime create inequalities in agency that are reproduced and magnified in time. Path dependence in this case would result in substantial political inequalities, entrenched elites who dominate the political system, and a perverse ratcheting phenomenon that strips marginalized people of the scraps of agency they have while augmenting that of the already powerful.

These two evolutionary scenarios—the path of inclusion and the path of exclusion—provide normative grounds for evaluating the legitimacy of an evolving constitution. They give us a much clearer idea of what it might mean to talk about

“expectations of legitimacy” in a constitution’s future development. When early events exercise disproportionate, determining influence on later ones, we have normative reasons to structure procedures accordingly. If we know that the institutionalization of political agency is a path dependent process, and we know that path dependence tends to promote either highly beneficial or highly detrimental states of affairs (rather than more mixed alternatives), we have a much clearer idea of what it means to promote inclusion and avoid exclusion. To avoid dynamics of exclusion, present procedures must promote inclusion and equal political agency on a self-sustaining path into the future.

The path dependence of political agency makes a powerful argument for creating tendencies towards equal agency early in the development of a constitution. When a constitutional regime is configured to promote path dependent inclusion *now*, we have reason to suppose that inclusion will continue to increase. Future iterations of the constitution will be more likely to promote inclusion and sustain it. We can thus be satisfied that the criteria for a future-oriented notion of legitimacy are met. A dynamically evolving constitution, amended by the political acts of actual citizens, takes on a kind of directionality when it adopts the right features. Those are the features promoting path dependent evolution towards reflexive citizenship for everyone.

Reflexive citizenship is therefore the core of a dynamic, inclusion-promoting constitution. Because of their path dependent, ratcheting character, laws promoting reflexive agency provide normative criteria of legitimacy for dynamic, evolving constitutions. Reflexivity is a variable property of systems of laws. As variable, it can be realized to a greater or lesser extent. To provide a reasonable expectation that full inclusion is being pursued, a constitution should promote reflexive agency so that a self-reinforcing, path dependent dynamic is established for as many people as possible. A constitution promoting reflexivity in a half-hearted or spotty way would fail to provide an adequate likelihood of future inclusion. As a result, it would fail the criteria of

legitimacy I outlined above. If we cannot project full inclusion in the future on the basis of present constitutional features, the constitution is illegitimate.

The constitutional features required to promote and sustain reflexive agency become vitally important in this picture. Any structural asymmetry towards inclusion and against exclusion would contribute to the kind of path dependent dynamic I have outlined. For instance, a constitution including new voices in the political process while making marginalization more difficult exhibits this kind of asymmetry. Similarly, one restraining gains in agency by political elites would prevent them from outdistancing less able compatriots and entering a self-reinforcing path of exclusion. A constitution entrenching equal political agency and shielding it from erosion or repeal would also privilege inclusion over exclusion (cf. Schwartzberg 2004). Rights have such an entrenching effect. They are more immune to revision than other forms of law and tend to be less sensitive to changing social conditions. Thus, rights to political agency can shield people from vulnerabilities that could undermine their reflexivity as citizens. In so doing, they also promote inclusion and constitutional legitimacy.

The path of inclusion provides the kind of directionality needed to resolve the paradox of dynamic indeterminacy. As a constitution is amended to fit changing circumstances, measures promoting reflexive agency provide previously marginalized people with the means to defend their own equality as citizens. The ratcheting effect of reflexive agency allows gains in inclusion to be sustained, producing directionality in constitutional reform. A constitution successfully promoting reflexive agency thus tends towards greater rather than lesser inclusion, satisfying the criteria for a forward-looking conception of legitimacy.

Although reflexive citizenship resolves the paradoxes of constitutional democracy much more effectively than politics, culture, or constitutional patriotism, it is not intended to replace them. Instead, reflexive citizenship converts them into useful resources for constitutional reform. Consider the relation between reflexivity and

politics, for instance. Reflexive agency is above all a characteristic of the political sphere; it is the political ability to control the legal bases of one's own agency. Whereas open-ended political contestation falls prey to the paradoxes of constitutional democracy, political procedures fostering reflexive agency would not. Reflexive agency provides a direction to constitutional politics, allowing them to avoid paradox. This implies an expanded role for social movements and grassroots politics in promoting the inclusion of marginalized people. Subaltern institutions of this kind can become part of a dynamic of path dependent development. The more political agency they achieve, the better able they are to sustain and increase it.

