

### Could Present Laws Legitimately Bind Future Generations? A Normative Analysis of the Jeffersonian Model

Agmon, Shai

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

#### Empfohlene Zitierung / Suggested Citation:

Agmon, S. (2016). Could Present Laws Legitimately Bind Future Generations? A Normative Analysis of the Jeffersonian Model. *Intergenerational Justice Review*, 2(2), 48-56. <https://doi.org/10.24357/igjr.9.2.548>

#### Nutzungsbedingungen:

Dieser Text wird unter einer CC BY-NC-ND Lizenz (Namensnennung-Nicht-kommerziell-Keine Bearbeitung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:

<https://creativecommons.org/licenses/by-nc-nd/4.0/deed.de>

#### Terms of use:

This document is made available under a CC BY-NC-ND Licence (Attribution-Non Commercial-NoDerivatives). For more information see:

<https://creativecommons.org/licenses/by-nc-nd/4.0>

# Could Present Laws Legitimately Bind Future Generations? A Normative Analysis of the Jeffersonian Model

by Shai Agmon

**A**bstract: Thomas Jefferson's famous proposal, whereby a state's constitution should be re-enacted every 19 years by a majority vote, purports to solve the intergenerational problem caused by perpetual constitutions: namely that laws which were enacted by people who are already dead bind living citizens without their consent. I argue that the model fails to fulfil its own normative consent-based aspirations. This is because it produces two groups of people who will end up living under laws to which they did not give their consent: (a) citizens who reach the voting age after the re-enactment process; (b) citizens who did not assent to being obliged by the majority vote's results. I reject possible responses to my argument by showing that they result in making the model either impractical or redundant. The remainder of the paper discusses whether implementing the model would enhance the consent-based legitimacy of the modern state.

## Introduction<sup>1</sup>

It is commonly believed that the legitimacy of political authority is founded on the consent of the governed to be bound by it. However, for those who take this stance, the transition between generations presents an intergenerational challenge: why should laws which were enacted by people who are now dead bind those presently alive? What about their consent?<sup>2</sup> Thomas Jefferson most famously raised this question in his

letter to James Madison from September 1789. His answer was that “the dead have neither powers nor rights” over the living, and thus “no society can make a perpetual constitution.”<sup>3</sup> Thomas Paine, who sided with Jefferson on this issue at the time, similarly claimed that “every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it.”<sup>4</sup>

For laws to have legitimate authority over future generations, Jefferson suggested the following institutional design: all laws would be re-enacted every 19 years by a majority vote of the living, and laws not re-enacted would lapse.<sup>5</sup> Such a mechanism is supposed to obtain the consent of every new generation to the state’s laws, and thereby provide a solution to the intergenerational challenge; only the living will govern the living.<sup>7</sup>

Although intuitively compelling, in this paper, by engaging with the contemporary discussion regarding modern states that followed Jefferson’s proposal, I argue that Jefferson’s institutional design in particular, and thus the idea of reaffirming the constitution at fixed intervals by every new generation in general, fails to fulfil its own normative aspiration of ensuring the legitimacy of the state based on the consent of its living citizens.<sup>7</sup> That is because it necessarily results in two groups of people (on a significant scale) living under laws to which they did not give their consent. Moreover, I argue that in order to fulfil its normative aspirations, there must be changes made either to the design, or to the type of consent on which it is based. Such changes, I argue, would either render the model’s implementation unrealistic and undesirable, or make it redundant.<sup>8</sup> This is not to say that the idea of reaffirming the constitution every generation is not desirable for other reasons. My argument refers only to the implausibility of the aspiration of legitimising the state by the consent of its citizens by using Jefferson’s mechanism (or similar mechanisms).

After reaching this conclusion, I discuss whether implementing Jefferson’s model, despite its defects, would still be an improvement over the status quo. Putting it differently, I discuss whether Jefferson’s model would make modern democracies “more legitimate”. I conclude that the Jeffersonian model is either not an improvement over the status quo, or not the best improvement available.

I argue that Jefferson’s institutional design in particular, and thus the idea of reaffirming the constitution at fixed intervals by every new generation in general, fails to fulfil its own normative aspiration [...].

The paper is structured as follows. First, I present the “lost-generation” objection, according to which, even after implementing Jefferson’s model, those who reached the voting age after the re-enactment would necessarily be unable to express their consent to past laws for a significant period of time. Second, I present the “majority consent” objection, namely that a majority-vote-based solution fails to ensure the legitimacy of past laws, since voters might not grant their consent for the vote itself (either by voting instrumentally or by not voting at all). Third, by exploring the option of “partial legitimacy”, I discuss whether implementing Jefferson’s institutional design would be an improvement over the status quo with regards to the legitimacy of modern states. Lastly, I conclude and discuss the practical implications of my analysis.

### The “lost generation” objection

Suppose that a constitution is legitimately authorised by means of a majority vote by generation X at  $t_0$ .  $t_1$  is the point in time 19 years later, when the majority of generation X has died, and the next generation – generation Z – participates in the re-enactment process. The problem is that all of the citizens who reach voting age between  $t_0$  and  $t_1$  – call them generation Y – would have to wait up to 19 years until they can express their consent to the laws in the reenactment process. Generation Y is thus a “lost generation” (see illustration).

Hence the objection: Jefferson’s account fails to provide generation Y with the option to approve the state’s laws for a significant period. Until generation Y votes with generation Z, instead of being governed by the dead, they would – on Jefferson’s account – be governed by generation X, and would not be self-governing.

