

Pre-commitments, Disagreement and the Limits of Constitutionalism

Carl Lebeck

1	Introduction	134
2	Reasons for Pre-commitments	134
2.1	Collective Auto-paternalism	134
2.2	Constitutionally Unrestrained Government is Self-defeating	136
2.3	Pre-commitments are Necessary to Avoid Cycles of Decision-making in Courts as well as in Political Branches of Government	137
2.4	If a People Want to be Able to Govern Itself, it Seems Necessary (as for Persons) to be Able to Create Stable Long-term Commitments to Different Things	139
2.5	Pre-commitments as Contracts	140
2.6	Constitutional Moments and Pre-commitments	140
3	Problems of Pre-commitment Rationales	142
4	What kind of Pre-commitments are Constitutions?	145
5	Protecting Commitments: Third-party Institutions	149
6	Pre-commitments, Disagreement and the Vagueness of Rules	152
7	Conclusions	155

1 Introduction

The idea of understanding various kinds of rules as “pre-commitments” has been relatively common in political and legal theory over the last decades. The basic understanding of it could be that by deciding to do or not do something in the future and attach some kind of incentive to that decision, individuals and groups might be able to avoid undesirable actions. An area where this has been especially common has been in constitutional theory. Are rules of constitutional law pre-commitments? In such case, who has committed himself, and towards what and whom is checking that the commitments are honoured? In this paper I am going to discuss some problematic aspects of the theory of constitutional law as a form of pre-commitment, a theory that is today widespread within legal and constitutional theory. This paper is thus on the borders between legal and political theory and more comparative studies of legal institutions. I seek to argue that it is an approach that has two main problems, the vagueness of constitutional provisions and the problem of making consistent interpretations over time and secondly that the essential commitment is to third-party institutions interpreting these pre-commitments. The first part of the paper is devoted to an extensive discussion of reasons for pre-commitments that also sheds lights on the problematic aspects of the theory.

2 Reasons for Pre-commitments

There is today a wide array of normative cases for constitutional pre-commitments of various kinds that supports various forms of prospectively binding the public powers that are proposed in constitutional and political theory. The most common justifications of constitutional pre-commitments are:

2.1 *Collective Auto-paternalism*

Collective auto-paternalism where constitutional rules are pre-commitments that we take on to in case of averting dangers arising from our own (predictable) judgmental failures due to akratic behaviour.¹

The application of theories of pre-commitment to social theory originated in works of Thomas Schelling² and Jon Elster put them to task in constitutional

¹ Holmes, Stephen *Pre-commitments and the Paradox of Democracy*, in Elster, Jon & Slagstad, Rune (eds.) *Constitutionalism and Democracy*, Cambridge University Press, Cambridge 1988, 195 ff., Elster, Jon *Ulysses and the Sirens*, Cambridge University Press, Cambridge, 1979, p. 65-77, 77-85, 88-103.

² Schelling distinguishes *inter alia* between rules that are enabling, precautionary, reinforcing, disabling, as well as those necessary to impose some kind of self-inflicted punishments in cases of breaks as well as rules for exceptions and for breakdowns of the entire system of pre-commitments. Schelling's conception of such pre-commitments emphasises the similarities between individual and collective pre-commitments in the sense that it assumes a greater degree of interpretation, but also that the scheme of pre-commitments would make it possible to preempt breakdowns and violations of the scheme itself. That might in one sense

theory. The relation between collective rules and rules created at individuals are central in the sense that pre-commitments are either aimed at: restraining future passions, protecting future self-interest, hyperbolic discounting of the future or preventing future changes of preference.³ Auto-paternalism has been a considerable element in theories of pre-commitments which is however not entirely accurate since the kind of pre-commitments that are concerned here are essentially inter- rather than intra-personal.

The problem of weakness as well as self-deception of will is a considerable problem for an individual since it both leads to inconsistent actions and diminishes the possibilities for successful inter-personal co-operation since weak-willed people might be regarded as less reliable than consistent persons and groups. The wish to avoid hyperbolic discounting of the future seems to be a similar interest in the sense that it seeks to create a reason for making decisions so to avoid too large inconsistencies in valuation of things over time. The most common case is of course somebody who overvalues the present and close future and devalues the more distant future too much. The interest in restraining future changes of preferences seems to be a part of the most problematic aspects in relation to collective choices, at least in democratic constitutional orders. That is as a major purpose of democratic institutions is to enable smooth changes of rulers as well as of policies (as it mainly is rulers that are elected in democratic political systems), as compared to more entrenched and authoritarian political systems. In that sense, while it might be rational for individuals to prevent themselves from changing preferences that might be a less advisable strategy for collective choices at least up to a point, since the possibility of revision of political decisions seems to be an important part of democracy.

The reason for wanting to restrain possible changes of preferences besides a wish for consistency is obviously that one believes that one's current choice for some reason is better than what one is supposed to make in the future. The basis for such reasons might vary from being quite good to being ill-advised, which is at least theoretically possible, while on the other hand, that a too great degree of rigidity in preferences might be a problem. By envisaging risks for future

be a rational choice from the perspective of an agent or even of a collective of individuals, but it seems equally clear that it is a conception of such rules that makes the system of constitutional rules (in the case of a society) or personal commitments (in case of an individual) self-containing and in one sense thereby immune towards changes of preferences and similar matters. Schelling's notion of pre-commitment seems not just to be directed against akratic behaviour, irrationality and changes of preferences, but it seems also to have few if any problems – which seems to be a recurrent problem of pre-commitments theories – to find the point in time in which the first decision to be held to be the one that the pre-commitments are to be protected. The problem seems only to be exacerbated in matters of collective choices that in order to delimit self-defeating by the tendency to create decision-cycles. The notion of pre-commitment seems therefore problematic in the sense that it has little to say in terms of which baseline that ought to be adopted. Schelling, Thomas C., *Economics, or the Art of Self-Management*, *Am. Econ. Rev.*, vol. 68, (1978a) p. 290-294. Schelling, Thomas C., *Self-Command in Practice, in Policy, and in a Theory of Rational Choice* *Am. Econ. Rev.* vol. 74, (1984) p. 1-11. Schelling, Thomas C., *Enforcing Rules on Oneself* *J. of L., Econ., & Org.*, vol. 1 (1985) p. 357-374. Thaler, Richard H. & Shefrin H.M., *An Economic Theory of Self-Control*, *J. Pol. Econ.*, vol. 89 (1981) p. 392-406.

³ Elster, Jon *Ulysses Unbound*, Cambridge University Press, Cambridge, 2000, p. 37-47.

aberrant forms of reasoning, such as, weakness of will and similar problems such as self-deception explain why there might be a reason to privilege preferences at a certain point, the notion of pre-commitments however presupposes that individuals as well as collectives ought to be able to make rational *ex ante* assessments of when their information is sufficiently good for making self-binding pre-commitments. The problem is thus the question of at which point in time a decision that can be considered more rational for making lasting choices than others is to be made. On the other hand, is the process of making pre-commitments to a great extent on-going over time, which is partly due to that certain kinds of pre-commitments are side-effects of other kinds of actions and consequences of constitutive rules. When it comes to understanding of collective pre-commitments in terms of constitutions there is in most cases of pre-commitments a mix between pre-commitments and “post-commitments” as post-constitutional legal and political choices that might affect in certain cases the effects of constitutional pre-commitments.