Similarly, culture is too variable and accidental to resolve the paradoxes by itself. A political culture developing in parallel with an inclusion-promoting constitution, in contrast, would be much more likely to foster ideals of democratic equality. It might approach more closely the ideal fusion of culture and normativity that Habermas describes as constitutional patriotism: a political culture informed by values of inclusion, reciprocity, and equality. In this case, however, the core values of the constitution would be based on its need to promote reflexive agency rather than on norms implicit in political communication. Politics, culture, and constitutional patriotism remain insufficient in themselves to resolve the paradoxes of constitutional democracy, but they would be useful helpmates to a reflexivity-promoting constitution. The formal characteristics of the law provide an organizational matrix and orienting framework within which politics, culture, and constitutional patriotism become useful. The law provides directionality but is itself inert. Political insurgency, cultural contestation, and discourse are the motive force that gives a body of laws movement. Politics, culture, and constitutional patriotism are resources for change; the law—certain kinds of law, at any rate—focuses them and provides consistent evolutionary direction.

This might seem like an unsettlingly haphazard solution at first glance. Predictions of path dependence are probabilistic projections of the relation between past

and future events (Arthur 1994, 4-8). Even though economists and historical sociologists like to characterize processes as “locked in” to a particular path, this is only a relative, predictive, fallible assessment of their likelihood of following one path rather than another. Things are similar in the law. The changeability of laws seems to undercut any guarantee of constitutional progress. Gains in political inclusion would be unstable and potentially reversible in this picture. Rapid economic change, for instance, could swiftly undercut the bases of political agency and marginalize vulnerable groups. Outright mischief could also be a problem. A group could be out-maneuvered or out-voted by others in the political arena, stripping them of agency and casting them into political silence. All of this makes it seemingly difficult to claim that reflexive citizenship could promote full inclusion.

Such worries merely illustrate an important point about the case at hand, however. All that is necessary to resolve the paradox of dynamic indeterminacy is overall *directionality* on a self-reinforcing path, not unswerving, beeline progress. To call political processes legitimate, we must be able to claim that they become steadily more inclusive over time. Overall directionality is sufficient to meet this standard. When reflexive citizenship is properly established, it creates such a direction. Reflexivity, institutionalized in the right way, generates an overall, aggregate, statistical tendency towards gains in political agency. Within the chaos of political change and constitutional amendment, it allows us to predict that on the whole, over time, there will be a general tendency for political agency to become more equally distributed. This tendency is sufficient to produce an expectation of slow, incremental progress towards full inclusion. It is most likely non-linear, in the sense that episodes of progress will be punctuated by occasional backsliding. It additionally depends on the right kinds of procedures being established to start things off in the right direction. When such normative requirements are met, however, a kind of dumb, mundane teleology is created by the interaction

between political processes and the concrete characteristics of the law. This tendency puts properly formulated constitutions on an indirect but steady path towards inclusion.

Because a dynamic constitution pursues full inclusion in real time, it necessarily subsists with a degree of inequality and exclusion. This is an unavoidable aspect of the historical character of constitutional amendment. The paradoxical nature of such exclusions makes them an obstacle that can only be overcome gradually. Nonetheless, the current legitimacy of a constitution does not imply that existing political inequalities or social injustices are acceptable. The *legitimacy* of a constitution should not be conflated with the *justice* of society as a whole. Legitimacy is a narrow assessment of a system of laws. Justice, in contrast, is a genre of claim about social relations made and justified in the political sphere (Olson n.d.). In the view I have outlined, a constitution is legitimate when it encodes normatively acceptable political procedures. Such a constitution can be considered legitimate while its broader society is, in certain ways, unjust. In such circumstances, we call a constitution legitimate precisely when it increases political equality, allowing marginalized people better means to articulate claims of injustice and destabilizing social inequalities. A developing constitution must subsist with inequality and exclusion, but it is oriented towards undermining them as well.

To make these ideas clearer, imagine a group of people unfairly exploited in the labor market. It would be completely consistent for them vehemently to condemn the unfairness of their economic treatment while embracing the legitimacy of the constitution. Their attitude would simply indicate that they agree to work within the political and legal system, pursuing justice through established constitutional procedures. They may be impatient with the progress being made with their own equality. They may say that they cannot wait for political equality to be achieved in the future—they want it *now*. Such claims are completely consistent with the view I have outlined. They are its motor, driving social change forward, enhancing the agency of marginalized people,

promoting equality, and establishing new levels of reflexive agency. A dynamic, reflexive conception of constitutional democracy does not renounce political equality, social justice, or political insurgency. Rather, it views them as vital parts of an imperfect but evolving political process.

