

# RESPONSE

## POLITICAL PARALYSIS AND TIMING RULES

In response to Daniel Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015).

FRANK FAGAN\*

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### INTRODUCTION

In their Article *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, Daniel Herz-Roiphe and David Singh Grewal develop an innovative framework for addressing political paralysis with sunrise constitutional amendments. Their work proceeds from the timing rules literature and an advanced theory of democratic-constitutionalism. Through the use of delay, the authors contend that sunrise amendments can overcome short-term vested interests through the conventional channels of Article V “thus enabling a fuller realization of democracy *within* the existing constitutional frame.”<sup>1</sup> Yet sunrise amendments reduce political accountability because lawmakers and their constituents do not live under the rules that they establish. Herz-Roiphe and Grewal seek a way out and propose that current lawmakers

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<sup>1</sup> Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1980 (2015).

“can only legislate legitimately if they understand themselves as trustees for their successors.”<sup>2</sup> Thus, sunrise amendments that enhance the ability of future generations to govern themselves democratically are normatively preferred. Otherwise, they are rejected. The Article reviews six sunrise provisions in the Constitution and finds that all but one improved the democratic character of the constitutional order. Given this mixed record, the authors offer a qualified endorsement.<sup>3</sup>

This Essay adds to the analysis of Herz-Roiphe and Grewal by recasting their framework at a greater level of generalization using standard bargaining theory. From this viewpoint, sunrise amendments can be compared to another type of timing rule that is used to overcome political paralysis, i.e. stabilization rules. The comparative framework suggests that sunrise amendments are more likely to overcome paralysis when current citizens have little interest in a future outcome or remain uncertain of its character. Instead, when interests in future outcomes are aligned but views on how to achieve those interests diverge, stabilization rules are more likely to generate solutions. This analytical extension is used to briefly reexamine several of the examples raised by Herz-Roiphe and Grewal, including the federal budget and climate change.

## I SUNRISES

One of the basic tenets of bargaining theory holds that parties are more likely to reach agreements as they increase the number of options for mutual gain.<sup>4</sup> Successful negotiators are able to clearly see the tacit needs of each party and suggest creative bargains that foster agreement. For example, parties to a tort settlement that hold divergent positions on damages may nevertheless reach agreement if the injured agrees to keep negotiation details private or if the injurer agrees to offer an apology. Lawmaking, too, routinely proceeds with complex bargaining. Lawmakers engage in logrolling, develop omnibus legislation, set strategic deadlines, and use other techniques to reach agreement.<sup>5</sup> Successful lawmakers are able to clearly see the needs of their colleagues and suggest creative bargains to increase their joint productivity as lawmakers. All of this leads

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<sup>2</sup> *Id.* at 1981.

<sup>3</sup> *Id.* at 1981–82.

<sup>4</sup> For a comprehensive example of bargaining theory applied to constitution-making, see ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000).

<sup>5</sup> See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). On strategic use of deadlines, see Daniel A. Farber, *Racing the Clock: Deadlines, Conflict, and Negotiation in Lawmaking*, in *THE TIMING OF LAWMAKING* (Saul Levmore & Frank Fagan eds., forthcoming 2016); David Kamin, *Legislating Crisis*, in *THE TIMING OF LAWMAKING*, *supra*.

to increased likelihood of agreement and passage of law.

### A. *Imposition and Entrenchment*

Sunrise amendments increase the likelihood of surmounting Article V by leveraging time. Lawmakers who may not agree to amendments that take effect today may instead agree to amendments that take effect tomorrow. Herz-Roiphe and Grewal generally set the boundary between a current and future generation.<sup>6</sup> Generational delay can provide a definitive bargaining advantage to current lawmakers because their constituents do not experience the full impact of constitutional adjustment. Thus, any immediate effect, pecuniary or otherwise, is expediently side-stepped to facilitate compromise. For example, the authors note that the Constitution likely delayed interference with the international slave trade in order to gain entrance of Georgia and the Carolinas into the Union.<sup>7</sup>

Although sunrise amendments confer definitive bargaining advantages today, they raise several potential drawbacks tomorrow. Consistent with their normative criterion of democratic legitimacy, Herz-Roiphe and Grewal house these drawbacks under the general heading of democracy restriction. Most obviously, sunrise amendments impose legal norms on future generations that have not engaged in the constitutional deliberations compelled by Article V. Any refinement of substantive law that would be based upon their own input is therefore withheld from them. In addition, their inherited legal norms are embedded at the constitutional level and difficult to remove.<sup>8</sup>

Despite potential imposition and entrenchment drawbacks, sunrise amendments may still enhance democracy if they meet certain requirements. Significantly, future generations plagued by political paralysis may otherwise be unable to reach democracy-enhancing agreements without the earlier help of their predecessors. Thus, imposition and entrenchment can have positive democratic effects.<sup>9</sup>

Herz-Roiphe and Grewal specifically suggest that law can enhance democracy across three broad categories of agreement: constitutive, such as agreements to ratify a constitution; representative, such as agreements that

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<sup>6</sup> Herz-Roiphe & Grewal, *supra* note 1, at 1991–92.