2.2 *Constitutionally Unrestrained Government is Self-defeating*⁴

The view that unrestrained (and ultimately even non-routinised) decision-making is self-defeating is an argument that is essentially taken from rule-utilitarian thinking and that is based on limited knowledge to foresee different kinds of possibly adverse effects of governmental action. On the other hand, constitutions can also be understood as coordinating in the sense that they both coordinate human behaviour but also reduce decision-costs when it comes to make routine decisions where the choices on the other hand could be a matter of creating conventions. However, the idea of pre-commitments is usually defined more strongly than the kind of weak equilibria that arise from conventions. By creating such rules one might avoid the potential self-defeating character of non-rule-bound action due to limits of knowledge. Pre-commitments can be seen as devices in relation to the avoidance of unfettered – and self-defeating action – as artificially created penalties for certain kinds of behaviour that rules it out as a possibility thereby creating a better outcome than would be attained if an agent acted on what was rationally at every point. In that respect one might say that the role of pre-commitments is related to creating a better outcome, however that should not be conflated with actually seeking to maximise outcomes. Certain kinds of outcomes are rather to be avoided as maximising the worst outcome, which might seem reasonable if the prospects for an unmitigated worst outcome would be considered too grim.

The other basis seems to be what could be called self-deception or in its collective counter-part “group-think” or “preference-falsification”⁵ that impairs the capacities for handling knowledge that otherwise would be accessible. By creating constraints, by rules, delegation and induce various forms of deliberation by introducing certain procedural requirements, it seems possible to

⁴ Holmes, 1998, p. 195-231.

⁵ Kuran, Timur *Private Truth and Public Lies*, Harvard University Press, 1995, p. 65-67.

avoid at least some of the worst forms of uninformed decision-making.⁶ The role of such rules means thus that certain kinds of rules might work against what could be described as “cognitive path-dependence”, i.e. a tendency that previous experiences reinforces certain patterns of views and decision-making. To a certain extent pre-commitments can work in a way that reduces the effects of such decisions, i.e. by instituting delays of effectiveness of legislation, as well as instituting demands for deliberation with a formalised opposition⁷ or introduction of sun-set clauses that makes repeated legislative decision-making necessary over time, features that all increase the number of options considered to a society. What can be said to work in that direction seems to be that creation of institutions that make repeated decision-making required in cases of creating rules and policies on one hand might create better deliberation, but the possibility of judicial review and decision-making creates possibility for successive revision of decisions, under more constrained conditions of deliberation that is characteristic of institutions of adjudication. The role of rules is obviously also related to that in terms of what can be attained through measures of adjudication, and by creation of rules of decision-making one can to a certain extent avoid pitfalls of unrestrained (rule-free) decisions.

However, the value of such rule-boundness is mainly dependent on that it avoids passions, weakness of will and lack of information by substituting a search for perfect decisions with rules of thumb. The core of rule-utilitarianism seems to be that overcoming of informational shortcomings by rules of thumb are to be seen as instantiating maximisation of values over time. The view reflected in rationales for pre-commitments can however be said to rather regards rules as a method for avoiding the worst losses. By creating conditions for slightly better information and deliberation it seems however possible to speak of a possibility to a – limited – but improved treatment of knowledge by such decision-making institutions. The other dilemma of rule-free and thus self-defeating government seems to be both a lack of availability of credible commitment as well as lack of lack of information. The rule-utilitarian justification of pre-commitments seems therefore to be both that it works as a kind of value-maximiser, which can be said to be a part of minimising bad outcomes to a certain extent mixed with rules increasing effectiveness and hopefully correctness of decision-making, while the minimax-conception of pre-commitments is focused on

2.3 Pre-commitments are Necessary to Avoid Cycles of Decision-making in Courts as well as in Political Branches of Government

Cycles of decisions are commonplace in democracy, since there is no entirely definite and determinate way of aggregating preferences of values or even views of facts of reality, which means that there is a risk for cycles of decision-making. Such cycles are usually regarded as creating instability and thus less desirable in

⁶ Sunstein, Cass R., *Why Societies Need Dissent*, Harvard University Press, 2003, p. 150-158.

⁷ The division between the government and the opposition in the British case is probably the most obvious example of that.

constitutional orders. On the other hand might lack of consistency be the other side of possibilities for revising possibly misdirected rules and decisions. The interest in creating such closure is both related to inconsistency of preferences as well as changes of preferences over time, and that they might also be an appropriate reflection of a fair procedure for constructing the popular will.⁸ The role of decision-cycles is to a certain extent less problematic than sometimes envisaged since certain kind of decision-cycles might be an adequate response to changes in society whereas the discarding and reintroduction of certain measures might actually be rational in relation to the purposes envisaged. It might to a certain extent also be argued (as some have) that pure consistency of decisions is not an appropriate measure of rationality of collective decisions, and neither is the demand for something more than overlapping consensus maintained through voting.⁹ Decision-cycles are the special problem of multimember bodies of decision-making that based on that decisions are characterised in the sense that although decision-makers have consistent individual preferences, they will run the risk of creating inconsistencies in decision-making, and thereby also in terms of indeterminacy in decision-making. The only possible remedy of that would be consistent unanimity in decisions,¹⁰ which is impossible sustain over time in any decision-making body that is either (as in the case of legislatures) designed to mirror certain kinds of disagreements and courts that by virtue of appointment, structures of accountability and probably also by the selection of candidates as well as the changes and possible interpretations of law create similar cycles of decisions. The theorem of impossibility shows that despite consistent individual preferences, collective bodies might end up in making inconsistent decisions while the Arrow-theorem shows that there is no method of aggregating preferences that will work in a consistent and entirely predictable way of aggregating preferences into a single decision. That has been seen as a problem of democratic theory, although lately some authors have questioned whether consistency is a proper goal for all kinds of democratic decision-making. To a certain extent the problem is solved by that we make choices between different kinds of institutions where we do not primarily choose a candidate for a specific stance on some issue, but rather prefer a candidate for office on an overall assessment on views, ideas and also possible judgement of how to handle upcoming issues. In making such choices to parliaments we choose a special kind of representatives that are constrained both by certain rules of majorities as well as rules of agenda-setting powers, while the choice of judges is usually defined partly through other parameters, by other people than the general electorate and bound by other rules of agenda-setting (including sub-majority rules for deciding to take up cases in appellate courts in many countries) that thereby partly reduces possibilities to legislative manipulation by putting certain matters in the hands of courts, while on the other hand in certain cases increases

⁸ Richardson, Henry S., *Democratic Autonomy*, Oxford University Press, Oxford, 2002, p. 63-67.

⁹ Luban, David, *Social Choice Theory as Jurisprudence*, S. Cal. L. Rev. vol. 69, (1995-1996) p. 521, 538-540.

¹⁰ Miller, David, *Social Choice and Deliberative Democracy* in Held, David (ed.) *Prospects of Democracy*, Polity Press, Cambridge, 1994, p. 47-57.

the possibilities for court-panels to use the agenda-setting powers of courts to change the effectiveness. By having as certain countries have an obligation on constitutional courts to accept all applications, the implication of that seems to be that in such cases (as in the case of e.g. Hungary, Poland and Czech Republic) imply a far smaller degree of possibilities for judicial manipulation of agendas. On the other hand, repeated decision-making on similar legal issues implies that the possibilities for gradual reinterpretation and cyclical decision-making are increased. The dilemma of judicial manipulation and the risks of cyclical decision-making that some authors argue is a problem for constitutional courts as well as for legislatures might actually be a trade-off between cycles of decision-making on one hand and freedom from manipulation of the agenda-setting.¹¹ The role of constitutional pre-commitments to certain kinds of decision-making is not primarily a matter of that courts will not be liable cyclical decision-making although, they probably will but which kinds of cycles that can be expected.