Such a problem, as acknowledged by Otsuka,

stems, at least partially, from narrow consent-based views, which base the legitimacy of political authority solely on freely expressed consent.<sup>9</sup> Hence, it might be plausible to overcome it by allowing a broader scope of types of consent as the normative basis of legitimate political authority, namely to include *tacit or hypothetical* consent. In this section, I scrutinise both options and argue that neither a tacit-consent-based view nor a hypothetical-consent-based view could salvage Jefferson’s proposal from the lost generation problem. In the last part of this section, I explore a different solution to the lost generation problem – shortening the length of the intervals between each vote – and argue that such a solution renders the implementation of the Jeffersonian model impractical and undesirable.

### Tacit consent solution

Otsuka proposes overcoming the lost generation problem by the realisation of a Lockean ideal of free and equal tacit consent.<sup>10</sup> In order to legitimise political authority, actual consent need not necessarily be expressed, but could also be inferred from action.<sup>11</sup> For example, Locke argued that tacit consent to political authority can be inferred from residence within a state’s territories, owning a land in a state, or enjoying benefits from the government.<sup>12</sup>

Jefferson’s account fails to provide generation Y with the option to approve the state’s laws for a significant period.

As Otsuka rightly notes, Locke’s account makes subjection to political authority hard to avoid.<sup>13</sup> There are citizens who lack the economic means to move abroad. Others are bereft of the necessary cultural background or reasonable alternative political authorities to choose from. Their inaction must not be regarded as tacit consent. People, therefore, can reside in a certain state, own property or make use of the government’s services, without consenting to it.<sup>14</sup> Had they had the opportunity – so they could claim – they would not have given their consent. Thus, in certain circumstanc-



es, inferring tacit consent could lead to a situation in which people who do not freely consent to being governed by a certain political authority are considered to have so consented.<sup>15</sup> In reality, most people do not give their consent, even tacitly, to a political authority just by residing or owning a property within its territory. That is because most people do not choose their place of residence, and cannot move elsewhere even if they wanted to, due to a lack of means or opportunity.<sup>16</sup>

To avoid this problem, Otsuka adds three provisos that must be fulfilled in a certain political association in order to infer tacit consent of its members to its laws:

- a) *Egalitarian proviso*: there must be an egalitarian distribution of worldly resources, so that everyone has the means to move from one political association to another.
- b) *Pluralistic proviso*: there should be sufficient decentralisation and pluralisation of political societies, so that everyone has alternative political authorities from which to choose.
- c) *International order proviso*: the relations between the political societies must be regulated by an inter-political government body, which is “charged to oversee the drawing of boundaries between the societies, settle disputes and govern the disposition of possessions of worldly resources to ensure that it is in accordance with the egalitarian proviso.”<sup>17</sup>

Under such circumstances, free and actual tacit consent could be inferred from residence, owning property or other actions, since everyone is free and able to live under a sufficient number of different political authorities.<sup>18</sup>

Assuming that Otsuka’s reconstruction of Locke’s tacit-consent-based view is indeed valid, and that only in such an ideal society one can infer tacit consent from residence, we are able to identify two plausible implications regarding Jefferson’s institutional design:

i. *Ideal world scenario*: In Otsuka’s ideal world, after the death of the majority of generation X, we can infer tacit consent by residence of both generation Y and Z, since everyone would have sufficient alternative options to live in, as well as the resources to move between political societies. In such a world, the Jeffersonian model would be rendered superfluous: we do not need the re-enactment process in order to provide people with the opportunity to express their

consent, since we can infer tacit consent from residence.<sup>19</sup>

ii. *Real world scenario*: In the modern real world, Otsuka’s conditions are clearly not met.<sup>20</sup> Thus, we cannot infer tacit consent from residence.<sup>21</sup> As such, we are left with the lost generation problem – we cannot infer generation Y’s consent only by virtue of its members living in a certain country.<sup>22</sup>

These implications of Otsuka’s tacit-consent-based approach show that tacit consent is not a viable option for vindicating Jefferson’s account from the lost generation objection regarding real-world modern states.<sup>23</sup> However, since Otsuka is focused only on inferring tacit consent from residence, there is a third option that needs to be considered – a real world scenario in which there is indeed a way to infer tacit consent. I cannot think of an example of such an option. However, it is reasonable to assume that if there were a way to infer tacit consent without Otsukian ideal background conditions, then we could legitimise political authorities in such a way for all people, not just the lost generation, and without needing the Jeffersonian model.<sup>24</sup> Therefore, in all three possible worlds – (1) ideal world; (2) non-ideal world with an option for inferring tacit consent; (3) non-ideal world without an option for inferring tacit consent – tacit consent is either not an option or makes the Jeffersonian model redundant.

In reality, most people do not give their consent, even tacitly, to a political authority just by residing or owning a property within its territory.

Hence, assuming that in the real world tacit consent is, at least at the moment, not an option, there is a need for institutional designs that are based solely on *express* or *hypothetical* consent. Jefferson tried to do the former, but failed to solve the “lost generation” problem. In what follows, I discuss the latter.

