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<https://escholarship.org/uc/item/728411x4>

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### Publication Date

2004-09-03

# Achieving Consensus for Wealth Redistribution Through Deferred-Implementation Agreements

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## Abstract

Social agreement as to the redistribution of wealth is often unattainable because the poor cannot adequately compensate the rich for their contribution. In this paper, we submit that under certain circumstances, such an agreement may obtain support if, and only if, it were to contain a clause postponing the implementation of the redistribution by a given period of time. Thus, despite the fact that at present or at any future point in time, no consensus on redistribution could be reached, society can reach an agreement to redistribute wealth in the future.

We term such an agreement a “deferred-implementation agreement” and focus on two reasons which could explain the appeal of such an agreement. The first reason is that the rich take into account the possibility that in the future they might be compelled to *change sides* with the poor and become the beneficiaries of the redistribution scheme, rather than its financiers. The second reason is that a deferred-implementation agreement entails *externalization of costs* to third parties thereby reducing the costs of the agreement to its parties.

In addition to promoting consensus in society regarding redistribution of wealth, which, in itself, might be virtuous, deferred-implementation agreements can also be justified on normative grounds. *First*, by setting the terrain for a potential sides’ change, the parties to the agreement are placed behind the veil of ignorance, or at least closer to this position, and are thereby encouraged to make an unbiased decision as to whether to enter into the social agreement. *Second*, despite the inefficiencies commonly associated with externalities, the externalization of costs from the present generation to future generations and to others who are ultimately expected to benefit from the agreement might be a Pareto-improving move that promotes intergenerational justice.

Arguably, if deferred-implementation of social agreements were such an attractive option as we contend, one should expect to observe a broad use of those agreements in the real world. We believe that the reason for the rarity of deferred-implementation agreements is the parties’ concern that future generations would find the attempt of the previous generation to bind them illegitimate and undemocratic and will therefore evade the implementation of such agreements. However, if the parties to these agreements utilized certain mechanisms and adopted a few constraints that we discuss in the paper, the legitimacy of the agreements could be enhanced and they would become less vulnerable to future nullification.

# Achieving Consensus for Wealth Redistribution Through Deferred-Implementation Agreements

Ariel Porat & Omri Yadlin \*

## Introduction

Unlike private contracts, many social agreements are not expected to enlarge the social pie but rather to redistribute wealth from one group of citizens to another, typically from the rich to the poor. Social agreement for the redistribution of wealth<sup>1</sup> is often unattainable because the poor cannot adequately compensate the rich for their contribution. In this paper, we submit that in some circumstances, such an agreement may obtain wide support if and only if it were to contain a clause postponing the implementation of the redistribution by a given period of time. Thus, despite the fact that at present or at any future point in time, no consensus on redistribution could be reached, society can reach an agreement to redistribute wealth in the future. We term such an agreement a “deferred-implementation agreement” and focus on two reasons which could explain the appeal of such an agreement.<sup>2</sup>

The first reason why parties would occasionally be more willing to enter into a deferred-implementation agreement, as opposed to an immediate-implementation agreement,

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\* Dean and Vice-Dean, respectively, Buchmann Faculty of Law, Tel Aviv University. For helpful discussions and comments we wish to thank Ronen Avraham, Daphne Barak-Erez, Hanoch Dagan, Meir Dan-Cohen, David Enoch, Elizabeth Garrett, Oren Gazal, Ayal Gross, Alon Harel, Amos Israel, Tzachi Keren-Paz, Roy Kreitner, Saul Levmore, Nira Liberman, Eric Posner, Yoram Shachar, Chava Shachor-Landau, Jennifer Shakbator, Doron Teichman and Adrian Vermeule, as well as the participants in the 2004 annual meeting of the American Law and Economics Association held at Northwestern University, and the law faculty workshops at Bar Ilan University and Tel Aviv University. Jennifer Shakbator provided superb research assistance.

<sup>1</sup> The expression “social agreement” is used in this article in a broad sense to encompass both intra- and inter-state agreements.

<sup>2</sup> A variety of reasons may warrant deferring the implementation of a social agreement. Occasionally, particular circumstances may render immediate implementation either physically impossible or particularly difficult. In other cases, deferring specific elements of implementation until a future date leads to its gradual implementation, allowing the parties to adapt themselves to changes brought by the agreement and also enhance the building of trust between them. In yet other cases, deferring the implementation of the agreement is considered by the performing party cheaper than immediate implementation, because of a discount factor attached to future performance especially when there is some level of uncertainty as to whether the performance will take place at all. This article will not deal with these reasons, most of which are well known and not unique to social agreements.

Scholars working in the field of behavioral psychology, explored the effect of deferrals on the parties’ conceptions’ of chances and risks. See e.g.: George Loewenstein, Anticipation and Valuation of Delayed Consumption, 97 *The Economic J.* 666 (1987); Yaakov Trope & Nira Liberman, Temporal Construal, *Psychological Review* (in Press). This topic is also beyond the scope of our present paper.

is that the former creates *the potential for the parties' changing sides before the redistribution takes place*. The potential for changing sides reduces the cost of the agreement to the rich and rendering them less reluctant to subscribe to the agreement. Consider, for example, a program to reduce unemployment by restricting the number of weekly hours each employee is allowed to work. Assume that such a law could not be enacted while the workers and the unemployed fail to reach a social agreement on the matter. Arguably, workers who feel their jobs are relatively secure in the near future would refuse to give up part of their paid work hours. However, acknowledging that in ten years time some of them may join the ranks of the unemployed, these workers might be less reluctant to back the proposed law if its implementation were to be deferred by ten years. The potential for the individuals composing the group of the workers to change sides in the future reduces the cost of the agreement to each such individual and increases the likelihood they would endorse the deal.

In order to make the deferred-implementation agreement an attractive option for parties to social agreements, it is crucial to immunize the agreement from future attempts of the "rich" party to withdraw the agreement as it approaches the time of implementation. Thus, in the unemployment example, there is a substantial risk, that in ten years time, the median voter, being employed, would still oppose the execution of the program, and the law restricting the weekly work hours will therefore be abolished. One way to achieve such immunity is by incorporating the deferred-implementation agreement into the constitution. Article One, Section Nine, of the U.S. Constitution, which postponed by twenty years Congress' power to prohibit the migration and importation of slaves, is one example of such constitutional protection of a "deferred-implementation" clause.

The second reason why parties would accept a deferred-implementation agreement, where they would reject the same agreement with immediate implementation, is that it often entails *externalization of costs* to third parties, thereby reducing the costs of the agreement to the contracting parties. Thus, if the Israelis enter into an agreement with the Palestinians to recognize a Palestinian limited right of return, but postpone its implementation by fifteen years, the present generation of Israelis would be externalizing part of the costs of the agreement to third parties—namely, to the future generations of Israelis and immigrants to Israel over the next fifteen years. This externalization would diminish the costs of the agreement borne by the present generation, thereby increasing its willingness to enter into such an agreement. Again, knowing that the future majority would contest the deal, the current members of society would strive to bind the future generation and fashion an agreement immune to future nullification, for example, by signing an international agreement.

In addition to promoting consensus in society regarding redistribution of wealth, which, in itself, might be virtuous, the two consequences of the deferral of the implementation of a social agreement—the potential of the parties to change sides and externalization of costs to third parties—have internal, normative justifications as well. *First*, the potential for changing sides places the parties to the agreement behind the veil of ignorance, or at least closer to this position, encouraging them to make a less biased decision as to whether to enter into the social agreement. *Second*, despite the inefficiencies commonly associated with externalities, the externalization of costs from the present generation to future generations and to others who are expected to benefit from the agreement might be a Pareto-improving move that promotes intergenerational justice.

Arguably, if deferred-implementation social agreements were as an attractive option as we contend, one would expect to observe many more such agreements in the real world than the few we actually observe. We believe that the reason for the rarity of deferred-implementation agreements is the current parties' concern that future generations would find the earlier attempts to bind them unconstitutional and undemocratic and therefore find ways out of the agreements. This concern in mind, both parties to the potential social agreement believe that deferred-implementation agreements are ineffective, since true immunity from future changes is unfeasible. However, as we will suggest shortly, if the parties to a deferred-implementation agreement were to adopt certain mechanisms and subject themselves to several constraints, legitimacy for these agreements would be increased, rendering these agreements less vulnerable to future nullification. Consequently, this would translate into wider use of deferred-implementation agreements.