2.4 If a People Want to be Able to Govern Itself, it Seems Necessary (as for Persons) to be Able to Create Stable Long-term Commitments to Different Things

The role of constitutive rules are important when it comes to enabling decision-making in certain respects, especially in constructing legal rules that enable action and also reduce the uncertainties of certain kinds of interpretation. In certain respects it is obvious that constitutive rules are enabling, the adoption of rules of property-rights as well as of rules on legal tender to the rules of universal suffrage enable and facilitate the exchange of goods and political accountability in a way that both enable people to make and commitments, but also can be used to handle unexpected possibilities (and threats) in a more flexible way.¹² A constitution that does not provide for such an opportunity to bind oneself or to change basic political institutions (as the British constitution traditionally was thought not to do for the parliament¹³) according to that view reduces the possibility for self-government over time by restricting the number of trust-worthy commitments that can be made or if they would, would be done in an unpredictable way. By creating rules and institutions that are committed to a state where certain things are either undecided or impossible it seems obvious that something is to be avoided.¹⁴ The things that we want to avoid thus seems mainly to be two, that some later version of ourselves to make a bad decision (a decision that will be possible to prevent through constitutional rules) or we want to create a safe-guard if someone we oppose or distrust will come ever to hold office or that we cannot agree currently on how to decide an issue or possibly

¹¹ Shapiro, Ian, *The State of Democratic Theory*, Princeton University Press, Princeton, 2003, 11-14, p. 20-23.

¹² Searle, John R., *The Construction of Social Reality*, Penguin, London, 1996, p. 33-37, 43-51.

¹³ Dicey, A.V., *The Law of The Constitution*, (ed. E.C.S. Wade), Macmillan Press, 9th ed., London, 1959, p. 87-91.

¹⁴ Searle, 1996, p. 43-51.

that we want to avoid the effects of. The absence of constitutive rules in some crucial respect in a system of constitutive rules (such as a constitution) might thus also be a way to create a gap that adds a high degree of ambiguity to the system and thus also empowers institutions of interpretation but also reduces the possibilities for certain kind of actions.¹⁵ On the other hand might gaps in certain pre-commitments be a way to alleviate the effects of disagreement in a moment of rule-making shifting the focus from substantive decisions on rule-making to interpretation.

2.5 *Pre-commitments as Contracts*

Constitutional pre-commitments are essentially informal contracts between actors that fear to lose out in the political game and the thus wants to protect the losers and limit the powers of the winners.¹⁶

The understanding of pre-commitments as one or a set of contracts between actors in the political process shifts the focus from the focus of the other points discussed here: namely the major pre-commitments as the result of a “contract” or “bargain” between the citizens and the government. In this respect, constitutional rules can be seen as a bargain between different actors within the political system and the distribution of individual rights (including political rights) can be seen in that context as mainly a trade-off of a set of agreements between different political actors. The basis for such agreements seems to be – as discussed more in detail below – the possibility that the “other” side would lose out in the political process, and the only reason to submit to them, as pre-commitments are constraints just not on other but also potentially for oneself also means that the political system actually must make such kinds of changes in power not just possible but over time also likely.

2.6 *Constitutional Moments and Pre-commitments*

Rules created in moments of heightened political participation (moments of constitution-making) we might be able to make wiser decisions than the ordinary political process is supposed to do.

There is an epistemic case for why such moments of heightened political participation should be regarded as better guides for governmental action than the processes of “ordinary politics” and that is that if assuming the correctness of the Condorcet jury-theorem.¹⁷ In times of heightened political participation, -

¹⁵ Sunstein, Cass R., *Practical Reason and Incompletely Theorized Agreements* in Ullman-Margalit, Edna (ed.) *Reasoning Practically*, Oxford University Press, Oxford, 2000, p. 98, 115-118.

¹⁶ Elster, 2000, p. 112-118, Przeworski, Adam, *Democracy and the Market*, Cambridge University Press, Cambridge 1990, p. 173-176.

¹⁷ The greater number of people that are involved in legislative decisions, the better the facts and reasons for such decisions are evaluated, provided that the people participating have a probability $> p(0.5)$ to make the right decision. The jury-theorem however also cuts in the

“constitutional moments” - a greater number of people are involved in constitutional law-making and can thus be expected to make better judgements than in ordinary elitist politics. A similar case can be made for constitutional conventions that develop over time in the sense that they can be said to be tested over time.¹⁸ Division of powers work in the same direction in the sense by increasing the number of people that are involved in making decisions, and thus also create both a greater span of time for decision-making and lessen the risks of concentration of powers (and thereby also the risk of faulty decisions). In that sense, one might argue that the role of constitutional norms as “higher law” might be justified by that they produce better decisions than *ad hoc* decisions.¹⁹ The problem with that justification is thus that it seems hard to claim that people making rules to be applied in a very distant future always will be better suited for that than people in that distant future. The idea of the higher-law justification based, implicitly or explicitly on the jury-theorem assumes that people are generally so partial (or suspected to be) that also constitutional assemblies with very vague notions of which problems that will be relevant will make better decisions. In a similar way, super-majority demands for constitutional amendments can be justified by the jury-theorem if assuming that the possible repercussions of the a bad amendment are extensive, it might be preferable to raise the threshold for amendment so that amendments are not just more likely to be right than to be wrong but much more so, i.e. that possible errors are to be at the side of status quo in order to avoid disastrous outcomes, although that might well sacrifice some small improvements. However, the reason for why unanimity is not demanded then, which would be logical is that the risk that there would be heavily skewed minorities that would be much more likely to be wrong than right and thus the risk for blocks against a good decision would be unduly high.

A common dilemma to various reasons for pre-commitments seems however to be that all systems of pre-commitments are susceptible to limitations due to lack of knowledge in creation of them. By such gaps, one can create a certain degree of flexibility but by that one can also postpone certain kinds of disagreement from the rule-making process to the process of application. By switching from conflicts from conflicts of legislation to conflicts of

other direction if seen as a justification of participatory decision-making and deliberation, at least as long as the participants are expected to have a $< p(0.5)$ chance to make the right decision.

¹⁸ Ackerman, Bruce A., *The Storrs Lectures: Discovering the Constitution*, Yale L.J., vol. 93 (1983), 1013 ff., Elster, Jon *Forces and Mechanisms in the Constitution-Making Process*, Duke L.J. vol. 45 (1995) 364-365, List, Christian & Goodin, Robert E. *Generalising the Condorcet Jury Theorem*, J. Pol. Phil. vol. 9 (2001), 277-306.

¹⁹ Following Ackerman’s idea of such “constitutional moments” the comparatively better quality of constitutional law as compared to ordinary legislation is because “constitutional moments” can be described as such because constitutional moments are not burdened by the self-interests but rather impartiality/ disinterestedness of the actors involved in constitution-making process. That is however a problematic assertion which has been the basis for arguments although self-interested agents can be supposed to be more farsighted if they are making choices likely to last long. On the other hand that pre-supposes that constitutions are expected to last long, either by being resilient or but because constitutional changes coming will be made according to rules of amendment chosen at that constitutional moment.

interpretation, a political order to a certain extent can switch from one type of decision-making, structure of accountability etc. However, since it usually cannot be entirely conceived when such interpretative conflicts will arise, one might say that the role of such gaps might work in a way to increase risks of incompleteness, but on the other hand also increase possibilities of agreement. Similarly might pre-commitments for actions in the future, such as sun-set rules that make revision of legislation necessary and enable both present and future and disagreement to influence decision-making. The creation of pre-commitments can however to some extent also be pre-commitments to limit the impact of pre-commitments, either in kind or in time, thus to some extent be alleviate disagreements, but they can also be problematic in the sense that by doing so, pre-commitments might enable some kinds of decision-making but also create risks of decision-cycles of the kind that constitutional pre-commitments can also be used to reduce the impact of and also reduce the problem of knowledge and susceptibility to risks arising from irrational decisions stemming from the problem of too limited knowledge of the future. There is thus a trade-off between making pre-commitments to avoid decision-cycles on one hand and the interest in delimiting pre-commitments to not become too extensive which might result in decisions that are more long-lasting than far-sighted. The trade-off between these interests can however also be seen at the level of interpretation where wide interpretations often provide better – if still often tentative – guidelines to the addressees of the norm, while more restrictive interpretations often are more precise and leave more possibilities for gradual interpretations and re-interpretations of commitments. However, while the first form of interpretation increases the possibility to realise the risks of short-sightedness embedded in the making of pre-commitments, it might also create some of the benefits of consistency that pre-commitments are assumed to provide. The other more gradual option risks creating both decision-cycles in (collegiate) courts as well as weakening the effectiveness of the pre-commitments, although the possible benefit would be interpretations of rules with more knowledge of the system in which they are to be applied, at the expense of providing addressees with such knowledge at an earlier point.