#### *Hypothetical consent solution*

Both express-consent-based views and tacit-consent-based views purport to base the legitimacy of political authority on the actual consent of the governed.<sup>25</sup> If, for example, someone explicitly says that she does not give her consent to be governed by political authority X, then according to both views, she cannot be legitimate-

ly governed by X. The shift from express consent to tacit consent is necessary since getting the unequivocal express consent of all citizens is very hard (as the lost generation problem clearly shows), and tacit consent is instrumentally a more viable option for consent-based views.<sup>26</sup> Hypothetical-consent-based views do not purport to base the legitimacy of the state on the actual consent of the governed for all sorts of reasons. The governed might be wrong and give their consent to illegitimate political regimes; they might reject perfectly legitimate regimes and so on. By contrast, such views base the legitimacy of the state on hypothetical consent – namely on the consent that one would hypothetically give if one were rational, reasonable, or meet any other normative criterion. In Muniz-Fraticelli’s words, hypothetical consent is “the normative supposition that an individual, if reasonable, *ought* to consent to a certain arrangement because of certain morally salient characteristics of the choice situation.”<sup>27</sup> The normative focus of such views is the moral characteristics of the political authority and whether one should consent to it or not, rather than the actual consent itself.<sup>28</sup>

Therefore, according to such views, a plausible response to the lost generation problem would be that if a reasonable person would agree to be governed by the Jeffersonian state, then the lost generation could be considered a generation that hypothetically consents to be governed. However, as the tacit consent response, this response fails to explain why the Jeffersonian mechanism is necessary at all. We could justify the state’s legitimacy for all generations according to a hypothetical consent criterion, without the need for reaffirming the constitution at fixed intervals, and thus the Jeffersonian model is, once again, redundant.

In sum, changing the type of consent from express consent to tacit or hypothetical consent in order to respond to the lost generation objection either is impractical (in non-ideal worlds where tacit consent cannot be inferred), or would make the Jeffersonian model superfluous.

#### *A different solution: Shortening the intervals*

There is a different plausible response on behalf of Jefferson to the “lost generation” objection. One could argue that it is true that the fact that a whole generation will not be able to give its consent to past laws is normatively repugnant. However, one may

add, shortening the length of the intervals between re-enactments could make the mechanism more plausible. Instead of 19 years, for instance, the re-enactment process could take place every four years. Living for four years in a democratic state under laws that you did not personally approve seems intuitively better, albeit problematic, compared to 19 years. If the regime is otherwise legitimate, and the cost is four years of waiting for the opportunity to participate in the re-enactment process, it seems like a much more negligible cost, which might not undermine the normative appeal of the Jeffersonian model as a whole (remember that for the non-lost generations the model is extremely appealing).

As the tacit consent response, [the hypothetical-consent view] fails to explain why the Jeffersonian mechanism is necessary at all.

However, the problem of this response is that as the number of years between re-enactments decreases, the plausibility and desirability of implementing such institutional design decreases accordingly. Muniz-Fraticelli argued against Jefferson's proposal that its practical implications are undesirable.<sup>29</sup> That is to say, that re-enacting the constitution every 19 years will result in social instability; it would be impossible to initiate long-term projects, even when the benefits are extremely large; the political turmoil before each re-enactment will result in fear of anarchy that in turn will ignite aggressive, perhaps even violent, political struggles. Conversely, Otsuka claimed that this kind of pessimistic forecast is too hasty.<sup>30</sup> He defended the practicality of Jefferson's proposal on the assumption that a majority vote every 19 years would probably not jeopardise the country's stability, and will not lead to disastrous consequences and anarchy. In support of his claim, Otsuka points out that even today a number of legislatures around the world possess the power to change the constitution by a simple majority vote (e.g. Israel or Britain), and yet, they refrain from doing so; most laws endure and major reforms do not take place too often.<sup>31</sup> That is because "there are strong informal barriers that stand in the way of frequent and destabilising repeal of laws by majority vote."<sup>32</sup> According to Otsuka, there would probably be a bias in favour of the status quo, and thus the norm would be that only minor changes could be made during each re-enactment. Therefore

it would be plausible to initiate long-term projects, and the polity would not suffer from exceptional instability.

I do not wish to determine which prediction is more accurate. Nonetheless, it seems reasonable to claim that the shorter the period between re-enactments, the more plausible Muniz-Fraticelli's prediction becomes. This is due to the costs of the process; the uncertainty as to the basic structure of the political society; and the frequent extreme political battles. All of these would take place more frequently, and thus political turmoil, as foreseen by Muniz-Fraticelli, would become more probable. Adding these costs of probable instability to the already normatively defective system decreases the desirability of the Jeffersonian model.<sup>33</sup>

It should be noted that the fact that Jefferson's proposal is impractical and politically destabilising does not render current stable, perpetual-constitution-based modern states legitimate. However, such fact could justify their existence *without Jefferson's model*, as a matter of necessity to preserve stability and refrain from anarchy (assuming that anarchy is undesirable). As Otsuka accepts, our right not to be governed by others "is not an absolute right, as there are circumstances in which it would be unreasonable to insist on its non-infringement."<sup>34</sup> Assuming Muniz-Fraticelli's predictions are correct regarding the modified version, states with perpetual constitutions guarantee stability, while the implementation of the Jeffersonian model could lead to anarchy and catastrophe. Considering such a trade-off, it is justified and reasonable to infringe people's rights for giving their consent to be governed. Thus, it is justified to govern people without their consent for the sake of stability, even though the state is still illegitimate from a consent-based view perspective.<sup>35</sup>

It should be noted that the fact that Jefferson's proposal is impractical and politically destabilising does not render current stable, perpetual-constitution-based modern states legitimate.

To recap, Jefferson's model fails to legitimise modern states for all of their citizens due to the "lost generation" objection. Other types of consent are either impractical or make the model redundant. The model's improved version is objectionable due to its probable undesirable results. Thus, the model and its improvement fails to fulfil

its normative aspiration to serve as an institutional design for legitimising the state on the basis of the consent of the governed.