*Part I* of the paper discusses the *symmetric* situation in which the potential for changing sides and the externalization of costs achieved by deferring the implementation of a social agreement identically reduce the consideration given by one party and received by the other. *Part II* proceeds with the *asymmetric* situation in which externalization of costs and the potential for changing sides affect each party differently. The purpose of these two parts is to point out paradigmatic cases which invite the use of deferred implementation agreements. *Part III* turns to the normative question and substantiates our contention that deferred implementation in the cases discussed in the previous parts of the paper might produce socially desirable outcomes. In *Part IV* we conclude and offer some general perspectives.

## **I. The Symmetric Situation**

### **A. Deferred Implementation - in General**

Assume a seller interested in selling a four apartment building, and a buyer whose financial ability extends to the purchase of one apartment only. Should the seller insist on selling the entire building as a whole, conceivably there might be no transaction between the seller and the buyer. On the other hand, assuming the seller would agree to sell one apartment, a transaction might take place. The seller's agreement to sell less than the complete item in return for reduced consideration coupled with the buyer's willingness to settle for less than the complete item at a lower price, could eventuate in a transaction that would not otherwise have been completed.

Let us change the example and assume that the seller has just the one apartment, the buyer is unable to meet the seller's asking price and selling part of the apartment is impractical.

Is there any chance of a transaction nonetheless being concluded? As in the first example, reducing the consideration given by the seller to the buyer with a parallel reduction of the price paid by the buyer may facilitate an agreement. One way of reducing the consideration given by the seller is to defer transfer of the apartment for five years. This may prove to be a workable solution for both parties, and a transaction would be reached. Deferred implementation is therefore a possible method for reducing the consideration given by one party to the other, resulting in the reduced consideration required by the second party.

The solution of deferred implementation in the apartment example is not the only possible solution. In developed countries, parties can also bridge gaps by utilizing credit markets: a purchaser takes out a loan on the market, immediately purchases an apartment and then finances the loan repayment with rental payments he receives over the next five years during which the apartment is rented. These arrangements, however, typify the private market; the credit market is often an unrealistic option for bridging gaps between political or social groups. So, where social agreements are concerned, deferred implementation is likely to be the preferred technique for their attainment.

The following example illustrates the possible use of deferred implementation for reduction of the consideration given by one party to the other, in a manner enabling the realization of an international agreement.

*The peace agreement between Israel and Egypt.*<sup>3</sup> Israel and Egypt are attempting to reach a peace agreement. Both parties have realized that an essential part of a peace agreement will be the return of the entire Sinai Peninsula to Egypt. Israel is prepared to give away all of these areas but demands in return: full normalization, exchange of ambassadors, open borders, commercial relations, tourism etc (hereafter – full peace). Such consideration is perceived as extremely high from the Egyptian perspective: giving it to Israel might be prohibitively costly in the international arena in terms of its relations with the other Arab states, as well as on the internal Egyptian front. As a result, Egypt is unwilling to give the full consideration required to convince Israel to withdraw immediately from the entire Sinai Peninsula.

How does one bridge the gap between the parties? One option is for Israel to be content with less than full peace and for Egypt to be content with less than the entire Sinai Peninsula. However, as stated, the underlying assumption is that Egypt cannot settle for anything less than the return of the entire Sinai Peninsula. The practical method of reducing the price paid by Israel without slicing up the Sinai Peninsula may be the deferral of the date upon which Israel gives the Peninsula back to Egypt. Our assumption is that deferral by a few years reduces the consideration being given by Israel, and symmetrically reduces the consideration that Egypt is receiving.<sup>4</sup> Reduction of the consideration given by Israel and received by Egypt allows Israel to consent to consideration less than that which it would have demanded as consideration for the immediate return of the entire territory. Accordingly, Israel may settle for a cold peace and all in all, pose fewer conditions for signing an agreement with Egypt.

In sum, if one party is unwilling to complete a transaction for the full consideration demanded by the other party, deferred implementation could be an effective technique for reducing this consideration, and facilitating an agreement which would not have otherwise been concluded. In both of the above examples, deferral of the implementation of the agreement reduces the contribution of one party – the seller or Israel, simply because, with positive interest rates, pushing delivery to a future date reduces its net present value. In this paper, however, we demonstrate that deferral of implementation might reduce the net present value of the deal even if we assume zero interest rates.

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<sup>3</sup> This example, as all other examples in this paper, is adjusted to illustrate our contention and does not purport to be historically accurate.

<sup>4</sup> Our assumption is that the deferral operates equally on both parties. In other words, the benefit derived by Israel from possession of the territories over the next five years is more or less equal to the benefit that the Egyptians would gain from possessing the territories during those five years. If the deferral had an asymmetrical effect on the parties, in the sense that the costs of non-deferral to Israel exceeded the costs of deferral to Egypt, this would be an additional reason for deferral, which will be discussed in the following part.

In the next sections we will observe how deferred implementation, by providing the potential for changing sides and externalized costs, constitutes a particularly effective technique for reducing the consideration given by one party and received by another, resulting in the subsequent attainment of a social agreement otherwise unattainable.

## **B. Cost Externalization**

Private law adopts various methods for confronting the problem of externalized costs. Contracts that externalize costs to third parties are frequently unenforceable. In certain cases, third parties to whom the costs are externalized have actionable claims in tort against the contracting parties. In some cases, criminal law too discourages externalization of costs by imposing sanctions on the externalizing parties, thereby deterring them from creating these externalities in the first place.

Social agreements too are liable to cause externalization of costs to third parties. An effective method of creating externalization is by deferring the implementation of a social agreement. Concededly, externalization may also occur where implementation is immediate, except that where implementation is immediate there is a high chance that the affected third party will oppose it and attempt to frustrate the attainment of the social agreement. Deferred implementation, on the other hand, typically externalizes costs to the future generations, who are unable by definition to frustrate the attainment of the agreement in the present.<sup>5</sup>

*The prohibition on slave trade.* In 1787 the states then comprising the United States agreed to the contents of the American Constitution, which determined *inter alia* that until the year 1808 the Federal Congress would not prohibit slave trade.<sup>6</sup> This compromise between the Northern States and the Southern States was necessary to prevent the breaking up of the Federation.<sup>7</sup> The compromise had two aspects: on the one hand the Northern States undertook not to alter the status quo for a period of twenty years. The Southern States on

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<sup>5</sup> When the future generation consists of the children of the current generation, there might be a *full* convergence of interests between both current and future generations. In those cases the deferral of implementation could create no externalities. In other cases, in addition to members of the current generation and their children, the future generation consists also of foreigners who joined the group. In those latter cases there is a *partial* convergence of interests between both current and future generations, and a deferral of implementation could create some externalities. In this paper, when we discuss externalization of costs to future generations we implicitly assume that there is no full convergence of interests between current and future generations. More specifically, we assume that the current generation values its self-interests more than it values the future generations' interests.

<sup>6</sup> Section 9 of the first chapter of the Constitution states the following:

“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or a duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

<sup>7</sup> Hugh Thomas, *The Slave Trade, The Story of the Atlantic Slave Trade: 1440-1870* (New York, Simon and Schuster, 1997) 500.



the other hand agreed that in twenty years time the Federal Congress would be authorized to prohibit slave trade.

One explanation<sup>8</sup> for the deferral of the abolition of slave trade is the one suggested in this article: an immediate discontinuation of slave trade would have exacted too high a price for the white population of the South, a price they would not have been willing to pay in return for the expected benefits of unification. The Northern states on the other hand, were prepared to accept lower consideration. One way of reducing the consideration given by the Southern States was by deferral of implementation for a period of twenty years.<sup>9</sup> This deferral entitled the white residents of the Southern States to benefit from an additional twenty years of slave trade. Concomitantly, the deferral reduced the benefit gained by the Northern States from the prohibition on slave trade.<sup>10</sup>

Clearly the social agreement between the Northern and the Southern states was reached at the expense of third parties and due to the fact that the consent of those third parties was not required. The main victims of deferring the abolition of slave trade were the slaves themselves, who remained tradable objects for an additional twenty years. Arguably, the future white residents of the Southern States, who were denied the "right" to trade slaves, also bore some of the costs of this social agreement.