3 Problems of Pre-commitment Rationales

The common rationale underlying of the different justifications of pre-commitments listed above is not generally to maximise outcomes, but rather to avoid potentially highly dangerous sub-optimal outcomes of political and legal decisions including such that are dependent on lapses of judgement and ill-founded decisions as well as various attempts to limit the role of political conflicts to certain areas.²⁰ The other common trait is to increase trust in

²⁰ A famous example is so called “Christmas club savings” frequent among poorer people where people make regular set-a-sides of money to no or very low interest, with usually quite severe penalties for early withdrawal in order to create a substantial sum of money for Christmas-shopping. Elster uses such clubs as an example for showing the character of pre-commitments, but he does not consider that it illustrates also that if it should be understood as

institutions and thereby facilitate cooperation despite existence of political conflicts of various kinds, in a similar way by reducing possibilities for worst-cases, also sometimes at the expense of maximisation.²¹ The purpose of pre-commitments is thus generally not to maximise outcomes.

When it comes to auto-paternalism as a rationale for pre-commitments The dilemma is that the basis is usually that we tend to discount future losses too heavily and sometimes give too much weight to the present or immediate future as opposed to the more distant future. However, pre-commitments are equally prospective as a decision-making process as a set of non-committing decisions. If pre-commitments are to be effective in the sense that Elster and most other theorists of pre-commitments have envisaged the dysfunctional character of our discounting must level out not just in the distant the future, but also in the immediate future if our pre-commitments are to work. (The pre-commitments are directed to a more distant future than the immediate actions which we fear would ruin our prospects for that future: we enter the Christmas savings club in January to prevent ourselves from spending too much in June in order to be able to shop in December, but we do not make our first deposit in June but in January, otherwise it would impossible to make pre-commitments since that would preclude a sounder discount-rate of the future.) Pre-commitments are thus not just a mean to rectify distortions of actions because of time-inconsistencies of preferences but pre-commitments are only possible because of inconsistencies that are dependent on the framing of decisions and creating more extensive contexts that relates actions that would otherwise have been of limited importance to some purpose. The solution seems to be like that if we give too much weight to the values of time t_0 but discount t_2 disproportionately more than t_1 , that might be changed according to the theory by committing oneself and thereby create a context of action. However that mechanism of heavy discounting might to a certain extent be entirely rational, there might be times where we do not expect to be alive (or have any other interests), pre-commitments cannot be rational for an individual, which however would make a rational person discount heavier the more distant some point of time is.

In cases of interpersonal commitments supposed to work over time in way that make inconsistencies more problematic, there is a common interest for all political actors to bind one's adversaries (if one expect them to win at some time), it might also to some extent be a common interest to avert certain kinds of dangers.²² However, although political decision-makers might have similar interests in binding future adversaries, their time-frames for doing so often diverge (since they might have different expectations of political success in time) which makes it possible that despite an interest for this kind of mutual pre-commitments, they will not necessarily work out, the perception of such political

rational it cannot be said to have the purpose of maximising an outcome (since the same savings would have yielded better interest under less draconic conditions) but to prevent a worst outcome (no money at all for Christmas shopping) due to either economic hardships or akratic behaviour. Elster, 2000, p. 31.

²¹ Hardin, Russel, *Liberal Distrust* (2002) Euro. Rev. vol. 10 (2002) p. 73-89, 74-76, 76-82.

²² McClennan, Edvard F., *Prudence and Constitutional Rights*, U. Penn.L. Rev., vol. 151 (2003), p. 917 ff.

dangers might also be slightly different depending on ideological points of view. These conflicts focus however mainly on political conflicts as defined by different interests of political actors, not focusing on different institutional interests that arise in most complex legal-political orders.²³ In certain respects, institutional interests can be assumed to counteract certain other kinds of political interests, as well as political interests (e.g. various organised political groups) might seek influence in more than one institution. There are thus certain aspects of “institutional interests”, i.e. that might be more persistent than political divisions. The understanding of such interests is notoriously difficult in the sense that it seems to depend on a certain degree of differentiation between one institution and another. The role of institutional interests is considerable, and thanks to their relative persistence, they might create a greater basis for pre-commitments. The other side of different institutional interests are that they increase the obstacles to effective actions, i.e. they increase the “transaction-costs” as well as they increase the role of deliberation over public decision-making.

As mentioned above there is a trade-off between making a decision at a point when it is easiest to make it in the most consistent way with regards to preferences and the time when one has the best information to do make the decisions. There is a collective replication of that as the trade-off between making the best possibly informed decision on one hand and facilitating cooperation by reducing the risks of emergence of suspicion concerning the impartiality versus the need for technical competency of the decision-makers.²⁴ To a certain extent that trade-off can also be seen in terms of expediency on one hand and the protection of certain pre-commitments that however to a certain extent might involve risks when acted on. The trade-off between expediency and establishing trust is sometimes reconciled through political consensus in the sense that the necessary super-majorities can be gathered to make necessary decisions to establish such institutions, but the purpose of that is to a great extent reflected in that we might allow for in certain respects greater risk-taking if also have insured ourselves against worst-cases.

²³ There is a – in certain settings – quite controversial idea of that the pluralisation and multiplying of public institutions create possibilities for division of powers by the increase, sometime drastically transaction costs of political actions as a way to create greater stability, regardless of other characteristics of the institutional order. In the creation of independent agencies, decentralisation and division of of the military forces into different branches could according to some people have that effect also in a military dictatorship. The basis for this seems mainly to be institutional interests, and one could say that divisions of powers and pre-commitments designed to enhance or preserve such division of powers based on institutional interests presumably might be countered by the creation of political groups that straddle these institutional divisions and create a political unification based on opinions or other interests across such lines. Smulowitz, Catalina, *How Can the Rule of Law Rule: Cost Imposition through Decentralized Mechanisms* in Przeworski, Adam & Maravall, J.M., (eds.) *Democracy and Rule of Law*, Cambridge University Press, Cambridge 2003, p. 168 ff., 169-174. Robert Barros, *Rule of Law and Military Dictatorship* in Adam Przeworski & J.M. Maravall (eds.) *Democracy and Rule of Law*, Cambridge University Press, Cambridge 2003, p. 188 ff., 207-218.

²⁴ Elster, Jon, *Deliberation and Constitution-Making*, in Elster, Jon (ed.) *Deliberative Democracy*, Cambridge University Press, Cambridge, 1997, p. 97, 105-116, 116-118.

4 What kind of Pre-commitments are Constitutions?

Many of the analogies between constitutions and pre-commitments are drawn from literature or from psychological studies of intrapersonal decision-making, such as decisions on quitting (moderately) addictive substances,²⁵ to overcome akratic behaviour or procrastination etc.²⁶ The analogy between individual pre-commitment and individual decision-making is of course to a great extent warranted insofar it combines commitments to act or refrain from acting in certain ways, however, one of the major differences is that a political order that conceives of itself – and is recognised as being – sovereign within a given territory has considerable problems in making commitments effective and also that it introduces problems of collective action. The analogy between persons and polities is of course also raising the question of collective action over time, and also which kind of collectives that are making such pre-commitments as well as in which kind of institutional settings it happens.²⁷ The assumption of pre-commitments theory if translated to collective institutions is thus that there are enduring patterns of identity that makes it meaningful to speak of a wish to create rules and commitments that are supposed to last over a period of time far longer than the life the people making the commitments, and far more extensive than the quite limited pre-commitments that people might make in their personal lives, but also more vulnerable since there seems to be limits of the kind of identity over time that societies can maintain.