### The "majority consent" objection

So far, I have assumed that the re-enactment process by majority vote ensures the legitimacy of the re-enacted laws regarding those who participate in the process. In this section I scrutinise this assumption. A consent-based theory of legitimate political authority requires each *individual* to personally consent to the authority by which she is bound.<sup>36</sup> Thus, it is not enough, as Jefferson assumes, to conduct a majority vote in order to legitimise laws; a prior requirement has to be met. Every individual of the new generation needs first to grant her consent to be bound by the results of the majority vote itself. Only then would the majority vote have the normative force to bind every participant. Without such prior unanimous consent, each individual who does not consent to be bound by the results of the majority vote would be illegitimately governed. Therefore, to be able to legitimise the political authority of the state, Jefferson's mechanism should include a way to ensure that all citizens would unanimously give their consent to be obliged by the majority vote itself. If, as it turns out, Jefferson's mechanism cannot meet such a requirement while remaining practically feasible, then the objection – namely that those who do not consent to be obliged to the majority vote results would be illegitimately governed by the state's laws – would hold.

Jefferson could respond to the above-mentioned objection in the following three ways:

#### *The "false interpretation" response*

One could argue that Jefferson, and anyone who supports reaffirming the constitution at fixed intervals by every new generation, is not committed to consent-based theory, but rather to some kind of democratic-based justification of authority, by which democracy has intrinsic value, or that democracy is the best institutional design for collective decision-making.<sup>37</sup> Therefore the majority vote is the normative basis for the state's legitimacy, and not the direct consent of each and every one of its citizens, and this is the reason for re-enacting the constitution every generation. This is not a direct response to the "majority consent" objection, but rather a claim that undermines

the whole idea that the Jeffersonian model relies on a consent-based view of political legitimacy.<sup>38</sup> However, such a claim cannot explain the intergenerational concern that underlies the Jeffersonian model. If the laws of the old constitute a democracy, why would Jefferson insist on re-enactment? If the democratic institutions and procedures make a state legitimate, then it seems there is no need to re-legitimise what is already a democracy (assuming that generation X established a democracy). Moreover, specifically regarding Jefferson, he was explicitly trying to defend individuals' consent by arguing that "the rights of the whole can be no more than the sum of the rights of the individuals."<sup>39</sup> He does not mention democracy, but rather refers to the control of each and every individual over her own life. Thus, the proper and only plausible interpretation of the underlying normative motivation of the Jeffersonian model is consent-based. Therefore this response fails.

If the democratic institutions and procedures make a state legitimate, then it seems there is no need to re-legitimise what is already a democracy.

#### *The "tacit consent by voting" response*

Jefferson could respond by saying that the re-enactment process is a signal from which we can infer tacit consent; i.e. that by voting, one tacitly consents to be obliged by the vote's results. This response does not render Jefferson's account redundant (as the tacit-consent-based response to the "lost generation objection" did), since the re-enactment of laws every 19 years would still be needed. Albeit promising, this response fails as well. The following case illustrates the reasons for such failure:

Mohanad is a Palestinian who became an Israeli citizen after Jewish military forces<sup>40</sup> conquered his city in 1948, the year in which the State of Israel was established. Mohanad did not consent to be governed by Israelis (more specifically, by Israeli Jews). However, he wished to stay in his homeland and thus decided not to leave. Furthermore, even if he had wanted to leave the country, he did not have the means to do so. People like Mohanad, i.e. Palestinians with Israeli citizenship, have the right to vote. By voting, Mohanad increases the chances of the election of a representative who will promote his interests. Thus, he chooses to vote for instrumental reasons.

It cannot be inferred from Mohanad's instrumental participation in the vote that he gave his consent to Israeli laws and Israeli political authority. Similarly, in our non-ideal world, where most people cannot easily leave their countries, Jefferson cannot infer from participation in the re-enactment process that all participants have granted their consent. As Mohanad does, they could be voting in an instrumental manner, while not giving their consent to the political authority they are under at the moment. Lacking Otsuka's ideal provisions, which guarantee that people have the option to choose a different political authority, this response, which also relies on tacit consent, fails too. Moreover, it should be mentioned that even if it were plausible to infer tacit consent from voting, in order to legitimise the state on the basis of consent, there is a need for all individuals to give their consent without exceptions. Therefore a further assumption has to be made, namely that there will be 100% turnout every 19 years, for we cannot infer consent from those who do not vote.<sup>41</sup> Granting that such an assumption is extremely unrealistic – especially in the modern world – it follows that even if we could infer tacit consent from voting, there would still be a group of people (the non-voters) who would be illegitimately governed.

#### *The modified model response*

Jefferson could accept the objection and amend his model by adding a requirement for unanimous consent of the governed to be bound by the majority vote. The problem with this amendment, as rightly argued by Simmons, is that "if unanimous consent is required for legitimacy, no government will be legitimate."<sup>42</sup> If every individual can undercut the legitimacy of the state, it would be virtually impossible to achieve unanimous consent in modern states, which consist of millions of people. This is indeed a problem shared by all consent-based theories of legitimate authority.<sup>43</sup> Nevertheless, it is especially troubling for Jefferson, for even if we can assume that unanimous consent could be reached once by the country's founding generation, it would be highly implausible to expect that it could be reached every 19 years. Thus the modified account solves the problem, but it is extremely unlikely to result in a functioning state and would probably lead to anarchy. It is unreasonable to expect an unanimous consent of millions of people to a certain

political authority every 19 years.<sup>44</sup> Moreover, as mentioned above, even if unanimous consent every 19 years were possible, there would also be a need for a 100% turnout every 19 years, in order to guarantee the consent of all people. Again, this is extremely unlikely to happen, a fact that makes this modified version of Jefferson's model even more unrealistic. If Jefferson's goal is actually, not theoretically, to ensure the legitimacy of the political authorities (which I believe it is), then this objection makes his model less compelling.