But one way or another, whether implementation was immediate or deferred, the future slave traders were to become subject to congressional power to prohibit slave trade. It may therefore be claimed that the deferral had no negative effects on these potential future slave traders. To generalize the latter point, one should bear in mind that any law that is not limited in time, whether its implementation is immediate or deferred, imposes certain costs on the next

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<sup>8</sup> There are alternative explanations for the deferral of the date upon which Congress is empowered to prohibit slave trade. See e.g. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. Ch. L. Rev.* 101 (2001); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *Yale J. L. & Human.* 413 (2001); James Oakes, *Bondage, Freedom & the Constitution: The New Slavery and Its Impact on Law and Legal Historiography*, 17 *Cardozo L. Rev.* 2023 (1996); Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience*, 3 *Loy. J. Pub. International. L.* 1 (2001)

We do not claim that our explanation is historically correct, nor do we have the required expertise to make such a claim. We use the example of slavery in order to illustrate our claim, and to show how it *could* theoretically provide a possible explanation for the historical event.

<sup>9</sup> We do not claim that in the example of the prohibition of slave trade the deferred implementation was the only device for reaching an agreement. Conceivably, another compromise could have been reached. For example, the parties could have agreed to an immediate, but partial restriction on slave trade. In fact both the Northern and the Southern States also agreed to the imposition of a tax on such trade and the agreement came into force immediately, which contributed, presumably, to an immediate reduction in its scope. Even so, the Northern States wanted to empower the Federal Government to absolutely prohibit slave trade, and apparently consent to a blanket empowerment was only possible by way of deferred implementation.

<sup>10</sup> It could be claimed that the reduction of the consideration was not symmetric: the residents of the Northern States derived benefit from the actual political and ideological achievement, and possibly, from their perspective, the deferral was not as meaningful as was its non-deferral for the white residents of the Southern States.

generations. Therefore, as long as the deferral does not raise the costs the next generations incur, the externalization problem is in all probability the same whether the implementation is immediate or deferred. The externalization problem is of particular concern, however, when the deferral is the cause of the externalization.

In order to characterize the cases in which the deferral, rather than the agreement as such, is the cause of the externalization, we distinguish between a social agreement which entails the transfer of a finite consideration – either of a fixed magnitude or for a definite time period -- and a social agreement which entails the transfer of an infinite consideration. In both cases deferred implementation improves the position of the members of the current generation who would have had to bear the cost of the agreement, and worsens the position of the members of the current generation who were supposed to benefit from it. However, in the first case, the deferral imposes costs on the next generation from which they would have been spared had implementation been immediate, and in the second case the next generation bears the cost irrespective of whether implementation is immediate or deferred. For example, the empowerment of Congress to prohibit slave trade was an agreement of permanent duration and therefore, *prima facie*, the consideration transferred from the Southern States to the Northern States was infinite in nature. Consequently, whether the implementation of the ban on slave trade was immediate or twenty years later was irrelevant for the next generation of potential slave traders, since in any event they would have been subject to the power of Congress to prohibit slave trade.<sup>11</sup> The consequence of this deferral was that the slaves would pay the price, together with those Northern States interested in the immediate abolition of slave trade, but the deferral had no intergenerational implications. On the other hand, if instead the constitution had obliged the slave proprietors to pay a one-time compensation to the slaves, then the timing of implementation would have generated intergenerational implications. Immediate implementation would impose the costs exclusively upon the generation of slave proprietors in whose time the constitution was adopted and improve only the position of those slaves in whose time the constitution was adopted. Deferring implementation for twenty years, on the other hand, would impose its costs exclusively on the slave proprietors of the next generation and improve only the position of the slaves of the next generation.<sup>12</sup>

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<sup>11</sup> Nevertheless, slave proprietors who are forced to send their slaves free suffer more than those potential proprietors who are denied the right to slaves they have never owned. Thus, although the deal involves an infinite consideration, most of the costs are incurred by the generation in which the agreement is implemented. For a further discussion of this “endowment effect”, see *infra* note 28 and the accompanying text.

<sup>12</sup> This distinction is not always precise: some of the slave proprietors in the current generation will also be slave

### C. Sides' Change

It frequently occurs in social agreements for the redistribution of wealth that the bearers of agreement's costs, or "the givers", are in the course of time prone to become the beneficiaries of the social agreement, or the "receivers". In a similar way, the "receivers" are likely to become the "givers". This phenomenon of sides' change primarily characterizes social agreements, and is rare in the area of private agreements between individuals.<sup>13</sup> In circumstances where a future sides' change is expected, deferral of the social agreement blurs the distinction between the givers and the receivers, for today's givers may become tomorrow's receivers. This, in turn, may increase the willingness of the givers to agree. In a symmetrical situation, deferred implementation along with increased prospects of sides' change as a result, effects a parallel and identical reduction in the consideration given and received. In this scenario, the parties may prefer deferred implementation should today's receivers be unable to offer today's givers a consideration worthwhile for the latter to deliver immediate implementation.

*Unemployment.* Assume that the rate of unemployment could be reduced by a law that limits work hours, so that those employed will work less, and the unemployed will join the work force. For example, after the 1997 elections the French legislature tried to reduce unemployment by adopting a law that restricted the weekly working hours of French employees to 35.<sup>14</sup> Arguably, the French legislature believed that such a restriction improves the position of the unemployed and worsens that of the workers. Assume that legislation of this nature requires a coalition of the workers and the unemployed. Also, assume that for such a concession the workers demand a high price for which the unemployed do not have the sufficient resources to meet. All the unemployed can offer in return is "industrial peace", a consideration which

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proprietors in the next generation and therefore will have to comply with the duty to compensate their slaves, even if only in twenty years. Furthermore, some of the proprietors in the current generation will desire to sell their slaves (or the offspring of slaves) in the present, and the price of these slaves will be affected by the fact that the purchaser will be subject to the obligation to pay compensation to this slave in the future. This makes it clear that some of the compensation will also be paid by the slave proprietors of the current generation. At the same time, it is clear that if implementation of the law were immediate, a larger portion of the cost would have been borne by the current slave proprietors.

<sup>13</sup> As between individuals, it is rather rare that a party to a contract will change sides. Still, corporate contracts are often structured in such a way that increases the probability of sides' change. Thus, a firm could confer shares or options on its employees or creditors, thereby rendering it feasible that the present employees and creditors will be future shareholders.

<sup>14</sup> The socialist government that won the 1997 elections in France aimed to reduce the high unemployment rate by way of restricting the number of weekly hours to 35 hours (previously the weekly hours quota was 39 hours). The government passed two statutes (Aubry Statutes): Statute No. 98-461 and Statute No. 37-2000 which determined that as of 1.1.2000 this rule would apply only in those work places that employed more than 20 workers and from 1.1.2002 it would apply to all work places.

does not satisfy the workers. Can the gap between the parties be bridged?  
Can a social agreement be reached which would enable legislation?

Suppose that a social agreement is proposed to the workers and unemployed in the spirit of the French solution, except that implementation of the law resulting from the agreement would be deferred for fifteen years. Presumably, from their own perspective, the workers would regard this as a “lower” price to pay for industrial peace than its alternative, by which the law would be immediately implemented. Consequently, they would be more willing to accept the social agreement. One trivial reason why the workers will regard the price as lower than the price they would pay if the law were to be immediately implemented is that a deferred implementation gives them fifteen more years of full employment. But there is an additional reason for the workers to regard deferred implementation as cheaper than the option of immediate implementation. Every worker knows that absent the law, he may find himself unemployed in fifteen years time, whereas every unemployed person knows that in fifteen years he is liable to be working.<sup>15</sup> Accordingly, deferred implementation entails that a significant part of the law’s costs are actually borne by today’s unemployed, and some of its benefits are conferred upon today’s workers.<sup>16</sup>

It should be noted that the reduction of consideration due to the prospect of sides’ change caused by deferred implementation operates symmetrically upon the workers and the unemployed. Deferred implementation for fifteen years does not just reduce the consideration given by the workers; it also reduces the consideration received by the unemployed. Facially, this invites the conclusion that parties have nothing to gain by deferred implementation and would prefer immediate implementation. However, since we assume that obtaining an agreement for immediate implementation is not possible, the real alternatives confronting the parties are either the absence of any agreement or, an agreement that the new law will come into force in another fifteen years. Deferred implementation for fifteen years and the possibility of sides’ change as a result, reduces the consideration required by today’s workers and though it simultaneously reduces the consideration received by those currently

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<sup>15</sup> Notice that the parties to the agreement are actually creating an insurance cooperative which starts operating in fifteen years. The benefits reaped from the agreement are considerable for both parties since no complete insurance market exists for risks of unemployment (unless caused by accidents or diseases). Moreover, since the harm of unemployment is not only of an economic nature but possesses also intangible aspects, the solution we propose provides a service that cannot be supplied by regular insurance.