A common view of constitutions is today that their major role is to serve as pre-commitments of government in general and potential incumbents in general to accept a certain allocation of competencies and rights in a political order.²⁸ That allocation is also guarded by special obstacles to change – rules of constitutional amendments – and with special institutions that will interpret the rules in order to avoid direct control of any political actor over the interpretation of constitutional rules. The view of constitutions as pre-commitments is akin to the view of constitutions as social contracts between citizens and the government.²⁹ A major similarity between contracts and constitutions is that they work as prospective commitments of different people, but also – as in the case of contracts – there are more or less frequently disagreements on how such constitutional rules are to be interpreted. Another important aspect is that constitutions are to be sustained over time, and thereby they can be seen as long-term contracts between different parties and thus require to be trustworthy institutions of effective enforcement. Much of contemporary theory of

²⁵ Elster, Jon, *Strong Feelings: Emotion, Addiction, and Human Behavior*, MIT Press, Cambridge Mass., 2000(a) p. 78-81.

²⁶ Elster, 1979, p. 88-103. Hurley, Susan, *Natural Reasons: Personality and Polity*, Oxford University Press, 1989, p. 260-61.

²⁷ Arato, Andrew, *Forms of Constitution Making and Theories of Democracy*, *Cardozo L. Rev.* vol. 17 (1995-1996) p. 191 ff., 227-228, 230-231. Rosenfeld, Michael *The Identity of Constitutional Subject*, *Cardozo L.Rev.*, vol 18, (1996-1997) p. 1049 ff., 1103-1109.

²⁸ Barendt, Eric, *An Introduction to Constitutional Law*, Clarendon Press, Oxford, 1998, p. 1-8, 14-26.

²⁹ Holmes, 1988, p. 213-214.

constitutionalism regard constitutionalism as a kind of commitments that people do under certain specific circumstances to avoid the negative sides of the process of ordinary politics. Commitments can either be understood as commitments between the citizens that are *prior* to the existence of the legal order, which is the traditional view of contractarian understandings of constitutional orders, or as commitments of the sovereign people assembled as a constituent power in the process of constitution-making or as commitments that expresses certain limitations of public institutions that are working as some kind of higher law that is thus *posterior* to the emergence of such institutions.

Theories of constitutional pre-commitments have usually focused on the re-allocation of powers from a sovereign ruler to some third-party branch of government, such as courts rather than on the establishment of constitutional commitments within a society. That understanding of constitutions reflects an older conception of constitutions as ways of harnessing governmental powers, rather than the contemporary view of the constitution as the political and legal self-expression of a certain society, and in that sense it seems to be a far more realistic view of constitutions.³⁰ The idea of constitutions as pre-commitments is akin to but does not pre-suppose the idea of constitutional design as it seems equally possible to apply the idea of pre-commitments to constitutions that have the character of incrementally developed rules for the conduct of government. The development of such incremental constitutional orders is far from uncommon and can be seen conspicuously in legal history where the roles of different political institutions were successively transformed through a piecemeal development that redefined the scope of their powers.³¹ The issue of whether constitutions ought to be seen as pre-commitments is related to a specific founding constitutional moment or to a general development is relevant in the sense that it relates to whether pre-commitments should be understood as developed at a specific time, or as rules aimed at protecting vital interests of the citizens as rights.

The idea of analysing constitutions as pre-commitments is thus widespread in contemporary legal and political theory, and it also seems to be a theory that appeals to a general understanding of the potentially self-defeating character of unrestrained freedom of action, something that might be acknowledged at individual as well as collective level of decision-making. Holmes has emphasised the potentially self-defeating character of unrestrained powers by arguing that a wise ruler will commit to leaving e.g. resolution of disputes to

³⁰ Holmes, 1988, p. 195 ff., 213-228. Holmes, Stephen, *Lineages of Rule of Law*, in Przeworski, Adam & Maravall, J.M. (eds.) *Democracy and Rule of Law*, Cambridge University Press, Cambridge 2003, p. 19, 24-25, 25 ff.

³¹ There are a number of historical developments of that kind, most clearly in the curtailing of the royal prerogative in British constitutional law during the sixteenth and seventeenth centuries, where the role of the royal prerogative diminished as the effectiveness of the parliamentary powers, especially when it comes to taxation increased. In terms of pre-commitments that was however to a great extent dependent on that the King accepted the rules concerning raising revenues, i.e. the role of parliamentary consent. Munro, Colin, *Studies in Constitutional Law*, Butterworths, London, 1999, p. 8-14, 162-166. Weingast, Barry R., *The Political Foundations of Democracy and Rule of Law*, *Am.Pol.Sc.Rev.*, vol. 91, (1997) p. 245-263, 247-251.

independent judges or that democratic leaders might increase their credibility by leaving certain contentious policies to independent agencies, not just to increase trustworthiness but also for reasons of convenience and effectiveness of their own action.³² That view is however not without problems, the major problem seems to be that self-binding is not just dependent on development of conventions, but also on the trust-worthiness of such conventions and that effective binding of one's own hands in the position of an autocratic ruler is very hard. Trust-worthiness seems to be possible to create in two ways, either by creation of effectively independent institutions to carry out certain tasks in a government by being protected in some way or by establishing long-standing conventions by which effective independence is attained although their formal independence is less protected. The development of constitutional government in countries undergoing processes of legal and political transition to democratic rule can be seen as examples of the first case and the second case can be seen in countries such as Britain and to a lesser extent also the Scandinavian countries where the rule of law was established rather through conventions than through effectively justiciable constitutions.³³

In Holmes' theory it seems thus to be a case for pre-commitments as commitments from some powerful group to some powerless group, such as individuals who get constitutionally protected rights. Holmes' theory of such pre-commitments assumes that long-term effectiveness can be attained best by a separation between legal and political decision-making and by doing so Holmes argues the trust-worthiness and effectiveness of both kinds of institutions increase. However, it seems as if in all complex societies, have a strong tendency to differentiate between different public institutions in order to attain greater effectiveness without creating the kind of pre-commitments relevant here. The effectiveness of such differentiation seems to a great extent to be possible to attain without making constitutional pre-commitments.³⁴ Holmes seems partly to fail to distinguish between constitutional pre-commitments on one hand and differentiation of different activities of government on the other that takes place more or less in all advanced societies. The distinction might to a certain extent be transformed into a system of practices that gradually attain such a status in the sense that differentiation of functions might change into a normatively binding commitment that can be regarded as trustworthy by being effective over time. However, it seems as if the pre-supposition for establishing such commitments is some kind of independent agent in order to be trustworthy in the first place.

In Elster's later version of the pre-commitments theory, the thrust of the argument is that constitutions are pre-commitments offered as "contracts" between groups, a view that makes them possible to conceive of rather as bargains to share powers than as of instruments in creating greater effectiveness.³⁵ Elster emphasises in this later work less the role of pre-

³² Holmes, 2003, p. 25-27.

³³ Holmes, 2003, p. 27-28.

³⁴ Holmes, 1988, 210-218, Luhmann, Niklas, *Political Theory in the Welfare State*, de Gruyter, Berlin, 1990, p. 193-196.