#### **Should a Jeffersonian model be pursued despite its defects?**

Up to this point, I have shown that if we were to implement Jefferson's model, and assuming no other type of consent-based theory is feasible (hypothetical or tacit), two groups of people would not be obliged to obey the state's laws:

- (1) Generation Y (i.e. those who reached the voting age after the re-enactment of the new laws).
- (2) People who vote and refuse to commit to the results of the majority vote reenactment process (that is assuming that everyone is voting; if some do not vote, then the non-voters are part of this second group).

Thus, if one still wishes to implement the Jeffersonian model, one has to decide between the following scenarios:

- a) *Partial anarchy scenario*: If one wishes to avoid illegitimately coercing people who did not give their consent to the laws (namely the two groups aforementioned), one would have to accept that those people, who live under the state's territory, will not necessarily obey its laws. In such scenario, a "window of anarchy" would open in the country, since the rule of law would be undermined.<sup>45</sup>
- b) *Coercive scenario*: One could accept the unfortunate fact that the model is limited, but still decide that in order to prevent anarchy and preserve the rule of law, there is a need to illegitimately force the people from these two groups to obey the state's laws, even without their expressed consent to it.

Assuming that most non-anarchists would reject the former option,<sup>46</sup> in the remainder of this paper I explore whether a Jeffersonian state as described in option (b) would be an improvement over current modern states, despite its defects.

After defending Jefferson's proposal, Otsuka states that he believes that "any actually existing democracy which adopted this proposal would more fully realise the ideals of democracy and the popular sovereignty of the living over the living."<sup>47</sup> Such a claim is controversial, both within and outside the Otsukian framework. Within the Otsukian framework, a legitimate state would fulfil the three provisos mentioned above. Thus, implementing Jefferson's mechanism should be considered an improvement if it would contribute to bringing modern states closer to such an ideal. Unfortunately, it is at least not clear if implementing the model would in fact bring modern state closer to the Otsukian ideals. The mere fact of conducting a re-enactment process every 19 years does not and cannot guarantee that the society would become more egalitarian, pluralistic, or that it would have any effect on international relations. On the contrary, as claimed by Muniz-Fraticelli, reenactment could lead to societies which are less equal and less stable.<sup>48</sup> Hence, it follows that implementing Jefferson's model would not necessarily be an improvement over the status quo, at least with respect to getting closer to the Otsukian ideal.

Even if we can assume that unanimous consent could be reached once by the country's founding generation, it would be highly implausible to expect that it could be reached every 19 years.

Having said that, I believe that Otsuka's claim regarding Jefferson's model being an improvement does not mean that the implementation of the model would bring contemporary modern states closer to an ideal, but rather that it would bring about a different kind of improvement, namely an improvement that makes current modern states "more legitimate" – although, as Otsuka himself acknowledges, not completely legitimate, due to the two objections. The question is thus whether legitimacy is a binary or scalar quality. Putting it in Simmons's words, the question is whether the concept of partial legitimacy is intelligible in the context of consent-based theories of political legitimacy.<sup>49</sup> Consider the following two types of states and assume that each state consists of 100 people. Also assume that both states are very similar to current western democracies, i.e. that most people enjoy relatively satisfactory material welfare and that the regime is

democratic and stable. In state A, there has never been a re-enactment process. Thus, none of state A's citizens have given their consent to being governed by it. In state B, on the other hand, 50 people have consented to the state's authority while the other 50 have not. Is state B "more legitimate" than state A?

An intuitive answer would be: "Yes, more people gave their consent, so state B is more legitimate." However, under scrutiny, this intuitive answer becomes questionable. The most salient principle underpinning consent-based theories is that the legitimacy of political authority should be founded upon the consent of each and every individual. As Locke argued: "nothing but the consent of the individual can make anything to be the act of the whole."<sup>50</sup> Without the overarching consent of all the people who are governed by a certain political entity, it is not permissible for such an entity to force someone to obey its laws. According to such a strict rationale, the aggregation of individuals who have consented should not make any difference; if the state infringes the right of one, then it is already illegitimate, and anarchy should be preferred over it, at least when focusing solely on the legitimacy of the state.<sup>51</sup> Under such strict view, legitimacy is a binary concept and thus the meaning of the fact that aggregation does not matter is that both states are equally illegitimate. Hence, the Jeffersonian model cannot be considered an improvement over the status quo.<sup>52</sup>

One could respond that this is a counter-intuitive view of rights, and that surely state B is more legitimate because its existence leads to fewer infringements of rights. Such a position would turn Lockean consent-based views of political legitimacy into "utilitarianism of rights" consent-based views. A utilitarian of rights would claim that if we believe that all people have a right not to be governed by a political authority without their consent, then we need to strive for an institutional design that *maximises the realisation of this right and minimises the number of infringements*.<sup>53</sup> Thus, if the best way to minimise the violation of right X in society is to actually infringe the rights of a small group within that society, then infringing the rights of the small group is justified. The best way to illustrate this point is to think about a case in which murdering one person would prevent the murder of five others. In such a scenario, according to the utilitarian of rights, killing the one is justifi-

fied. Therefore, following such logic, Jefferson's mechanism is justifiable because even though it necessarily infringes both generation Y's right and the right of those who do not consent to be obliged by the majority vote to not be illegitimately governed, it is the institutional mechanism that minimises the violation of such.

The mere fact of conducting a re-enactment process every 19 years does not and cannot guarantee that the society would become more egalitarian, pluralistic, or that it would have any effect on international relations.