<sup>16</sup> Admittedly, even if the implementation of the law was immediate, it could still benefit the workers because every worker might become unemployed in the future. But it is reasonable to assume that at the time the law is enacted each worker’s chances of losing her job in the far future are higher than in the near future. As a result, the deferred implementation increases the workers’ chances to benefit from the law.

unemployed, it might facilitate an agreement, which could not have otherwise been attained.<sup>17</sup>

## 2. The Asymmetric Situation

### A. Deferred Implementation – in General

Contracting parties may agree to defer the implementation of a contract when the benefit that one party receives from the deferral exceeds the costs it creates for the other party. Thus, returning to the example of the buyer and seller of an apartment, the seller may have a particular use for the apartment over the next five years which is worth more to him than the value of the purchaser's use. In such circumstances one could expect that the parties, if entering into a contract, would defer its implementation for five years.

This applies similarly to social agreements. The achievement of the Israel-Egypt peace agreement, under which the parties chose to defer the return of the Sinai Peninsula, could be explained *inter alia* as the result of the benefit accruing to Israel from holding the territories for another five years exceeding the benefit gained by Egypt from immediately receiving the territories back. In these kinds of cases, deferral of implementation increases the aggregate benefits the parties gain from the contract. There are cases in which this increase of aggregate benefits may be a condition for reaching an agreement.

Two main reasons may cause the benefit gained by the giver to exceed the cost borne by the receiver from deferring the implementation of the agreement.

*One reason*, illustrated above, relates to the objective benefit gained by the giver and receiver (of implementation) from deferral and non-deferral, respectively. In the example of the apartment, the parties' different uses for the asset and the varying benefits attained therefrom, may justify deferral of implementation. In the example of the peace agreement between Israel and Egypt, the parties' dissimilar interests regarding the date of implementation for the agreement and the different benefits gained from the realization of these interests may

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<sup>17</sup> Here too, it could be argued that the parties can reduce the consideration in another manner. For example, instead of the workers waiving a day of work as of a particular date in 15 years time, the parties could agree on an immediate waiver on the workers' part of half a day's work. Nonetheless, the implicit assumption in this example is that just as there is no possibility of agreeing to sell half of an apartment, or the return of part of the Sinai Peninsula, or the partial abolition of slavery, so too it is impossible, or at least most inefficient, to divide a work day into two. This assumption could of course be challenged. For example, it could be claimed that even if one cannot split a work day into two, one could alternate the length of the worker's week so that one week he is employed for five days and the next week for four days, so that the final result would be an average of four and a half days a week. Alternatively, one could limit the numbers of hours in a week (this is what was actually done

also justify the deferral of implementation.

*A second reason* which may cause the parties to defer the implementation of their agreement relates to their different assessments of what the future holds. The issue at hand is not one of different objective benefits, but rather different assessments of those benefits by the parties to the agreement. Thus, suppose that in the example of the seller and buyer of the apartment the buyer believes that over the next five years tax will be imposed on the rental of apartments whereas the seller does not believe that the tax will be levied. Even though the objective benefit for the seller and the buyer from possession of the asset for the next five years is identical (both parties designated the apartment for rental), their assessments of the future are contrasting, thus warranting a deferral in the transfer of ownership of the apartment.<sup>18</sup>

In certain cases, this second reason may also justify the deferral of a social agreement. The following example illustrates this.

*Division of Jerusalem.* The Palestinians are prepared to sign a peace agreement with Israel on the condition that a short time after signing of the agreement East Jerusalem will become the Palestinian Capital. In order for Israel to sign a peace agreement all political parties must consent. The right parties, however, oppose the signing of the peace agreement because it adamantly opposes East Jerusalem becoming the Palestinian capital. The left parties, on the other hand, support this change. The benefit gained by the right in not signing the agreement is equivalent to the left's gain in signing it.

How can one bridge the gap between the left and the right? One option is to propose to the Palestinians that the conversion of East Jerusalem into a Palestinian Capital be deferred by five years. It is clear to both the right and the left parties that should the Palestinians violate their part of the agreement East Jerusalem will not be given to them. The left parties believe that the Palestinians will not contravene the agreement over the next five years. The right parties, on the other hand, believe that the agreement will be breached. Due to such conflicting assessments of future events it may be possible to reach consensus among Israeli parties to support an agreement under which East Jerusalem will become the Palestinian capital within five years *if and only if* the Palestinians keep their part of the peace agreement. Whereas the right parties would support the agreement because they believe the Palestinians will not respect their commitments and the deal will never be implemented, the left parties will endorse it because they believe the condition will be satisfied. It is this very diverse

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in France).

<sup>18</sup> Alternatively, the parties could transfer ownership immediately and agree that should tax be imposed, it would

assessment which may allow them to arrive at an agreement which would not have been possible without the deferral of implementation.<sup>19</sup>

In the following sections we discuss two additional reasons for the benefit gained by the giver of implementation exceeding the benefit gained by the receiver from immediate implementation: the externalizations of costs and the sides' change.

## **B. Cost Externalization**

Occasionally, deferral of the agreement enables one party to externalize a large portion of his costs while the second party expects to receive most of the benefits *even if* implementation is deferred. In these asymmetrical cases the deferral of implementation increases the chances of reaching a social agreement.

*The Pension Program.* The legislature considers the adoption of a national pension insurance program, under which every person over the age of 65 will be entitled to a pension while all people aged 18 to 65 will pay a tax which would finance the pension payments. On average, the older the person is, the lower the tax he pays and the more annuities he receives. To illustrate, a person who is 64, and expects to retire in another year, will have to pay the tax for a period of only one year and after that will enjoy the pension for the rest of his days. A person who is 55 on the other hand, would have to pay for the arrangement for a period of ten years prior to retirement and there is a higher probability that he will not actually make it to pension age, and thus would not derive any benefit from the proposed program. Obviously, there is a certain age at which the expected cost of the tax is equal to the expected benefit from the pension program. We shall assume that this age is 30, and therefore people younger than 30 ("the youth") will lose from the arrangement and those older ("the adults") than that age would profit from it.

Suppose that in order to legally adopt the pension program an agreement must be reached between the 'youth' and the 'adults'. This necessitates an arrangement, which increases the willingness of the youth to partake in the agreement. Immediate implementation

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be chargeable to the seller.

<sup>19</sup> A third reason, which could cause the parties to agree to defer the implementation of the agreement, is disparate attitudes to risks. For even if the receiver and the giver derive identical benefit from immediate or deferred implementation respectively, and even if they share identical assessments with respect to what the future holds in store, their disparate attitudes to risk could, from their perspective, justify deferring the implementation of their agreement. Suppose that in the example of the seller and the buyer of an apartment, both sides have a shared assessment regarding the chances of tax being imposed on the income from the apartment. They both estimate a likelihood of 50% that tax will not be imposed at all, in which case their income from the apartment would be 100, and a likelihood of 50% that tax will be imposed, thus reducing the income to 50. The expected income over the next five years would therefore be 75 according to both of them. Suppose now that the seller is risk neutral while the buyer is risk averse. In that case both parties would prefer to defer implementation of the contract for five years, so that the risk neutral seller would have to bear it.

of the program would aggravate the position of the youth and would therefore be opposed.<sup>20</sup> On the other hand, deferring implementation for 12 years would appreciably reduce the price to be paid by today's youth. In another 12 years, the youth will have become adults and the program would improve their position. The ones required to pay the costs of the deferral are the "children", currently below 18, who in 12 years time will have to bear the costs that are greater than the benefits they stand to gain by the program. Deferred implementation therefore creates a situation in which some of the costs potentially borne by the youth in the event of immediate implementation are externalized and imposed upon today's children.<sup>21</sup>

In the pension example, externalization of costs operates asymmetrically on different age groups. The youth, as well as some of the adults (primarily those beneath the age of 53<sup>22</sup>), will profit from the deferral. Those approaching pension age will lose from the deferral and would prefer the national pension program to be implemented immediately. The reason that the latter agree to the deferral is that without such deferral there will be no pension program at all. The fact that the children, who were not party to the agreement, are financing a substantial part of the program could prove that the benefit gained from the deferral by the youth exceeds the loss to the adults, this being the basis for the asymmetry created by the deferral.<sup>23</sup>

In the following example, deferral of the implementation of the social agreement externalizes costs and benefits in a facially symmetrical manner. Nonetheless, due to the conflicting value attributed by the parties to the externalized values, an asymmetric situation emerges. Consequently, deferring implementation increases the chances of reaching agreement.