³⁵ Elster, 2000, p. 92-93.

commitments as a way to insure against bad judgement and more of the role of constitutions as restraining others' ill will. To a certain extent these conceptions of constitutions as pre-commitments might clash: Elster's theory of political pre-commitments might be created without third-party institutions, such as in so called "consociational" democracies that include sophisticated forms of power-sharing at the political level but an almost complete lack of judicial constitutional control.³⁶ The effectiveness of such compromises was largely political, although it also respected the independence of judicial institutions when it came to private law and resolution of civil disputes. However, these constitutional models rested on a considerable degree of political consensus, unification of powers and executive and legislative discretion in matters of public law.³⁷ In that respect, the role of mutual pre-commitments undermined the creation of pre-commitments on the part of government in relation to other parts of society. Similarly, the consociational form of political pre-commitments precluded pre-commitments aimed at alleviating the consequences of bad political judgement in a society beyond the demand for rule of more than bare majorities. The dilemma in these respect is that different purposes of pre-commitments might conflict in a way that is impossible to resolve in any definite manner and furthermore that mutual pre-commitments among political actors to protect "losers" in the political process need not to result in creation of constitutional checks and balances but might equally well result in political agreements that have the form of informal contracts between the major political actors. However, in order to make them "enforceable" among the political participants, they rely on a much weaker constitutional protection of the citizens and such political systems also tend to have far less effective mechanisms for political and legal accountability of governmental decisions.³⁸

While the institutional solutions that are concerned with stabilising expectations of individuals seems to be closely related to protection against bad judgement and can be connected to solutions against "winner-takes-all" solutions to political conflicts. However, it should be emphasised as Elster has, that the binding of political opponents can be achieved in a way that is related to the stabilisation of individual expectations as well as of protection against bad judgement. Elster's theory of constitutional pre-commitments seems in thus respect to be based on being agreements between different political actors working in a way to diminish the adversary effects of political conflicts within a polity and secondly it seems to be agreements among political groups in order to prevent the problems of bad judgement in political decision-making.³⁹ In

³⁶ Barry, Brian, *Political Accommodation* in Barry, Brian, *Democracy, Power and Justice*, Oxford University Press, Oxford, [1975] 1989, p. 100 ff. 104-108, 109-113, 130-135 Barry, Brian, *The Consociational Model and its Dangers* in Barry, Brian *Democracy, Power and Justice*, Oxford University Press, Oxford, [1975a] p. 1989, 136 ff., 148-153. Lijphart, Arend, *Patterns of Democracy*, Yale University Press, New Haven, 1984, p. 31 ff., 31-34.

³⁷ Lijphart, 1984, p. 34-36.

³⁸ Barry, [1975a]1989, p. 130-135.

³⁹ Elster seems to assume in his theory that there is a choice between binding oneself and restraining others. Scott Shapiro has criticised that view from the point that a legal system that assumes equality before the law effectively binds both a person making a choice and those he wants to bind by making that choice. However, the consociational forms of

Holmes' case the structure of pre-commitments rather than being a contract seems to be a unilateral promise from the government to the citizens issued in order to make the government capable of more long-term and consistent action than would otherwise be the case. In all institutional forms of collective pre-commitments, the problems of effective protection as well as the problem of collective disagreement over issues of collective choices covered by pre-commitments as well as of interpretation of the rules embodying the pre-commitments are common problems.

5 Protecting Commitments: Third-party Institutions

The role of pre-commitments is also related to how effectively they can work and to which extent they are protected. Since the various self-binding strategies based on contractual agreements that are open to individuals are impossible to governments (and societies) as they formulate and make the rules to which they shall adhere to, that also reduces their possibilities for making pre-commitments. Constitutional pre-commitments are rather to be understood as devices for mutual but partial agreements on collective choices. While there are – as Elster noticed – no way to decide things external to society, there are various forms of making decisions in a way that are external to some specific, otherwise relevant agent, i.e. judicialisation and delegation of powers can be seen as ways to “externalise” decision-making from the political branches and in the end from people directly concerned and thus create some kind of independence among decision-makers from certain kinds of immediate influences. The “externalisation” of decision-making takes place by a number of techniques, the most obvious case is separation and division of powers, the division of competencies between different agencies within an executive branch (as opposed to conceptions of the executive branch as a unified actor) divisions between e.g. civilian and military branches of the executive as well as division between local, regional and national (and possibly supranational) branches of the different branches of government, between the political decision-makers and the bureaucracy all work to increase the possibility that decisions have to be made jointly by people who are “external” to each others institutions. The purpose of creating that kind of “external institutions” are multiple but they all under-gird

government rather seems to make a case for that although a certain degree of mutual binding seems to be inevitable if “contracts” of the kind that Elster envisages are to have any stability, it seems also quite clear that different kinds of such agreements have different impacts on the degree of which such a “contract” is binding. While the pre-commitments strategy associated with forms of constitutionalism emphasising the role of third-party institutions creates greater insecurity for the political actors, the consociational model seems to create greater predictability for the political actors since it creates mutual checks but also as a general rule makes political as well as legal accountability less effective and thereby increases the possibilities for action for the “parties” to the contract. In the end it seems as that self-binding and binding of others are associated, but that the effectiveness of one aspect is not directly related to the other, and the effects on third-parties are strikingly different in different forms of self/other-binding, a point that neither Elster nor Shapiro make. Shapiro, Scott J., *Ulysses Rebound*, Econ. & Phil., vol. 18 (2002) p. 157 ff., 175-182. Elster, 2000, p. 87 ff.

an important aspect of rules as pre-commitments, namely that they take away all powers necessary for consistent implementation a certain set of rules by one institution.⁴⁰

When it comes to personal pre-commitments, they are usually relatively simple to interpret as long as there no body else involved. If I decide not to eat biscuits, I might have problems in actually doing so, but there are no problems in *interpreting* that pre-commitment. When pre-commitments are dependent on agreements with others, the problems of interpretation becomes obvious and the problem becomes more serious the more complex the issue is. Constitutions as pre-commitments however do mainly rely on a combination of interpretative practices that are commonly shared *and* authoritative interpreters of them, i.e. in most cases courts. That does not necessarily settle the normative issues, but it might create a general assumption that such adjudication might work as a reasonably effective and consistent way to settle such issues. All constitutions that create such third-party institutions have more or less extensive constitutional regulation protecting them.⁴¹ The role of such rules is therefore mainly to protect interpretation of pre-commitments, as well as to a great extent to protect the role of such pre-commitments. However, such rules can also be used to weaken the pre-commitments by restricting the role of third-party institutions. The solutions to such problems of interpretation are thus generally dependent on institutions that constitute themselves through a combination of assumptions of the social reality and normative principles combined with allocation of competencies. In a similar way, allocation of powers of interpretation seems crucial to establish effectiveness of pre-commitments in general and of rules in particular.

The creation of third-party institutions is usually a part of the creation of trust-worthy pre-commitments in constitutional and other rules. The creation of such third-party institutions can take numerous effects it might include judicial review, independent agencies (e.g. central banks) that can work either as to reduce the immediate role of action of the committed branch of government or in the end also to work as a pre-commitment that is more stable and under-girded by special requirements for the commitments and the institutional structure that

⁴⁰ Luhmann, 1989, 167 ff, Luhmann points to how the creation of political system with internalised oppositional forces also can be seen as a way of increasing certain aspects of knowledge within the political system and thereby also create dissenting voices within the system in a way that also increase the possibility to restrain certain aspects of governmental action.