This response partially fails, because it does not take into account the possibility of anarchy. If there is no institutional design that ensures that all people are able to express their consent to the political authority that governs them, the design that will maximise the realisation of the right to be legitimately governed and that would minimise its violation, is no government at all. Thus a coherent utilitarianism of rights view would lead to the conclusion that anarchy is the best plausible solution – and not the Jeffersonian state. However, this response only partially fails. Although it is not the maximal improvement at hand, the Jeffersonian model is still an improvement over the status quo.

To recap, I presented two different views about the right to not be governed without consent. The first is a strict view that sees a state as illegitimate if it violates even one individual's right to be legitimately governed. According to such a view, both state A and state B are equally illegitimate, since the aggregation of people whose rights are not infringed does not normatively matter. Therefore both states should either find a mechanism to ensure the consent of all people under their authority; or open a "window of anarchy" for the people who refuse to give their consent; or not exist at all. The second outlook, a utilitarianism of rights view, also leads to the conclusion that anarchy would be better than implementing Jefferson's model (in terms of consent-based legitimacy), but it does consider the Jeffersonian model an improvement.<sup>54</sup>

## Conclusion

I have argued that the underlying normative motivation of Jefferson's account is to legitimise all laws using the consent of all living citizens. I have established that

regarding real-world modern states, the original account of Jefferson fails to ensure that aspiration for two specific groups of people. I have also explored the question of whether a Jeffersonian state would be more legitimate than contemporary states, and argued that it would not be. Thus, a Jeffersonian state might be compelling, but not for reasons of legitimacy grounded in consent. The practical implications of such a normative analysis are of significance, since one of the underlying motivations of the intergenerational debates regarding perpetual constitutions is exactly the motivation that drove Jefferson to propose his model: the fact that the living are being ruled by the dead without their consent. Hence, if one holds a consent-based view of political legitimacy, and one does not have other reasons to pursue periodic constitutional re-enactments, then ideas such as Jefferson's should be off the table, and the intergenerational debate should focus on other solutions or on different theories of legitimacy.<sup>55</sup>

#### Notes

1 I am grateful to Michael Otsuka, Matt Hitchens, Chris Otero and Yonatan Levi and the jurors of the Intergenerational Justice Prize 2015/2016 for reviewing this paper and providing me with valuable comments.

2 I use the terms "laws" and "constitutions" interchangeably throughout the paper. By both terms I mean the set of political principles whereby a state is governed, e.g. the design of political institutions, the separation of powers, the conventions underpinning law making, the protection of human rights, etc. For the purpose of this paper, I do not make a distinction between written constitutions and constitutional statutes (basic laws).

3 Jefferson 1984: 959-963.

4 Paine 2011: 74.

5 According to Jefferson's (1984) calculation, 19 years was the time needed to pass for a generation's majority to die. Otsuka (2003) amended this number to 20 years, according to current life expectancy.

6 Muniz-Fraticelli 2009: 380-382.

7 I wish to emphasise that there are other views concerning the basis of legitimacy of political authorities. If one does not accept consent-based theories to begin with, one should not be concerned with my argument or with the Jeffersonian model.

8 My argument is irrelevant to the question of whether Jefferson's model, as described

by him, is practical or not. This question has been discussed both by Otsuka and by Muniz-Fraticelli. While Otsuka argued that Jefferson's mechanism could be practically implemented without colossal costs, Muniz-Fraticelli claimed that such a mechanism would result in economic and social instability, which makes Jefferson's proposal undesirable. My argument is different: I contend that Jefferson's mechanism fails to fulfil its own normative aspirations. In order to fulfil them, as I show later on, Jefferson would be required to make amendments to his model; and these changes, in turn, make the mechanism both impractical and undesirable. Thus, I do not discuss whether Jefferson's mechanism is practical in its original form, since I argue it is a normatively flawed mechanism regardless of its practicality. For the discussion regarding the practicality of the original model see Otsuka 2003: 139-141; Muniz-Fraticelli 2009: 386-391.

9 Otsuka 2003: 90.

10 Otsuka 2003: 147.

11 For a detailed review of different kinds of consent, see Simmons 1979: 75-100.

12 Locke 1988: 347-349; Simmons 1979: 83-84.

13 Otsuka 2003: 91.

14 According to Simmons, Locke also asserts that one cannot give even express consent to be governed by a tyrant or by an arbitrary government. Locke, in Simmons's interpretation, suggests that tacit consent could be given only to states which are established on the basis of some kind of a social contract and which do not violate the law of nature. According to such interpretation, residence, property ownership etc. are mere signs of consent, but are by themselves insufficient to establish it. In contrast, Otsuka argues that for Locke, giving consent to tyranny or arbitrary power is impossible, and therefore does not demonstrate that tacit consent is insufficient for subjection to legitimate political authority. According to Otsuka, tacit consent by residence "is a sufficient condition of subjection to legitimate political authority for as long as one owns land and resides or moves within the governed territory." My focus is not on interpreting Locke's argument, but rather on the possibility of solving the lost generation problem by referring to tacit consent. For this end, interpretational debates are irrelevant. See Otsuka 2003: 90-91 fn. 8; Simmons 1979: 83-95; Locke 1988: 347-349, 355-356.

15 Otsuka 2003: 91-92.

16 In the real world people do not "consent" to a political authority by residing within its borders. There could be a number of reasons for that, such as poverty, oppression, and lack of knowledge about other ways of life or alternative political institutions. In sum, people do not voluntarily choose to live where they do.