*The Israeli Arabs.* The Israeli Arabs demand that the Israeli budget be allocated equally between the Jewish and Arab sectors. While the government in power represents primarily the Jewish sector, it desires to placate the Arab sector and attain its cooperation. At the same time, the government perceives the price requested by the Israeli Arabs as too high, and it is neither able nor

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<sup>20</sup> In this situation, the "youth" cannot be consoled by the opportunity of receiving back part of the pension paid to the "adults" in the form of a future bequest. Empirical studies have showed that increased annuitization of resources to the "adults" means that the "adults" have less reason to fear that they will run out of resources if they live longer than expected. Consequently, they are likely to choose to consume at a higher rate (*see* Laurence J. Kotlikoff, Jagadeesh Gokhale & John Sabelhaus, *Understanding the Postwar Decline in U.S. saving: A Cohort Analysis, Essays on Savings, Bequests, Altruism, and Life-Cycle Planning* (The MIT Press, edited by Laurence J. Kotlikoff, 2001) 17, 55; Dan Shaviro, *Do Deficit\$ Matters?* (The University of Chicago Press, 2000) 125).

<sup>21</sup> It is important to emphasize here that we assume that members of the present generation are self-interested, in the sense that they do not consider the interests of members of next generation as if they were their own. See *supra* note 5.

<sup>22</sup> Adults between 53-65 would save the tax costs, but also lose pension payments. Within that sub-group, to the extent that a person is closer to pension age his profits from the deferral diminish, and at a certain stage, the deferral begins to harm him.

<sup>23</sup> Notice however, that under certain circumstances the credit market can also be utilized to bridge the gaps between the youth and the adults.



willing to pay it.

One possible solution to the above Israeli-Arab intrastate conflict is a price compromise, namely, the government increases the budget allocated to the Arabs but not to the full extent demanded. However, such a solution would not gain the support of the Arab minority: Whereas the Jewish majority is troubled only by the deal's effect on their standard of living, the Arabs are striving to achieve political equality and therefore, cannot support a deal that offers them any less than full equality.

Our claim is that, in such cases, it might be easier to reach a compromise over the time line rather than price. The Arabs should prefer a scheme promising them full equality within fifteen years, over a scheme that ensures them an immediate, but moderate increase in the budget, even if the net present value of the budget payments they receive under both deals is the same. From the Jewish population's perspective, they would also opt for deferral as this externalizes some of the costs to the future generations.<sup>24</sup>

Facially, the example of the Israeli Arabs illustrates a symmetric externalization: Just as future generations of Israeli Jews will bear part of the costs in the place of those living today, so too future generations of Israeli Arabs will receive part of the consideration instead of the Israeli Arabs living today. Objectively, therefore, deferral operates symmetrically on both populations. Subjectively, however, we have suggested that whereas the Jews might chiefly consider the effect of the deal on their individual standard of living, the Arab minority might attach a very high value to the state's recognition of their equal status as a community. Hence, whereas deferral of the scheme would be very beneficial for every individual Jew, it would be of less significance to the Arabs who might perceive this social agreement as a "constitutional moment"<sup>25</sup> for their community. In constitutional moments such as this, the present generation tends to rise above its own particularistic, current interests and ascribes greater importance to the affects of its decision upon the community as a whole, including its future generations.

Thus, taking into account the subjective values of the parties, one might envisage circumstances in which the costs of deferral to the present generation of Arabs would be lower

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<sup>24</sup> Notice, however, that Jews of current generation would still live in fifteen years to bear part of the costs. Still it is clear that a large portion of the cost will be externalized to their children and to new Jewish immigrants.

<sup>25</sup> The expression "constitutional moment" is borrowed from Bruce Ackerman, *We the People* (Harvard University Press, 1991). The features of the "constitutional moment" are discussed in Ackerman, *ibid* 170. The constitutional moment in American History dealt with by Ackerman is described in: *Federalist No.10*, at C. Rossiter Ed. (1961), 78 (J. Madison)

than the benefits it grants to the present generations of Jews.<sup>26</sup>

### C. Sides' Change

Facially, a deferral enabling sides' change will always operate symmetrically on both parties: the deferral reduces the consideration given by one party at exactly the same rate as it reduces the consideration received by the other party. Nevertheless, the prospect of sides' change may create benefits for the givers, which are higher than the costs imposed on the receivers, thus increasing the joint benefit created by the agreement. Accordingly, deferral in asymmetrical cases is more effective in increasing the chance of reaching an agreement than in symmetrical cases.

An example of a deferral which has an asymmetric effect on the parties is the case of the Disabled Law.

*The Disabled Law.* State XYZ is considering the enactment of a law that imposes an additional tax on the healthy to subsidize the disabled population. The healthy population opposes such a law because it surpasses what they are willing to pay to support the disabled.

Deferring the law's implementation may increase the healthy population's enthusiasm for the law as every healthy person foresees the possibility of his becoming disabled in the future. The probability of such an undesirable contingency, as estimated in the present, increases with the lapse of time. It follows that every healthy person knows that come time for law's future implementation he or she may be on the receiving end. Concededly, the disabled population is interested in the immediate implementation of the law, but since such an agreement cannot be attained, it can choose between the adoption of a law whose implementation is deferred or not to adopt any law. Under these circumstances the disabled population would likely settle for a deferred-implementation-law. The healthy population on the other hand would support a law whose implementation is deferred not only because during the deferred period they are not required to pay anything, but also because by the time of the implementation date some of them might become disabled and benefit from the law. This example illustrates an asymmetric case as the possibility of sides' change is mostly one-sided: healthy people may become disabled, but many disabled persons are doomed to remain in

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<sup>26</sup> As in the prohibition on slave trade example here too a question arises whether the externalization was caused by the deferral or by the agreement as such, independently of the time of implementation. As we explained earlier, the answer to this question depends on the characterization of the consideration transferred by the agreement as either a finite or infinite one. See *supra* text accompanying notes 11-12.

their unfavorable position.<sup>27</sup>

In other cases, the potential of sides' change is objectively symmetric but due to different assessments of this potential by the givers and the receivers, generates an asymmetric effect on the parties, thus enhancing the chances of reaching an agreement. In the illustrative unemployment example, it seems as if the deferral of the law operates symmetrically on the employed and the unemployed. But, although the consideration offered by the workers decreases by reason of the deferral at the same rate as the reduction of the consideration received by the unemployed, due to the endowment effect it is expected that the benefit the workers derive from deferral would be higher than the cost the unemployed incur from the same deferral. The endowment effect mandates that owners of an asset tend to ascribe it greater value than others.<sup>28</sup> Likewise, it is conceivable that workers attach greater value to their right to work than those unemployed not in possession of such a right. Nonetheless, the workers know that as time passes so rises the potential for sides' change, namely that they will lose their jobs. Therefore, from their perspective the deferred arrangement preserves part of the asset currently in their possession and does not only endanger it. Such deferral however, would not bear similar implications for the unemployed since this group is not affected by the endowment effect at the time the agreement is reached. Thus, the workers' benefit from deferral is greater than the cost it imposes on the unemployed.

### **III. The Normative Justifications for Deferred Implementation**

In the previous parts of the paper we argued that deferring the implementation of social agreements could be an effective technique for reaching such agreements, because occasionally the deferral externalizes part of the implementation costs to third parties and enables the possibility of sides' change. In this part of the paper we propose two justifications

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<sup>27</sup> See the European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to Article 18, the member states are required to take steps to implement the Directive within three years. However, the Article allows a deferral of three more years with respect to the implementation of the provisions of the Directive on age and disability discrimination. As in many other cases it is hard to know whether the deferral is motivated by reasons offered by us in this article or by other reasons, such as allowing the member states to adapt themselves to changes brought by the Directive.