⁴¹ The effectiveness of the protection of such institutions might even, as in the case of the judicial committee of the House of Lords in Britain be *higher*, without any written constitution since it is impossible to change the basic institutional structure without active consent from all its parts. On the other hand, statutorily defined bodies such as Bank of England, as well as the constitutional reforms taking place since 1997 are protected to a considerably lower extent. The paradox seems thus to be that a very radical agenda for constitutional reforms aimed at creating a greater degree of constitutional stability in certain respects (such as with regard to civil rights, central bank independence, freedom of information etc.) has not been able to rid itself of the limits to such pre-commitments that the uncodified constitutional practices are that have proved despite their evasiveness to be utterly resilient. Bogdanor, Vernon, *Our New Constitution*, L. Q. R., vol. 120 (2004) p. 241 ff. 242-243.

supports it to be changed.⁴² Similarly, the strength of commitments is usually also to a certain extent dependent on the restraints for withdrawing from the commitments. In certain cases, the effectiveness of pre-commitments might grow on the time since the actors making commitments are usually able to limit the effectiveness for a certain period of time and in successful cases of pre-commitments, it seems possible to assume that the restraining effects of commitments on actions might increase over time. The role of third-party actors can be distinguished in different forms, the judiciary (or rather the judiciaries in the sense that the judiciary is working),⁴³ and to a certain extent also mediating institutions⁴⁴ that are integrated in national political systems, as well as third-party institutions that are integrated into inter- and supranational legal-political orders.⁴⁵ The creation of third-party institutions might also enhance the legitimacy of the political order as such by introducing a greater element of impartiality,⁴⁶ as well as increase the quality of the legal system by creating an agency mainly concerned with overseeing legislation as well as delimiting the most negative side-effects of such legislation continuously and thereby also increase the effectiveness of legislative work as such.

The creation of third-party institution is generally one of the most problematic aspects of constitutional rules, and the various approaches to that task can be analysed from different points of view but involve: organisation, centralised vs. decentralised, rules of standing, appointment, length of terms of office and possible renewability of mandate, as well as rules of accountability of members of that kind of institutions.⁴⁷ However, the capacity for actually working of such institutions seems to be dependent not just on the structure of adjudicative institutions, but also on the possibilities of introducing institutional and procedural restraints on these institutions and the entrenchment of the practices of these institutions.⁴⁸ The institutionalisation of third-party institutions is thus delimited by a possibility of ongoing control of these institutions that makes the political control over e.g. courts and central banks more immediate, while still leaving the quotidian work of these institutions untouched. Pre-commitments thus seem to be mainly dependent on a commitment to

⁴² One can notice the difference between “independent” central banks in many democracies that are entrusted with pure policy-making powers that are independent from immediate pressures from the executive and legislature on one hand, but also usually only protected by ordinary procedural rules for statutory changes, to be compared with the role of constitutional courts that are often protected by constitutionalised rules.

⁴³ Vermeule, Adrian, *The Judiciary is a “They” not an “It”*, University of Chicago Law School Working Papers in Public Law and Legal Theory, 2003, p. 5-18.

⁴⁴ Sweet, Alec Stone, *Governing With Judges*, Oxford University Press, 2000, p. 3-10.

⁴⁵ Howse, Robert, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in Weiler, Joseph H.H. (ed.) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade? The Collected Courses of the Academy of European Law*, 9/1. Oxford: Oxford Univ. Press, 2000, p. 35, 37-41, 63-69.

⁴⁶ Howse, 2000, p. 42-51.

⁴⁷ Pasquino, Pasquale, *Constitutional Adjudication and Democracy: Comparative Perspectives: USA, France, Italy*, *Ratio Juris*, vol. 11 (1998) p. 38, 46-50.

⁴⁸ Lebeck, Carl, *Constitutionalisation*, forthcoming in *Rechtstheorie Beiheft* xx (n.d), 3-7.

institutional stability in order to be trustworthy, while institutional control also might be said to be necessary for making such institutions possible to institute at all.⁴⁹ By creating such continuous checks on third-party institution, the risks associated with constitution-making are diminished, and the possibilities of creating a closer proximity between legal and political branches are enhanced, without infringing on the daily work of neither branch.

6 Pre-commitments, Disagreement and the Vagueness of Rules

While the introduction of third-parties to conflicts might increase legitimacy and effectiveness of resolution of such disputes, it does not eradicate disputes and disagreements themselves. All societies, in particular constitutional democracies have disagreements that are to be handled in some way, the place and treatment of disagreement going to the heart of political theory.⁵⁰ Pre-commitments are related to the role of disagreement in societies and the institutions aimed at handling such disagreements and resolve such conflicts are thus related to which commitments that are supposed to define these institutions, as well as pre-commitments made in order to ensure respect of individual rights. Pre-commitments do not eradicate disagreements in a society, but they define the forms of solving them, and thereby the choice of decision-procedures might provide more or less independence, responsivity, flexibility and accountability of decision-makers as well as the degree of rule-boundness that pre-commitments create. One could thus argue that pre-commitments can be seen as both substantive solutions that has as purpose to settle an issue, as well as a method to solve disagreements on interpretation of that kind of substantive rules. By creating commitments on substantive issues, politics can be said to create safeguards against certain kind of political risks, at least in the short-term, as well as making the decision-procedure less neutral towards certain political choices.⁵¹ The dilemma of that seems to be when the pre-commitments concern issues of disagreement, in many cases, such as when there are few clearly controversial alternatives but a common opinion that an issue should be settled, that kind of pre-commitments can be central to such solutions since it increases possibilities for settling certain issues and to create a certain degree of stability in an institutional order. The dilemma is obviously that the possibilities of disagreements increase with the endurance of the constitutional order, and thereby it could be expected that constitutional pre-commitments being too extensive would result in political disagreements over constitutional matters. Constitutional disagreements thus include political disagreements, which seems to be an obstacle to constitutional legitimacy in general. The other source of

⁴⁹ Knight, Jack, *Institutionalizing Constitutional Interpretation*, in, Ferejohn, John A., Rakove, Jack N. & Riley, Jonathan (eds.) *Constitutional culture and democratic rule*, Cambridge University Press, Cambridge, 2001, p. 361 ff., 363-367.

⁵⁰ Waldron, Jeremy *Law and Disagreement*, Oxford University Press, Oxford, 1999, 260-266, 266-270. Gutmann, Amy & Thompson, Dennis, *Democracy and Disagreement*, Belknap Press, Cambridge Mass., 1996, p. 116-132.

⁵¹ Waldron, 1999, p. 270-273.

such disagreements other than conflicts of value seems to be the need for exceptions, i.e. a certain degree of need for discretionary action in political systems in general, something that might range from quite simple to utterly complex cases, where political and interpretive disagreements are interrelated to each others.⁵² Similarly, pre-commitments assume to a great extent that actions that are patently irrational in the short run will be carried through despite that because of their possibly rational result in a longer run. However, that requires institutions that are able to create consistent time-frames for actions in terms of terms of mandate, which to a certain extent also diminishes the possibility for credible commitments.

To a certain extent it seems as if the multiplicity of decision-making bodies that are made to ensure the effectiveness of pre-commitments also end up in that it might diminish consistency which makes the effects of vague provisions (that many key provisions in constitutional law are) more problematic since it probably reduces the effectiveness of such rules when it comes to delimit the effects of disagreement. The “constitutional solution” in that sense rather concerns the procedural role of third-party institutions than the possibility of substantive solutions of legal disagreements. The effectiveness of pre-commitments is to a great extent limited by indeterminacies of decision-procedures, but one might still assume that pre-commitments also are subject to more or less extensive interpretive conflicts. Constitutional pre-commitments have in common that they have created procedures for interpretation and decision-making, but also created, as a part of the larger system of pre-commitments that constitutions consist of created special forms of commitments that are defined as decided under special rules (e.g. justiciable constitutional rights protected by constitutional courts). One could thus say that while one side of the effectiveness of constitutional pre-commitments is dependent on the independence of third-party institutions such as courts, the effectiveness of pre-commitments as strategies for solving disagreements are also dependent on that institutions such as courts are able to solve problems in ways that are understood as neutral and relatively determinate. The role of such interpretive agreements includes obviously substantive issues, but it can also be seen as a way to reduce the legal scope of political disagreement through e.g. the use of “public reason”, application of procedural rules and legal interpretations of such pre-commitments.⁵³ There is in that sense an informal role of interpretive

⁵² Waldron, 1999, p. 266-273.