17 Otsuka 2003: 105-109; Otsuka 2006: 332.

18 Enoch 2006: 317-318; Otsuka 2003: 109-110, 149.

19 Otsuka 2003: 137.

20 Enoch, 2006: 318-319.

21 Otsuka, 2006: 334.

22 Otsuka is not alone in rejecting the idea of a tacit-consent-based solution under contemporary real world conditions. Jefferson himself rejected such a solution in reply to Madison's suggestion to base the constitution's legitimacy on tacit consent via non-repeal. Madison argued the following: "I can find no relief from such embarrassment but in the received doctrine that a tacit assent may be given to established governments and laws, and that this assent is be inferred from the omission of an express revocation" (see Madison 1904: 440 fn.). In effect, Madison maintains that if the living have the opportunity to repeal laws using a simple majority, then the fact that their elected representatives choose not to repeal a law is a sign of tacit consent of the whole population that the law is legitimate. Thus laws could retain their legitimacy via non-repeal by the living majority, and therefore there is no need to re-enact the constitution. As shown by Otsuka, Jefferson provided two responses to Madison's answer. First, for practical reasons, without a formal process of re-enactment people will find it harder to change or repeal existing laws: it is hard to assemble; people are not involved in politics; personal interests might lead representatives to act against the people's will, and so on. Second, Jefferson makes a substantive comparison between being governed by the dead and being governed by another state. Such comparison has force if we think of the following example. A foreign country declares that its laws apply to the United States. The fact that this foreign country provides American citizens with the opportunity to repeal its laws using majority vote does not eradicate the Americans' view whereby these laws have no authority over them. I do not elaborate on Madison's suggestion any further, since



the focus of this paper is Jefferson's model and not the objections of his adversary. For the full discussion between Jefferson and Madison and for Otsuka's interpretation see Jefferson 1984; Madison 1904; Otsuka 2003: 132-136.

23 I do not argue that Otsuka's consent-based account is flawless. I use it only to press the problematic issues in Jefferson's account. Enoch, Harel and Muniz-Fraticelli all highlighted problems with Otsuka's account and raised objections to it which are beyond the scope of this paper. For the discussion regarding Otsuka's consent-based account see Enoch 2006; Harel 2006; Muniz-Fraticelli 2009: 391-395; Otsuka 2006: 330-336.

24 One might argue that there is an action which is performed only by the lost generation and from which we can infer tacit consent. If we can indeed infer tacit consent from such an action in a non-ideal world, then it could serve as a solution for the lost generation problem. However, since the lost generation consists of a cross section of the population, I doubt such an action exists.

25 Muniz-Fraticelli 2009: 391-392; Simmons 1979: 80.

26 Muniz-Fraticelli 2009: 391-392.

27 Muniz-Fraticelli 2009: 392.

28 Such a position regarding political legitimacy has been embraced by many, most famously by Rawls in his "public reason" argument. Some, like Muniz-Fraticelli and Enoch, claimed that in hypothetical consent accounts, consent does not have much of a normative force, and that it is not what really matters for legitimacy, but rather the objective conditions in which the consent hypothetically should be given. Therefore, they argue, the objective conditions these theories argue for (e.g. the conditions that make it reasonable to consent to political authority) should be at the heart of such theories, not the consent itself. Thus one could argue that hypothetical consent-based arguments in general cannot serve consent theorists like Jefferson. Although one should bear such possibility in mind, the debate about the validity of consent theories in general and of hypothetical consent theories in particular is beyond the scope of this paper. My narrow claim is that even if hypothetical consent views were viable, they would not be able to justify implementing Jefferson's mechanism. For the full discussion see Enoch 2006: 322; Enoch 2015: 126-130; Muniz-Fraticelli 2009: 392-395; Rawls 2005: 48-54.

29 Muniz-Fraticelli 2009: 386-391.

30 Otsuka 2003: 140-141.

31 Both the UK and Israel are countries without written constitutions. Rather, their political systems are framed by constitutional statutes which have the same legal status. That is of no significance to the point I am trying to make; namely that the fact their basic laws are easily alterable – requiring nothing more than a simple majority vote in Parliament – has not led to a state of instability.

32 Otsuka 2003: 140.

33 Albeit relatively negligible: four years of lost generation according to consent-based theories are still four years of unjustified coercion.

34 Otsuka 2006: 333.

35 According to Otsuka, even though he believes that the right not to be governed without consent is not absolute, he does clearly state that in order to override such a right, the circumstances need to be catastrophic. Therefore Otsuka could argue that even in the four-year version of the Jeffersonian model, the probable instability that would emerge is insufficient to reject Jefferson's model, assuming it legitimises the state's authority for all. However, as mentioned, even the four-year version of the model still suffers from the "lost generation" objection, and thus Otsuka would reject it on that basis alone. I have elaborated on the possibility of shortening the length of the intervals, in order to press the issue that even if shorter versions seem intuitively more plausible, they suffer from practical deficiencies that render them undesirable, and thus the response fails. For Otsuka's statement regarding the non-absoluteness of the right to be legitimately governed, see Otsuka 2006: 333.

36 Green 1988: 161; Simmons 1979: 57.

37 For Christiano's and Estlund's full accounts of democratic legitimate authority, see Estlund 2008; Christiano 2008.

38 Such a response could also be applied to the lost generation objection. However, I have decided to place it here because it is more directly related to the "majority consent" objection. That is because its focus is the attempt to explain why Jefferson has not taken into account the legitimacy of majority vote as the normative watershed of political legitimacy. In any case, this response fails with regard to both objections in the same way.

39 Jefferson 1984: 959.

40 Which after the establishment of the

state of Israel have become to be what is known today as the Israeli Defense Forces (IDF).

41 The fact that we cannot infer consent from those who do not vote does not mean that the non-voters necessarily do not give their consent. It is an epistemic problem. Within the scope of logically plausible possibilities, it is tenable to claim that all of the non-voters do consent to be governed by the state. However, it is extremely unlikely. Furthermore, tacit-consent-based solutions purport to solve this exact epistemic problem by providing a mechanism to infer consent. If we cannot infer consent from some, then the solution fails. When we do not know whether someone gave their consent, we are obliged to get this information before governing them illegitimately.