<sup>28</sup> Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, The Endowment Effect, Loss Aversion, and Status Quo Bias, in Richard H. Thaler, *The Winner's Curse – Paradoxes and Anomalies of Economic Life* (Princeton University Press, 1992) 63; Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem in *Behavioural Law & Economics* (Cambridge University Press, 2000, Cass R. Sunstein ed.) 211; Russel B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 *Calif.L.Rev.* 1951, 1107. (2000).

for using the technique of deferred implementation, and illustrate situations in which these justifications become particularly relevant. We will then examine a seemingly strong counter-argument according to which the deferral of a social agreement is anti-democratic, and propose its rejection to the extent that it purports to be a general argument against deferred implementation.

### **A. Sides' Change—Making Decisions Behind the “Veil of Ignorance”**

A consequence of the potential for sides' change triggered by deferred implementation is that it tends to bring the individual members of the groups attempting to conclude a social agreement closer to the Rawlsian “veil of ignorance”. As a result it increases the likelihood that the social agreement achieved will also be just and fair according to the Rawlsian criterion.<sup>29</sup>

An individual behind the veil of ignorance does not know whether he or she is rich or poor, strong or weak, or of a high or low social status. Behind the veil of ignorance, an individual will choose rules and principles to apply to society devoid of any bias or self-interest, in a state of pure neutrality. In the spirit of Rawl's theory of justice it can be claimed that rules and principles adopted in this manner would be just and fair.<sup>30</sup> In reality, people required to establish the rules and principles to be applied to a society are not free of self interest, and will be presumably biased in favor of their own interests or the interest of the group to which they belong. Thus, a veil of ignorance is a metaphor for impartiality and neutrality to which decision makers should aspire.<sup>31</sup>

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<sup>29</sup>J. Rawls, *A Theory of Justice* (Harvard University Press, 1971) 60-108. Our utilization of the Rawlsian theory of justice is by way of analogy or inspiration, and is not a direct application of that theory. For a discussion of different methods (including deferring of implementation) that can be used in order to approximate legislators to the veil of ignorance, thereby moderating conflict of interests, see Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 *Yale L.J.* 399 (2001). Those methods attempt to introduce uncertainty about the distribution of future benefits and burdens that will result from a decision. Amongst them, the delay rules take advantage of the inherent unpredictability of the decisionmaker's long-term interests. By confining the range of the decision's application to cover only the period in which decisionmakers' interests are unpredictable, a delay rule ensures that the only period current decisionmakers can affect is subject (from their standpoint) to a veil of uncertainty (*ibid.*, 419-420); See also, Elizabeth Garrett, Purposes of Framework Legislation, *forthcoming J. Contemp. Legal Issues* (2004) (suggesting that while enacting framework laws, the lawmakers act behind a partial veil of ignorance, as they are uncertain about which procedures included in the laws will help them and which will hurt them in the future.).

<sup>30</sup> Rawls, *ibid.*, 136.

<sup>31</sup> A limit on the information available to the decisionmakers is one of the methods that can create a “real-world” veil of ignorance, see Michael A. Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 *Mich. L. Rev.* 917 (1990) (suggesting that less information can sometimes further utilitarian efficiency by helping to overcome various collective action problems, in which individuals' or groups' pursuit of their narrow self-interest makes most or all parties worse off. Vagueness about the political position of different groups can promote public acceptance of and desire for resource distribution, help stimulate a

Our claim is that one can create a Rawlsian veil of ignorance for the individuals of the groups in a social agreement, or at least simulate it, by deferring implementation, which creates a potential for sides' change. In its ideal state, deferred implementation produces a situation in which all members of either group anticipate that they have an equal chance of belonging to either the giving or the receiving group.<sup>32</sup> For example, in the unemployment case, if deferred implementation creates a situation in which all members of both groups (the workers and the unemployed) share an identical assessment of the likelihood of their being workers or unemployed at the time of implementation, then their decision whether or not to agree to a division of work in the spirit of the French solution is in effect an unbiased decision, adopted from behind a veil of ignorance. Obviously this does not mean that they would necessarily agree to adopt the French solution, for it may have shortcomings (e.g. reduction of incentives to invest in work) occasioned thereby. But in all events, the decision of each of the individuals in the groups would not be affected by whether she is *currently* a worker or unemployed, for as stated, she has no way of knowing which group she will belong to at the time of implementation.

In reality, the likelihood of a person working today still being employed in 15 years time probably exceeds the chances that a person currently unemployed will be working in 15 years. The workers will therefore not relate to the proposal to follow the French solution – even if implemented in 15 years - in the same way as they would have related to it had they been positioned behind a veil of ignorance. Still, because of the deferral of implementation, their individual interest in opposing it would be moderated by the superior prospect of becoming unemployed, rendering it easier for them to agree. The deferred agreement achieved would be close, though not identical, to the agreement that would have been reached by people deciding from behind a veil of ignorance. Thus, as the implementation date is delayed, it is more likely that the agreement reached by society will be just and fair in accordance with to Rawls criteria.

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rational dialogue, and even further a political consensus); Vermeule, *ibid.*, at pp. 428-29, observed that there is an information-neutrality tradeoff: supplying decisionmakers with more information produces more decisional bias; restricting information produces impartial but poorly-informed decisions (*see also* Garrett, *supra* note 29, sec. II. B, describing budget rules and the Electoral Count Act considering the tradeoff).

In some cases, such uncertainty may be preferred to the “traditional” decision making. *See e.g.* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A Theory of Delegation, 68 *Cornell L. Rev.* 1 (1982) (claiming that the delegation of legislative powers to an agency is equivalent to creating a public-policy “lottery,” which a majority of legislators and their interest-group clients may prefer to any individual public-policy certainty).

<sup>32</sup> *See also*, Fitts, *ibid.*, 966-967; Jon Elster, *Ulysses Unbound* (Cambridge University Press, 2000) 144-146 (arguing that by increasing uncertainty, delays create a veil of ignorance that forces an agent to put himself in

## B. Sharing the Burden of the Agreement by all the Beneficiaries

Can deferred implementation be justified when such deferral externalizes costs to third parties? As explained earlier, the law generally assumes a hostile attitude toward externalizations, frequently prohibiting them. The law takes a less hostile stance, however, toward externalizations in the context of social agreements. In fact, many social schemes for redistribution of wealth externalize costs to the givers, in the sense that they are required to bear much of the scheme's costs, regardless of their consent. Arguably, therefore, deferring the implementation of a social agreement for redistribution merely reduces the burden that the redistribution scheme imposes on the rich group of the present generation and allows them to share part of the burden with the rich group of the future generations. Such externalization to future generations is particularly justified in those cases where immediate implementation imposes a particularly heavy burden on a certain group in present society but would benefit future generations. Allowing the givers in present-day society to transfer some of its costs to future generations who are expected to benefit from the implementation of the agreement, while shouldering some of the costs themselves, is justified on fairness grounds, as it burdens all the beneficiaries of the agreement with its costs. Moreover, it is often very likely that without these externalizations a socially beneficial agreement would never be reached.

Philosophical and legal writings discuss very thoroughly the risk that the present generation would externalize costs to future generations.<sup>33</sup> These writings tend to downplay, however, the mirror problem—which is just as prevalent as the risk of cost externalization—that the present generation is often forced to confer benefits upon future generations without the ability of charging them anything in return. A deferred implementation is one mechanism which allows the present generation to charge the future generations for benefits the latter will receive, thereby motivating the present generation to adopt desirable social agreements they

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everybody's place).