One of the greatest benefits of this solution is its philosophical minimalism. This proposal does not take on large burdens of justification, nor does it make adventurous assumptions about moral norms or political culture. The path-dependent, ratcheting effect of reflexive citizenship is normatively indiscriminate. It does not matter, on these terms, *why* gains in political agency occur. They could come about because citizens recognize one another as communicative equals. They could occur because of a culture of egalitarianism. They could even arise from unrelated social changes, say a change in a group's economic fortunes that correspondingly increases their political agency. All that matters is the actual fact of change and its accompanying tendency to allow people a self-referential ability to defend their new status. Development towards greater reflexivity and inclusion is thus a factual, positive characteristic of certain systems of laws. It does not rely on particular ethical norms, cultures of equality, civic virtues, or cross-generational commitments to promote a constitution's legitimacy.

This is a solution, as Immanuel Kant would say, for a nation of devils rather than a nation of angels (Kant [1795] 1996, AA 8:366/p. 335). It does not presume that citizens need always do the right thing for the right reasons. Rather, they must only occasionally do the right thing for reasons that can remain obscure. People's intentions become much less important in this picture. Instead, structural properties of the law, as it institutionalizes and interacts with politics, become our central focus. As a solution to the paradoxes, this one is theoretically lean. It need not make weighty assumptions about morality or culture to account for the legitimacy of a dynamically evolving constitution.

In spite of its minimalism, this view still packs a strong normative punch. It declares illegitimate any constitution that does not systematically pursue full political

inclusion. If applied today, this conception would delegitimize most of the world's democracies. After all, most of them lack serious attention to eradicating political inequality. The view I have sketched requires us to abolish such inequalities as fast as paradox will allow, evolving towards a point at which disadvantaged people would be able to protest the injustice of their own condition.

6. Conclusion

The two paradoxes I have outlined form a Scylla and Charybdis for constitutional democracy. Any democratic constitution must find some course between them. I have tried to chart such a course here. Because it has been a convoluted one, it is worth retracing some of our steps. My argument shows that it *is* possible to get a legitimate democratic constitution off the ground. The solution I have outlined is an evolutionary one. It emphasizes dynamic reform, the political functions of citizenship, and structural properties of the law.

Dynamic constitutionalism and reflexive citizenship promote steady progress towards inclusion. They are constitutional features that would successfully match a future-oriented conception of legitimacy. Among constitutions of this type, there need be no intentional sense of a shared project nor overall normative continuity across a constitution's history. The changing normative intentions of political actors are sedimented in the law and refined over time. This solution is not based on any single normative core or shared insight, but on a long history of legal development that could be quite discontinuous and heterogeneous. It is a materialist, proceduralist, and positivist solution, one that capitalizes on the law's own abilities to foster a self-reinforcing spiral of political inclusion.

This argument makes a very particular point about constitutional democracy. A democratic constitution that is going to measure up to demanding standards of popular sovereignty – standards that many in the West take for granted – can do so as a result of

its internal legal structure. That constitution must be dynamic, which means that it must contain procedures for its own amendment. It must have measures providing political agency to its citizens – participatory rights of various kinds but also auxiliary measures like education and welfare that promote political equality. Those measures must support political agency to the point at which citizenship becomes reflexive for as many people as possible. Reflexive citizenship functions as the ratchet of inclusion in a developing constitution. It provides groups struggling for inclusion with constitutional resources to sustain the gains they achieve. Such episodes of social change spur the expansion of citizenship and provide new levels of agency for the ratchet to sustain. Taken together, these features make possible an upward spiral of reflexivity – the growing self-determination of all citizens.

The simplicity of this list may be surprising. It suggests that the paradoxes of constitutional democracy can be resolved through fairly prosaic means. A constitution with particular, carefully chosen features can evolve in a direction of greater political equality and inclusion. Resources internal to democracy and positive law support political change if they are started off in the right direction. Minimalism is the ultimate payoff of this argument, then. It shows that we need not resort to substantive notions of culture or morality to resolve the paradoxes. It also lightens the normative burden borne by theories like Habermas's, showing that the task they set themselves is less demanding than often believed. Positive, procedural characteristics of the law take us quite far towards resolving the paradoxes at a fairly low cost.

Beyond its lessons for legal and political theorists, this argument has heuristic value for politics in a broader sense. Insofar as actual democracies seek to implement something like the liberal-democratic notion of popular sovereignty, this essay serves as a warning of the challenges that lie ahead. Any society relying on its own democratic resources to institutionalize democracy plays a dangerous game. It is important to acknowledge the pitfalls that such a project will encounter. Measures promoting

dynamic constitutionalism and reflexive citizenship would help to avoid these problems. In this regard, the paradoxes themselves furnish a compelling argument for inclusion and political equality. If citizens want to organize their social and political lives in a non-contradictory way, the burden is placed on them to choose their laws accordingly. Paradox thus furnishes a powerful argument for a particular kind of democratic constitution – one fostering inclusion through dynamic reform and reflexive citizenship.

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