42 Simmons 1979: 73.

43 Simmons 1979: 73.

44 If one succeeds in arguing otherwise, i.e. that unanimous consent is likely to be achieved, then it might be a good response to the majority consent objection, but recall that the "lost generation" objection still holds.

45 Otsuka 2003: 147.

46 I personally cannot imagine how a modern state could function where a whole generation is allowed not to follow the state's rules for a significant amount of time, up to 19 years, in addition to those who did not give their consent to the regime (especially when those who do not give their consent will sometimes have an interest to act against the state and the citizens who support it). If there is a plausible way to establish a state in which so many people do not follow the laws (without the state becoming an anarchy), then it is a plausible way to vindicate Jefferson's proposal.

47 Otsuka 2003: 146.

48 Muniz-Fraticelli 2009: 389-91.

49 Simmons 1979: 73 (footnote m).

50 Locke 1988: 98.

51 Nozick 1974: 26-33.

52 Although equally illegitimate, the Jeffersonian model should be implemented even under this strict framework under certain assumptions, but not for reasons of legitimacy. Imagine a scenario where you know that P1 and P2 are persons who are going to be murdered. One can only save P1. P2 will be murdered either way. In such a case, most would agree that one has an obligation to save P1, even though P2's rights would still be violated. Similarly, one can argue that implementing the Jeffersonian model,

or in other words choosing state B, is just like saving P1. That is if one is assuming the following: (1) Anarchy is not an option. (2) There is no better mechanism than Jefferson's that can ensure the state's consent-based legitimacy, and thus necessarily there will be people whose right to be legitimately governed will be infringed (i.e. the non-voters and generation Y). (3) Otsuka is right and Muniz-Fraticelli is wrong, and thus the Jeffersonian model would allow for stability. Under such assumptions, we have an obligation to respect the rights of those who voted in favour of the state's authority from generations X and Z, as we have the right to save P1, since generation Y's and the non-voters' rights will be infringed either way. In such a case, the Jeffersonian state would still be illegitimate in a strict Lockean sense, but it should be implemented in modern states because it would prevent the unnecessary infringement of the rights of generations X and Z.

53 Nozick 1974: 29-30.

54 Otsuka's left libertarianism rejects utilitarianism of rights, so I do not believe he would support such justification for implementing Jefferson's model.

55 There are, as I show in footnote 52, other reasons to implement the Jeffersonian model. Thus implementing it is still relevant, but not for the reason of legitimising modern states.

## References

Christiano, Thomas (2008): *The Constitution of Equality*. Oxford: Oxford University Press.

Enoch, David (2006): Critical Comments regarding Otsuka's (Version of Locke's) Political Voluntarism. In: Iyyun: The Jerusalem Philosophical Quarterly, vol. 55 (2/2006), 317-324.

Enoch, David (2015): *Against Public Reason*. [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2601187](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2601187). Viewed 15 October 2016.

Estlund, M. David (2008): *Democratic Authority: A Philosophical Framework*. Princeton, NJ: Princeton University Press.

Green, Leslie (1988): *The Authority of the State*. Oxford: Clarendon Press.

Harel, Alon (2006): In Defense of an Involuntary Polity: Comments on Otsuka's Vision of the Consensual Polity. In: Iyyun: The Jerusalem Philosophical Quarterly, vol. 55 (2/2006), 310-316.

Jefferson, Thomas (1984): Letter to James Madison, 6 September 1789. In: Peterson, Merrill D. (ed.): *Thomas Jefferson. Writings*. New York, NY: Library of America, 959-964.

Locke, John (1988). *Two Treatises of Government*. Student Edition. Cambridge: Cambridge University Press (first published in 1690).

Madison, James (1904): Letter to Thomas Jefferson, 4 February 1790. In: Hunt, Gailard (ed.): *The Writings of James Madison*. New York, NY: G. P. Putnam's Sons, 438-439.

Muniz-Fraticelli, Victor M. (2009): The Problem of a Perpetual Constitution. In: Gosseries, Axel / Meyer, Lukas H. (eds.): *Intergenerational Justice*. Oxford: Oxford University Press, 377-411.

Nozick, Robert (1974): *Anarchy, State, and Utopia*. New York, NY: Basic Books.

Otsuka, Michael (2003): *Libertarianism without Inequality*. Oxford: Clarendon.

Otsuka, Michael (2006): Replies. In: Iyyun: The Jerusalem Philosophical Quarterly, vol. 55 (2/2006), 325-336.

Paine, Thomas (2011): *Rights of Man*. Peterborough: Broadview Press (first published in 1791).

Rawls, John (2005): *Political Liberalism*. New York, NY: Columbia University Press.

Simmons, A. John (1979): *Moral Principles and Political Obligations*. Princeton, NJ: Princeton University Press.



Shai Agmon is currently working at Molad, Israel's premier progressive think tank. He is also completing his last year of studies for a LLB degree at Tel Aviv University. He

has a MSc in Philosophy and Public Policy from the London School of Economics (LSE), and a BA (Hons) from Tel Aviv University. His research interests are political philosophy, jurisprudence, ethics and the philosophical concerns underpinning economics and public policy.

## Contact details:

Shai Agmon  
Molad – The Center for the Renewal of Israeli Democracy  
Lloyd George 6  
9311006 Jerusalem  
Israel  
E-Mail: [shaiagmon@gmail.com](mailto:shaiagmon@gmail.com)