<sup>33</sup> See e.g. John Locke, *Two Treatises of Government* (Cambridge at the University Press, edited by Peter Laslett, 1964), book 2, ch. 8, sec 116, p. 364 (“’Tis true, that whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but *cannot* by any *Compact* whatsoever, bind *his children* or *Posterity*”); Thomas Paine, “The Rights of Man,” *Political Writings* (Cambridge University Press, edited by Bruce Kuklick, 1989) 63 (“every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it”); Thomas Jefferson, *Basic Writings* (Garden City, N.Y. edited by Philip S. Foner, 1950) 590 (“by the law of nature, one generation is to another as one independent nation to another”); Adam Smith, *Lectures on Jurisprudence* (Oxford, Clarendon Press, edited by R.L. Meek, D.D. Raphael & P.G. Stein, 1978) 468 (“A power to dispose of estates for ever is manifestly absurd. The earth and the fullness of it belongs to every generation, and the preceding one can have no right to bind it up from posterity”).

would have otherwise never adopted.<sup>34</sup>

Having said that, we are aware a substantial risk exists of deferred implementation agreements being abused by present generations.<sup>35</sup> In the next section we offer constitutional constraints to be imposed on the deferral of social agreements, ensuring that only those deferred redistribution schemes beneficial to both present and future generations will be adopted.

### C. The Anti-Democratic Aspect of Deferred Implementation

Concluding a social agreement featuring deferred implementation requires an effective method of immunizing the agreement against future changes. The mutability of a deferred agreement upon the arrival of the time of implementation may render its initial attainment superfluous. Consider first the example of the French solution to unemployment. Arguably, society was unable to reach an agreement on such a solution since the majority of people in society were workers. Assuming the unemployment rate will not vary dramatically by implementation time, the working group will still outnumber the unemployed and so, just as the majority at present refuses immediate implementation, the majority in the future would support the law's repeal. Similarly, externalizing costs to future generations may be confronted by the future generations' refusal to endure the costs, leading to the termination of the social agreement. The present majority's ability to prevent tomorrow's majority from terminating or modifying the deferred agreement at the time of implementation is therefore a precondition for the effectiveness of deferred implementation.

Therefore, the social agreements we advocate in this paper can be effective either if they become part of the constitution or if the constitution empowers the parties to immunize the social agreement from future repeal.<sup>36</sup> Absent such immunity, deferred social agreements

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<sup>34</sup> The generational accounting theory suggests that modern fiscal policy generally has transferred wealth from younger to older Americans (Dan Shaviro, *Do Deficits Matter?* (The University of Chicago Press, 2000) 122-28). When this is true, a deferred implementation agreement might help in balancing the wealth redistribution among younger and older people.

<sup>35</sup> See Elster, *supra* note 32, at pp. 169-70 (describing this risk as "the minority problem" and "the future-generation problem", and arguing that no group has an inherent claim to represent the general interest). Likewise, economists indicate that the American tax system tends to benefit present generations at the expense of future generations. For discussing generational equity proposals, see Shaviro, *supra* note, at pp. 151-185.

<sup>36</sup> See Elster, *supra* note 32, at pp. 105-115; Jon Elster, Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment, 81 *Tex. L. Rev.* 1751 (2003); John Ferejohn & Lawrence Sager, Commitment and Constitutionalism, 81 *Tex. L. Rev.* 1929 (2003) (discussing different reasons, methods and tactics of precommitments). See also Cass R. Sunstein, *Designing Democracy* (Oxford University Press, 2001) 97-101 (examining what sorts

are unlikely to be concluded.<sup>37</sup> Herein lies the difficulty. In many democratic states, limiting a future majority's power to change the law is regarded as illegitimate and inconsistent with the basic foundations of democracy.<sup>38</sup> For that reason, in Britain the Parliament cannot immunize its statutes against future changes by a majority of members of parliament.<sup>39</sup> In other states, the power conferred by the legal system to the current majority to immunize its laws against future change is limited and bestow exclusively upon a *constitutive* body rather than a "regular" legislative body. Moreover, it is questionable whether the constitution may include substantive arrangements such as redistribution schemes, and whether courts that recognize the power of the founding fathers to dictate redistribution schemes to future generations would legitimize an attempt to dictate such a scheme when it includes a deferred-implementation clause. Perhaps the reason we seldom see such deferred implementation laws adopted is the fear of present generations that the law would not sustain the future majority's power and will to repeal it.<sup>40</sup>

One of the most powerful justifications for recognizing the power of the current majority to harness the majority's power, both current and future, is that such constraint serves the majority's (as well as minority's) interest to commit itself to the minority, and thus merits the cooperation of the minority.<sup>41</sup> Since legislative power resides in the majority, the minority may have the niggling suspicion that at some stage in the future it might exploit its legislative

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of considerations might lead people to place basic rights and arrangements beyond the reach of ordinary politics); David Chang, A Critique of Judicial Supremacy, 36 *Villanova L. Rev.* 281, 290-302, 330-340 (1991) (discussing the reasons that lead the founders generation to create supreme constitutional provisions, and the considerations of the present generations to obey them); Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 *Yale L. J.* 1665 (2002) (describing the benefits of legislative entrenchments and claiming that legislatures should be allowed to bind their successors, subject to any independent constitutional limits in force); Garrett, *supra* note 29, Sec. II.D (suggesting that framework laws can be seen as precommitment devices, enacted to constrain lawmakers in the future and to make certain legislative outcomes more likely). See also Saul Levmore, Precommitment Politics, 82 *Va. L. Rev.* 567 (1996) (discussing precommitments made by political candidates).

<sup>37</sup> However, even if a social agreement whose implementation is deferred is not immunized against future changes, occasionally it still may be difficult to change it upon the date of its implementation because the *status quo* is more easily maintained than changed. Hence, in the case of the Israeli Arabs, were the Jews to attempt to repeal the social agreement at the time of its implementation, they would encounter serious opposition on the part of the Israeli Arabs, as well as from numerous Jews.

<sup>38</sup> For a survey of conventional objections to legislative entrenchments, see Posner & Vermeule, *supra* note 36, at pp. 1673-93.

<sup>39</sup> S. De Smith & R. Braizer, *Constitutional and Administrative Law* (7<sup>th</sup> ed., 1994) 79; A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (12<sup>th</sup> ed., 1997) 63.

<sup>40</sup> For alternative arguments, see Vermeule, *supra* note 29, at p. 429 (claiming that a rule delaying the effective date of a legislation can be socially problematic because of the rapid pace of social change; the legislation in effect at any time would have been enacted by the ill-informed legislators of a decade ago.); Elster, *supra* note 32, at p. 145 (claiming that "demands for constitution making or constitutional revision tend to arise in times of crisis in which waiting is an unaffordable luxury").

<sup>41</sup> See e.g., Garrett, *supra* note 29, sec. II.D (claiming that a minority block crucial to passage of a law including the entrenchment may demand the entrenchment in the hope that it will bind the current majority in subsequent related decisions).



majority power and deprive the minority of the consideration it was promised in return for its cooperation. In order to allay this justified fear, in the absence of which there is no possibility of agreement being attained, there must be an effective way for the majority to entrench the rights of the minority against future infringement of their rights by the majority. The overwhelming interest of the majority is therefore to deny itself, and any other future majority, the power to change the law in a way that deprives the minority of the protections it was promised. It would appear that this justification does not hold for the schemes we advocate in this paper. In the case of sides' change, one of the principal reasons for the majority's readiness to adopt the deferred social agreement which benefits the minority, is that the individuals comprising the majority know that there is a real possibility that in the future they will comprise the minority, and therefore benefit from the agreement, and not only bear its costs. Similarly, in cases involving cost externalization both the majority and the minority agree to deferred implementation because they know that third parties who may be the majority in the future, will bear the costs of the social agreement, while they will be its prime beneficiaries. In short, in most of the cases discussed in the article, from the majority's perspective, the entrenchment of the deferred social agreement against change is not motivated by its desire to effectively protect the minority, but rather by its desire to protect the individuals comprising the current majority, if and when they become the minority in the future.<sup>42</sup>

If the future majority is motivated by its desire to protect the constituents of the majority and not the minority, then the protection of the minority cannot serve as the rationale for restricting the legislative power of future generations. Furthermore, the current majority's motivation for protecting its own constituents and only theirs creates a basis for the claim of illegitimacy, which may heave the ire of future generations. The present majority imposed an onus on the future generation, which it was not prepared to shoulder itself. The pension

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<sup>42</sup> See also Chang, *supra* note 36, at pp. 290-293 (describing the motives of one portion of the electorate to create supreme constitutional provisions exploiting "an extraordinary political advantage over another portion of the electorate").