<sup>7</sup> *Id.* at 2020–21.

<sup>8</sup> *See id.* at 1985 (noting that if a sunrise enactment can be repealed effortlessly, then “sunrise lawmaking is a pointless—or at least merely hortatory—endeavor”).

<sup>9</sup> In many contexts, identification of democracy-enhancing law may prove especially challenging for a current generation. Saul Levmore notes that durability of constitutional law appears to derive from moral intuitions and education, and that any reversion of an amendment therefore may take many years since intuitions and knowledge which lead to an understanding that the amendment was ill-advised will take many years to develop. Saul Levmore, *Interest Groups and the Durability of Law*, in *THE TIMING OF LAWMAKING*, *supra* note 5.

set the number of senators for each state; and administrative, such as agreements that govern the day-to-day relationships of the governed. Sunrise amendments enhance the democratic character of constitutive and representative agreements if they “push the relevant form of constitutional decision-making closer to a ‘one person, one vote’ model.”<sup>10</sup> They enhance the democratic character of administrative agreements if they “increase the accountability of the constituted government to the sovereign people.”<sup>11</sup>

### B. *Guardianship and Long-term Interests*

Apart from potential imposition and entrenchment drawbacks, the authors suggest that a normative theory for evaluating sunrise amendments must address exploitation because current generations can use sunrise amendments to engage in irresponsible consumption at a future generation’s expense.<sup>12</sup> For example, current generations may believe that a balanced budget is democracy-enhancing. They may believe that it pushes decision-making closer to the “one person, one vote” model by dampening special interest group activity, or that it enhances democratic accountability by increasing the likelihood that new spending is met with new budget cuts. Suppose, however, that political paralysis and short-termism forestalls immediate passage so that current lawmakers and their constituents can only agree to a sunrise balanced budget effective several generations later. The authors take issue with this lawmaking strategy because “[t]he generation that produces such an amendment does not simply ‘enable’ its descendants to live within their means; it also takes advantage of the frugality it imposes on the future in order to live an extravagant lifestyle in the present.”<sup>13</sup> Put differently, although sunrise balanced budgets may confer a definitive benefit on a future generation tomorrow, they violate moral intuitions of intergenerational equity today. Herz-Roiphe and Grewal view sunrise climate change policies in the same way.<sup>14</sup> It may be said generally that offloading costs onto a future generation imposes moral culpability on the current generation and violates a deep theory of democratic-constitutionalism rooted in Kantian principles of

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<sup>10</sup> Herz-Roiphe & Grewal, *supra* note 1, at 2008–10 (noting that with respect to constitutive agreements “majoritarian decision making in a plebiscitary . . . fashion—as occurred in the American ratification experience . . . rests on the ideal of ‘one person, one vote’ and any reform that moves the constitutional order in that direction thus proves ‘democracy enhancing’”); *id.* at 2010 (noting that with respect to representative agreements “we include as democracy-enhancing reforms . . . those that democratize the government in its operation”).

<sup>11</sup> *Id.* at 2010–11.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2012.

<sup>14</sup> *Id.*

guardianship.<sup>15</sup>

Before turning to stabilization rules, a final analytical point worth mentioning is the alignment of long-term interests within the current generation. In the context of sunrise amendments, Herz-Roiphe and Grewal generally present short-term interests as misaligned. For example, they describe negotiations surrounding the Slave Importation Clause as consisting of groups of states representing opposing views on the immediate abolition of slavery.<sup>16</sup> Short-term interests were overcome with a sunrise provision. With respect to the long-term interests of the pro-slavery group, two possibilities are raised. Either it cared little about its long-term interests in continuing the pernicious slave trade, or it agreed enough with the long-term moral intuitions of the anti-slavery group to open the door for discontinuance. Given agreement to the provision, it follows that either its long-term interests were non-existent or partially aligned.