⁵³ Michelman’s conception of discourses of application are related to the pragmatic meaning of legal rules, as he conceptualises the relation between norms and decisions where the development of norms is largely posterior to the making of decisions in singular cases. However, it seems inevitable to assume that over time, the pragmatic approach of solving interpretive disagreements would not provide even partial solutions to the problem of interpretive disagreement in any different way than “one case at a time” would. The principles that Michelman identifies for that are “rational universalism” and “civility” that both can be said to be a part of the mindset of the people taking part in such discourses of application, whether they are legislators, judges or administrators. The pragmatic resolution of this kind of disagreement thus can be said to be more dependent on the general mindset that is more specifically not related to any specific institutional order, but to an – ultimately civic – ethos that determines the procedures for resolving disagreement of constitutional matters, regardless of which branch that actually do resolve them. The resolution of such pre-

agreements that is problematic since they create an element of on-going choice in the role of pre-commitments, and also enables successive reinterpretations of such pre-commitments, which the rules to be interpreted were also sometimes designed for.⁵⁴ To a certain degree that decreases the effectiveness of pre-commitments, but it does also diminish the import of the substantive disagreements by the possibility of interpretive disagreement.⁵⁵ There is thus a problematic relation between entrenched constitutional rules and the prevailing role of political and to a certain extent also legal disagreement in established political orders, and the role of such orders in handling such disagreements. On the other hand, there seems to be a certain need for consistency, since one aspect of rules is constitutive, i.e. that creation of rules enable us to engage in certain kinds of acts that if the rules did not exist would not be (legally) possible and thus far less protected. That is, in order to maintain constitutive rules, they have to be relatively consistent over time, which in turn presupposes relative stability over time as it otherwise would be impossible to maintain these rules. Similarly, the resolution of interpretive disagreement over time assumes that new interpretations will attain a precedential role, obviously pre-supposing consistency over time in order to be meaningful.

The problem of disagreement to the political order is not per se as problematic as the relative indeterminacies of law⁵⁶ since that limits the effectiveness of methods for resolving disagreements. Indeterminacies of law are sometimes explained as stemming from the value pluralism and conflicts of interests in modern societies that inevitably make legal concepts laden with diverging and sometimes conflicting meanings, but also with the structure of the legislative powers suggesting that its (alleged) ineffectiveness of legislative action explains some parts of it. However the complexity in terms of the amount of legal rules in the legal order itself creates a tendency of indeterminacy that undermines some aspects of pre-commitments, by making a greater number of

commitments is however in this case also problematic as it seems to rest on highly contentious notions of rationality and civility that are only possible to understand in any sensible way in a wider social context where such descriptions are given some kind of meaning, which is far from easy in a society characterised by "reasonable pluralism". The various conceptions of interpretive communities and discourses of applications can thus be said to have in common that they pre-suppose a considerable degree of stability in the institutional framework that provides the actual framework for such interpretation as well as some kind of common standards of rationality, rather than the idea that such standards are to come from the institutional framework itself. The effectiveness of such discourses of applications as ways of resolving interpretive disputes seems thus to be dependent on that the legal system and the institutions maintaining it is relatively closed to external influences on its reasoning by having strongly developed notions of rationality, civility and other evaluative concepts of its own. Michelman, Frank, *The Problem of Constitutional Interpretive Disagreement – Can discourses of application help?*, in Aboualfia, Mitchell, Bokman, Myra & Keup, Catherine (eds.) *Habermas and Pragmatism*, Routledge, London, 2002, p. 113, 113-115, 115-122.

⁵⁴ Sunstein, 2000, p. 115-117.

⁵⁵ Knight, 2001, p. 365-367.

⁵⁶ Tushnet, Mark, *Defending the Indeterminacy Thesis*, in Bix, Brian (ed.) *Analyzing Law*, Clarendon Press, Oxford, 1998, p. 223-237, 225-227.

rules relevant to a legal decision.⁵⁷ In one sense it is obvious that interpretive disagreement of the kind that is discussed here only have solutions in terms of procedures for decision-making, but the common problem seems to be that pre-commitments of the kind envisaged in theories of constitutionalism assume a fairly homogenous interpretive community as well as a relatively effective political system in order for pre-commitments to be effective.

7 Conclusions

Pre-commitments is as has been proposed in now seminal analyses of Schelling, Elster and Holmes essential to understanding of constitutional government, and constitutional rules should be understood as mutual pre-commitments within a society to maintain a specific kind of political order. However, the major flaw of the theory seems to be that no one of the theories have developed a sufficiently clear conception of the institutional context in which such pre-commitments are situated, and accordingly, that the effectiveness pre-commitments is not entirely a matter of predictability (and thereby some kind of de facto credibility) but also to a great extent a matter of institutional safe-guards that make them trustworthy, not just over time but in a more direct way, something that in turn is largely dependent on the kinds of commitments made in the creation of such institutions.⁵⁸

In this paper I have sought to pinpoint some of the roles of constitutional rules understood as collective pre-commitments, and the trade-off between such pre-commitments and how they are protected on one hand, and the relations between legal and political disagreements when it comes to creating stability. However, while the creation of constitutional pre-commitments are generally aimed at avoiding disastrous outcomes of illfated political decisions. the possibility for creating such institutions despite the criticisms from *inter alia* legal theorists as Waldron increase the possibility for creating such commitments. There is thus a paradox in constitutional rules in the sense that if they are to be effective as well as acceptable, they are probable to be unclear in order to provide for enough possibilities for interpretation to accommodate the limited knowledge in the moment of constitution-making, which obviously reduces the foreseeable impact of how constitutional provisions will work. By creating a possibility for interpretive disagreements, the role of pre-commitments is delimited over time, but might well be effectively protected for an intermediate period of time that might be the major actual interest of the constitution-makers. To a certain extent, the mixing of constitutional and post-constitutional choices that has become commonplace in many contemporary constitutional orders,⁵⁹ thereby also in a certain extent changing the meaning of pre-commitments, but also enabling both legal and political disagreements to influence the actual application of pre-commitments. However it is thereby also

⁵⁷ Tushnet, 1998, p. 225-228. Epstein, Richard A., *Simple Rules for a Complex World*, Harvard University Press, Cambridge Mass., 1995, p. 21 ff., 23-29, 29-31.

⁵⁸ Knight, 2001, p. 364-366.

⁵⁹ Lebeck, n.d, p. 4-8.

creating possibilities to counter the limits of knowledge in making constitutions as well as (at least to a certain extent) changing conception of justice, as well as (to a lesser extent) limit the lack of knowledge in policy-making arising from ineffective legislative powers.

However, they all fail to acknowledge that disagreements arising from interpretive disagreement arising from indeterminacies of law are the by-product of the social and institutional order partly created by the constitutional order, and thereby also that the kind of pluralism necessary for making commitments credible in relation to one dominating actor (e.g. the government) which might in the end also diminish effectiveness when it comes to more substantive commitments. The pragmatic solution to this ongoing problem seems to be the institutionalisation of an "interpretive community" that is maintained by shared understandings as well as a minimum degree of substantive or procedural political agreement outside it. If anything can be learned from this conception of constitutional rules – which seems indeed likely – it seems to be that the effectiveness of rules are dependent on a certain kind of institutionalised but informal consensus of their application, which over time creates predictability, but at the price of creating possibilities of flexibility in cases when the enforcement of pre-commitments would create extra-legal strains on the social order. Pre-commitments are thus always limited in effect and dependent on a continuous existence of at least a consensus on procedures of collective decision-making and the values of the collective abilities of making pre-commitments. One could thus say that legal-political institutions designed to manage a considerable degree of legal, political and social disagreement assume a considerable degree of consensus themselves. It should also be acknowledged that creation of pre-commitments need not in effect to lead to constitutional arrangements, on the contrary highly politicised constitutional orders might maintain such stability and trustworthiness to a great extent too. In acknowledging the limits of constitutionalism and the interdependence between institutional stability and interpretive agreements, both limits and possibilities of constitutional government are acknowledged.