*Prima facie*, there is nothing wrong in the fact that the motive of the majority in its protection of the minority is its fear that the majority may become the minority. Hence, for example, there is nothing wrong with the white majority entrenching the rights of the black minority only because of its fear that in the future the whites will become the minority. But the source of legitimacy of this entrenchment is in the fact that the entrenching generation bore the onus in exactly the same manner as did generation upon whom the entrenchment was forced. In other words, the white majority protecting the minority's rights because of its fear of being in the minority in the future, will in the future be able to receive legitimization from the future black majority for such a protection only if in the past, when the whites were the majority (and blacks the minority), the whites protected the minority's rights. If the whites adopt a rule that protects the minority rights only in ten years from now, when they are in the minority, it is presumable that the future black majority, if it deems that when it was a minority it was not properly protected, will not acknowledge the legitimacy of this constitutional principle.

example is a case in point. According to that example, the “adults” and the “youth” would not have been able to reach agreement on the immediate implementation of the pension arrangement because the youth was unwilling to bear the adults’ pension burden. The only way of reaching such an agreement was by deferring implementation and forcing the main burden upon the “children’s” shoulders who, at the actual commencement of pension arrangement, will constitute “youth”. One can definitely presume that at implementation time, the youth of the time will deny the legitimacy of the actual arrangement and will criticize the adults of that time, claiming that they are not interested in bearing the duty for the benefit of those adults who had displayed a disinterest for their welfare in the past, and were unwilling to bear a similar onus as the youth are now being required to bear.<sup>43</sup>

Although the common justifications for one generation’s power to restrict the legislative power of future generations may not support the deferred-implementation schemes we advocate in this paper, we believe there are alternative justifications for it. The legitimacy of the deferred agreement can be justified on the basis of an anomaly innate to the democratic system -- the present generation has deficient incentives to benefit future generations because it cannot charge those generations for the benefits conferred to them. To illustrate, assume that the present generation should invest 15 for generating benefits of 20, to be equally shared by the present and next generation. Absent the ability of the present generation to charge at least 5 from the next generation, the present generation would be reluctant to invest the costs of 15 in the first place. This anomaly could be avoided if all the generations were represented at the legislative body. More realistically, the problem can be solved by allowing a generation that benefits future generations to charge the latter some of the costs it incurred in creating those benefits. Such a charge would be justified because it solves the inherent inefficiency we have just described and also because it promotes intergenerational justice. A deferred implementation agreement, which externalizes costs to future generations, functions as a mechanism for charging those generations for the benefits the present generation conferred to them, and is justified as long as there is a correlation between the costs and the gains externalized to the future generations.

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<sup>43</sup> Facially, the deferral of the pension arrangement creates a problem similar to that created by the deferral of the prohibition of slave trade. In both cases the deferral imposes costs on groups that were not parties to the social agreement. In the first case, the costs are imposed on ancestors of the current generation and in the second case the costs are borne by the present slaves. Clearly, both the ancestors and the slaves could be expected to object to the deferral that was agreed upon. A basic difference however separates the cases: in the first case, when the ancestors grow up they will desire to revoke the arrangement and release themselves from the onus imposed upon them by the previous generation. The slaves on the other hand, will support the proscription of slave trade when the deferred time arrives, regardless of whether they were slaves at the time of the constitution’s adoption or born thereafter.

The next generation would respect restrictions imposed by the present generation that promote intergenerational justice, not only because these restrictions are intergenerational, efficient and fair, but also because it is in the next generation's best interest to respect it. To see why, one should envision the constitution as a repeated game between generations – any generation that ignores the restrictions imposed by the previous generation and refuses to pay the price the previous generation charges for a social agreement that promotes intergenerational justice, cuts the chain of repeated games and surrenders its own power to adopt similar social agreements.<sup>44</sup> The fact that the next generation respects the deferred agreements adopted by the previous generation, preserves the power of the next generation to restrain the generation following it.<sup>45</sup>

We may conclude, therefore, that as with any constitutional restraint, its legitimacy does not flow exclusively from the procedure guiding its acceptance, but more so from its substance. Unjust constitutions would not be respected by future generations, at least not voluntarily, even if they were adopted in a “proper” procedure. Similarly, unjust social agreements with a deferred-implementation clause will not be respected if they exploit the next generation. Thus, in the pension example discussed, if the arrangement were adopted so that its entire onus was transferred from the shoulders of the youth of the current generation to those of the next generation, then its legitimacy would certainly be suspect and it is unlikely that courts of next generation would enforce it. If on the other hand the burden of the pension arrangement was fairly allocated between generations, it would probably be in the next generation's best interest to enforce it, at least for the sake of preserving its own power to adopt similar deferred social agreements.

Similarly, one may assume that if in the unemployment example all of the workers had known as a matter of certainty that in another 15 years they would be unemployed, then the deferred implementation would not have been legitimate. It is likely that the workers in 15 years time would challenge the legitimacy of the deferred social agreement and refuse to comply with it. On the other hand, if there was a reasonable likelihood, say 20% of sides' change, and it was clear to all that today's workers, in reaching the social arrangement, assumed a heavy burden, it is more likely that future courts would recognize the legitimacy of the social agreement and would enforce it.

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<sup>44</sup> See also Edmund Burke, *Reflections on the Revolution in France*, *Works*, vol. III, p. 359 (describing society as “a partnership... between those who are living and those who are dead, and those who are to be born”).

<sup>45</sup> See also Stephen Holmes, *Precommitment and the Paradox of Democracy*, *Constitutionalism and Democracy* (Cambridge University Press, edited by Jon Elster & Rune Slagstad, 1988) 222-23 (“To influence a situation, an actual power-wielder must adapt himself to preexistent patterns of force and unevenly distributed possibilities

## IV. Conclusion

This article attempted to show that the deferred implementation of a social agreement frequently allows sides' change and externalizes costs to third parties, thereby increasing the chances of attaining socially desirable agreements. In many cases the deferred social agreement is more just and fair than an agreement to be implemented immediately, since it often creates intergenerational justice by imposing the costs of the social agreement upon all the generations standing to gain from it, and not just on the present generation. In other cases the deferral of the social agreement enables the individuals constituting the contracting parties to adopt less partial decisions, as if they were viewing the subject of the agreement from behind the Rawlsian veil of ignorance. We have shown that the deferred social agreement can gain its legitimacy despite the attendant harnessing of the discretion of the coming generations and the coming legislators, provided that it ensures intergenerational justice.

We believe that the paucity of deferred-implementation agreements<sup>46</sup> stems from the present generation's concern that the next generations will neither respect these agreements nor recognize their legitimacy. In this paper we have argued that in many cases this concern is unfounded and that the deferred implementation of social agreements is not merely a technique to facilitate consensus for the redistribution of wealth, but that it may also be legitimate, desirable and just.<sup>47</sup>

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for change. The influencer must be influenced: that is a central axiom of any realistic theory of power").

<sup>46</sup> Here are few examples of deferred-implementation arrangements: The Amended Proposal for a European Parliament and Council Directive on Company Law Concerning Takeovers Bids (unpublished draft, 1999), aimed at prohibiting the use of "poisoned peels" in order to prevent hostile takeovers, included a clause which stipulated that the Directive would become effective only in 2010. Initially the Scandinavian states objected to the passage of the Proposal, whereas Germany and France supported it. But the Proposal was rejected by the EU parliament for other reasons.

The declaration for the transfer of Hong Kong into Chinese control was signed in 1984 and determined that the transfer would take place in 1997 (a 13-year deferral). In one of the declaration's appendices it states that the rental rights in the Hong Kong lands, which were under British control, may be extended for another fifty years after the day of their transfer to China, i.e. until 2047. See: Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Great China on the Question of Hong Kong. See also the European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *supra* note 27.

In a few cases it was determined that the validity of a law or legal arrangement expire after a few years. Deferred implementation is not the same as implementation for a limited period. Nonetheless, there is a certain similarity between the two techniques and of the purposes for which they are used. In the Treaty for the Establishment of the European Community for Coal and Steel 1957, it was determined that the treaty would remain in force for a period of fifty years from its date of commencement.

<sup>47</sup> One more possible explanation for the scarcity of such agreements is the uncertainty these agreements create and parties' fear that when the time of implementation comes circumstances will change, rendering the implementation of the agreement either impossible or completely different from what the parties anticipated it to be. Another explanation is that occasionally other mechanisms, such as the credit market, can be used to achieve the same effects created by the deferral of implementation.