All of this suggests that sunrise amendments are to be normatively preferred when (1) short-term interests are misaligned (2) sunrise amendments are democracy-enhancing, and (3) long-term interests are non-existent or partially aligned. With difficult reforms that challenge a current generation's moral intuitions, however, a different type of timing rule can prove useful.<sup>17</sup>

## II

### STABILIZATION

Sunrise amendments use prescriptive delay, which is a type of timing rule. Lawmakers can use timing rules for a number of reasons including: to increase the likelihood of bill passage,<sup>18</sup> to leverage a greater amount of information for lawmaking,<sup>19</sup> to experiment with different laws,<sup>20</sup> to change

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<sup>15</sup> *See id.* at 2007–09.

<sup>16</sup> *Id.* at 2021.

<sup>17</sup> Another possibility is to change the moral intuitions of the current generation. The authors cite Guido Tabellini and Alberto Alesina for the proposition that delay is one way to achieve balanced budgets. *Id.* at 2012 n.172 (citing Guido Tabellini & Alberto Alesina, *Voting on the Budget Deficit*, 80 AM. ECON. REV. 37 (1990), reprinted in 2 MONETARY AND FISCAL POLICY: POLITICS 157, 171 (Torsten Persson & Guido Tabellini eds., 1994)). Tabellini and Alesina make clear that future balanced budgets may be a second-best solution in a world where present-day frugality remains politically controversial. Tabellini & Alesina, *supra*, at 171. By changing moral intuitions of what constitutes exploitation of a future generation, a sunrise balanced budget becomes palatable. Of course this raises a number of complexities including the introduction of moral hazard as applied to other behaviors that impact future generations.

<sup>18</sup> Frank Fagan & Firat Bilgel, *Sunsets and Federal Lawmaking: Evidence from the 110th Congress*, 41 INT'L REV. L. & ECON. 1 (2015) (providing empirical evidence that inclusion of a sunset clause increases passage probability).

<sup>19</sup> Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 266 (2007) (explaining that temporary timing rules permit lawmakers to use piecemeal decision making, which facilitates the integration of new information in the policymaking process).

social norms,<sup>21</sup> to nudge citizens from path-dependent compliance outcomes,<sup>22</sup> and, as highlighted by Herz-Roiphe and Grewal, to facilitate political compromise. Another type of timing rule able to facilitate compromise is the stabilization rule.<sup>23</sup> Stabilization rules facilitate agreements differently from sunrise amendments in one important respect: Instead of expanding the space for agreement by leveraging time, they do so by creating multiple versions of the same policy that apply conditionally.<sup>24</sup>

### A. *Tensions Within Guardianship*

Suppose that climatologists desire a carbon tax and that skeptics oppose it. Setting aside who has the better evidence, climatologists and skeptics both justify their positions on the basis of scientific claims. To facilitate compromise, lawmakers can counterintuitively ignore the evidence altogether and instead create a stabilization rule.<sup>25</sup> That rule implements a tax only when a conditional event occurs, say, when average annual temperature is increased by 1.2 degrees over pre-industrial levels or some other threshold. Otherwise, the tax is not placed into effect. By tying a policy to conditional events, lawmakers expand the bargaining set between groups. Climatologists and skeptics each receive their version of the carbon tax policy, but only if their scientific beliefs prove to be correct.

A defining characteristic of a suitable legal environment for stabilization rules therefore is that long-term interests are aligned, but parties nevertheless disagree on the policy to achieve those interests. There may exist countervailing evidence that can be leveraged by special interest groups to stonewall agreement as seen with climate change policy. With stabilization rules, lawmakers can shift the debate from whether or not there should be a carbon tax, which is largely based on historical evidence

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<sup>20</sup> SOFIA RANCHORDAS, *CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE* *passim* (2014) (providing a comparative perspective on experimental lawmaking).

<sup>21</sup> See Frank Fagan, *After the Sunset: The Residual Effect of Temporary Legislation*, 36 EUR. J. L. & ECON. 209, 210 (2013) (theorizing that lawmakers can pass difficult reforms temporarily to leverage the expressive effect of law in order to increase the likelihood of their permanent passage at some point in the future).

<sup>22</sup> Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 292–94 (2014) (explaining that temporary law can be used to nudge actors from suboptimal equilibria created by path dependence).

<sup>23</sup> Frank Fagan, *Legal Cycles and Stabilization Rules*, in *THE TIMING OF LAWMAKING*, *supra* note 5.

<sup>24</sup> Cf. Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 560 (2007) (discussing conditional timing rules that make laws effective only if a particular state of the world obtains where those states are provided for by the legislation *ex ante*).

<sup>25</sup> Fagan, *supra* note 23.

and divergent predictive models, to “how to best design a law that could lead to a tax if fluctuations in the climate continue to trend upward.”<sup>26</sup> Lawmakers overcome disagreement, therefore, by enacting multiple versions of policy and by specifying which version governs when various states of the world obtain.<sup>27</sup> This form of lawmaking recognizes that a current generation may be willing to reduce consumption for a future one, so long as it is certain that its reduction will achieve its desired effect. By expanding the space for sacrifice, stabilization rules can satisfy a deep theory of democratic-constitutionalism based upon Kantian principles of guardianship.

Similarly, stabilization rules can help facilitate agreement in federal budget law by working from the assumption that a current generation does, in fact, wish to leave a viable financial order to its offspring. Certainly, there may exist parties to sunrise budget agreements who are selfish, as Herz-Roiphe and Grewal acknowledge, yet an immediate agreement to reduce consumption may reach an impasse because parties refuse to reduce unless their counterparties do the same and by amounts that they deem equitable.<sup>28</sup> To the extent that timing rules can inject sacrificial equity into policies for long-term financial health, they expand the space for reaching agreement.

Consider briefly the current method of controlling public spending through debt limits. Even if a large number of legislators and their constituents care about the fiscal health of a future generation, they often fail to reach an agreement to limit spending.<sup>29</sup> To the extent that negotiation failure results from an appearance of unfairness, stabilization rules can help parties reach an agreement. For example, spending limits over a budget period can be legislatively tied to the public revenue estimate.<sup>30</sup> Tying tempers the appearance of unfairness which results from agreeing to spending limits only on occasion. Parties who would otherwise agree to limit spending in 2016, but do not because they fear spending will not be limited in 2017, receive additional assurance of consistency and equity over time.<sup>31</sup> Switzerland implemented a version of this rule and reduced its debt-

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<sup>26</sup> *Id.*

<sup>27</sup> For a general discussion, see *id.*

<sup>28</sup> Cf. Alan J. Auerbach, *Budget Windows, Sunsets, and Fiscal Control*, 90 J. PUB. ECON. 87, 89 (2006) (developing model that demonstrates how both parties to budget negotiations fully care about their heirs, but refuse to sacrifice consumption because of fear that a competitor will capture sacrificed resources).

<sup>29</sup> *Id.*

<sup>30</sup> See Fagan, *supra* note 23 (discussing how debt limit negotiations can be eliminated by tying the limit to revenue estimates that are adjusted to upward and downward trends in the economy).

<sup>31</sup> The circumvention of PAYGO, a rule designed to decrease budget deficits, was largely achieved because it only tied revenues to spending over a budget window of ten years and not to

to-GDP ratio from 50.7% in 2004 to 34.9% in 2014 despite weathering the Great Recession with increased public spending.<sup>32</sup>

Instead of producing balanced budgets each year, budgetary stabilization rules tend to produce balanced budgets over the course of a business cycle.<sup>33</sup> They expand the space for reaching agreement by providing parties with additional assurance that any reduction in consumption will be shared. By enabling broader modes of sacrifice for future generations, they can satisfy the normative values of democratic-constitutionalism put forward by Herz-Roiphe and Grewal, specifically when parties fear unequal treatment throughout their own lifetimes.

### B. *The Challenge of Representative Agreements*

The opening examples raised in *Make Me Democratic* all implicate competing short-term interests. Congressional representation of the District of Columbia favors Democrats, equal representation in the Senate reduces the power of small states, and elimination of the Electoral College reduces the power of swing states.<sup>34</sup> While the normative framework of Herz-Roiphe and Grewal suggests that moving each of these examples closer to a representative model of “one person, one vote” enhances democracy,<sup>35</sup> bargaining theory suggests that implementing any reform will be difficult. The authors point out that increased lengths of delay marginally reduce the opposition of the current generation.<sup>36</sup> Still, “many legislators may believe . . . that they can reliably identify how particular policies will affect their constituents’ descendants in the distant future . . . [and] some lawmakers may be more concerned with a [policy’s] expressive meaning.”<sup>37</sup>

These observations suggest that lawmakers and their constituents ascribe a present value to sunrise policies that is separate and distinct from any short-term interest that they have in perpetuating the status quo. Their

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ongoing economic activity. See George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 228 (2009).

<sup>32</sup> Fagan, *supra* note 23.

<sup>33</sup> Cf. Frank Bodmer, *The Swiss Debt Brake: How It Works and What Can Go Wrong*, 142 SCHWEIZERISCHE ZEITUNG FÜR VOLKWIRTSCHAFT UND STATISTIK 309, 313–16 (2006) (describing how the Swiss “debt brake,” a type of budgetary stabilization rule, aims to balance budgets over a business cycle).

<sup>34</sup> Herz-Roiphe & Grewal, *supra* note 1, at 1987–88.

<sup>35</sup> *Id.* at 2010.

<sup>36</sup> “[A] hypothetical New Hampshire legislator would have *far less* difficulty explaining to his constituents why he voted to diminish the political power of future generations of Granite Staters through a sunrise amendment abolishing the Electoral College than he would justifying a vote to eliminate the Electoral College today.” *Id.* at 1989 (emphasis added).

<sup>37</sup> *Id.* at 1988–89. The expressive effect in this example might consist of “what eliminating the Electoral College communicates about ‘New Hampshire’ in the abstract [and not] how it affects the well-being of any flesh-and-blood Granite Staters, now or in the future.” *Id.* at 89.

*future-derived* component of present value consists of an undiscounted expressive value, which provides them with immediate abstract benefits like pride and distinct identity from supporting a policy. To this is added a discounted legacy value, which consists of future benefits like knowing that one has supported the best policies for her progeny.<sup>38</sup> While sunrise amendments side-step short-term interests in perpetuating a current policy, they must contend with short-term interests derived from future policy. This means that as expressive benefits and interests in one's progeny approach zero, the passage of sunrise amendments is more likely.

This presents an inherent tension within sunrise amendments that address representation because those amendments explicitly ask a current generation to care about a future one. Herz-Roiphe and Grewal seem to address this tension by stressing that sunrise amendments can place current generations under veils of ignorance and foster uncertainty in determining how a policy will affect one's progeny specifically.<sup>39</sup> Thus, representative sunrise agreements are more likely to appeal to a current generation when the future is more difficult to determine.<sup>40</sup> Of the three examples, reform of Senate representation is perhaps the least likely to generate support. The authors note that a majority of older Americans reside in the state of their birth and that they can "reliably predict that [their] descendants will continue to be benefited by [the status quo]."<sup>41</sup> By contrast, Congressional representation of the District of Columbia is more likely to generate support to the extent that the policies of Democrats shift over time. As party policy becomes more uncertain, predicting how that policy will affect progeny becomes more difficult and a representative sunrise agreement becomes more palatable.

It should be clear that stabilization rules are poorly suited for representative agreements. They rely on recurring patterns in the legal environment such as misunderstood fluctuations in the climate, which can drive opposing scientific views, or recurring business cycles, which can drive appearances of unequal treatment. They presuppose that long-term interests are aligned, but that parties disagree on how to achieve those

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<sup>38</sup> For an expanded discussion of how legislators evaluate timing rules when explicitly concerned with legacies, see FRANK FAGAN, *LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION* 35 (2013). For a broad consideration of contemporary entrenchment strategies, see Daryl Levinson and Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L. J.* 326 (2015).

<sup>39</sup> Herz-Roiphe & Grewal, *supra* note 1, at 1990 ("[T]he vagaries of political realignments and population shifts make it difficult to pin down the future effects of these changes. . . . [Therefore it] might . . . be possible for reformers to obtain the broad-based support required to alter the constitutional specifications for elections through sunrise lawmaking.").

<sup>40</sup> See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

<sup>41</sup> Herz-Roiphe & Grewal, *supra* note 1, at 1989 n.63.

interests, or that parties fear unequal treatment today when they set policies for guarding tomorrow's citizens. By expanding opportunities for mutual gain, stabilization rules foster reaching those difficult agreements that make exploitation appear so prevalent. In contrast, sunrise amendments can overcome short-term interests in perpetuating the status quo when the expressive effect of a future policy and the interests in one's progeny approach zero or when the future value of a policy is more difficult to determine. One would hope that the expressive effect of maintaining the international slave trade was so costly that its sunrise met with little resistance. Applied to representative agreements, sunrise amendments must leverage uncertainty.

### CONCLUSION

Herz-Roiphe and Grewal have made an important contribution to the timing rules literature by providing a normative theory for evaluating sunrise constitutional amendments. Their innovative combination of timing rules and normative democratic theory has created additional space for greater operation of Article V. By recasting their work through the lens of bargaining theory, this Essay provides a comparative perspective on the ability of two types of timing rules to solve political paralysis. Stabilization rules may provide solutions to controversial issues like climate change and budget deficits because their architecture fosters agreement between parties that share a long-term vision but no short-term trust. In contrast, sunrise amendments can provide solutions to issues where short-term interests widely diverge but their perpetuation matters little to proponents beyond their lifetimes or is otherwise expressively costly, perhaps as seen in the Slavery Importation Clause. In addition, sunrise amendments can provide solutions when the value of the future is less certain, perhaps as will be seen in constitutional agreements pertaining to democratic representation.