Promoting Consensus in Society Through Deferred-Implementation Agreements

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Abstract

Social agreement regarding redistribution of wealth is often unattainable because the poor cannot sufficiently compensate the rich for their contribution. In this paper, we submit that under certain circumstances, such an agreement could obtain wide-spread support if, and only if, it contains a clause postponing the implementation of the redistribution of wealth by a given period of time. Thus, despite the fact that consensus on redistribution at the present cannot be attained, society can reach an agreement to redistribute wealth in the future.

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

In addition to promoting consensus in society regarding the redistribution of wealth, which might be virtuous in itself, DIAs can also be justified on normative grounds. Firstly, by establishing the possibility of a change of sides, the DIA places the parties to the agreement behind the veil of ignorance, or at least closer to this position, and encourages them to make an unbiased decision as to whether to enter into the social agreement. Secondly, despite the inefficiencies commonly associated with externalities, the externalization of costs from the present generation to future generations and to others who are ultimately expected to benefit from the agreement might be an efficient move that also promotes intergenerational justice.
Arguably, if DIAs were such an attractive mechanism as we contend, one should expect these agreements to be widely used in the real world. We believe that the main reason for the rarity of DIAs is the parties’ concern that future generations might avoid implementing such agreements. However, if the parties to these agreements utilized certain mechanisms and adopted a few constraints discussed below, such agreements would become less vulnerable to future nullification.
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"The earth belongs always to the living generation. ... The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. ...Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.” Thomas Jefferson, in a letter to James Madison, 6 Sept. 1789 Papers 15:392-97

Introduction

Unlike private contracts, many social agreements are not expected to maximize wealth but rather to redistribute it from one group of citizens to another, typically from the rich to the poor. Social agreement for the redistribution of wealth\(^1\) is often

\(^1\) The expression “social agreement” is used in this article in a broad sense to encompass both intra- and inter- state agreements.
unattainable because the poor cannot sufficiently compensate the rich for their contribution. In this paper, we submit that in some circumstances, such an agreement may obtain wide-spread support if and only if it contains a clause postponing the implementation of the redistribution of wealth by a given period of time. Thus, although no consensus on the redistribution of wealth in the present can currently be attained, society can, however, reach an agreement to redistribute wealth in the future. Unlike Thomas Jefferson, who believed that constitutions and laws should be enacted for no more than 19 years, we submit that some laws should not be applied to the current generation but rather to the next generations. We term such an agreement a “deferred-implementation agreement” (“DIA”) and focus on two reasons which could explain the appeal of such an agreement.

The first reason why parties would occasionally be more willing to enter into a DIA, as opposed to an immediate-implementation agreement, is that the parties to the former anticipate the possibility of changing sides before redistribution takes place. The fact that the rich could potentially become poor reduces the cost of the agreement to the rich and renders them less reluctant to subscribe to the agreement. Consider, for example, a program to reduce unemployment by restricting the number of weekly hours each employee is allowed to work. Let us assume that such a law could not be enacted if both workers and the unemployed failed to reach a social agreement on the matter. Arguably, workers who feel their jobs are relatively secure in the near future would refuse to give

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2 These types of laws are today called “sunset laws” and sometimes they bear resemblance to DIAs. See discussion infra Part IV.B.

3 A variety of reasons may warrant deferring the implementation of a social agreement. Particular circumstances may occasionally render immediate implementation either physically impossible or particularly difficult. In other cases, deferring specific elements of implementation until a future date leads to its gradual implementation, allowing the parties to adapt themselves to changes brought about by the agreement and also to enhance the building of trust between them. In yet other cases, deferring the implementation of the agreement is considered by the performing party to be less expensive than immediate implementation, because of a discount factor attached to future performance especially when there is some level of uncertainty as to whether the performance will take place at all. This article will not deal with these reasons, most of which are well known and are not unique to social agreements. Scholars working in the field of behavioral psychology have explored the effect of deferral on the parties’ conceptions of chances and risks. See e.g.: G. Loewenstein, 'Anticipation and Valuation of Delayed Consumption' (1987) 97 The Economic J. 666 (arguing that waiting for a future consumption can be pleasurable or painful and exploring the behavioral consequences of these feelings); Y. Trope & N. Liberman, 'Temporal Construal' (2003) 110 Psychological Review 403 (proposing that temporal distance influences individuals' responses to future events by systematically changing the way they construe those events). This topic is also beyond the scope of the present paper.
up part of their paid work hours. However, if they acknowledge that some of them might join the ranks of the unemployed within ten years, these workers might be less reluctant to back the proposed law, provided its implementation is deferred by ten years. The possibility that the individuals comprising the group of the workers might change sides in the future reduces the cost of the agreement to each such individual and increases the likelihood they would endorse the deal.

The second reason why parties would accept a DIA, whereas they would reject the same agreement with immediate implementation, is that it often entails the externalization of costs to third parties, thereby reducing the costs of the agreement to the contracting parties. Thus, if a rich ethnic majority enters into an agreement with a poor ethnic minority to transfer wealth from the former to the latter, but its implementation is postponed by fifteen years, the present generation of the majority would be externalizing part of the costs of the agreement to third parties—namely, to future generations of the majority group and to future newcomers. This externalization would reduce the costs of the agreement incurred by the present generation, thereby increasing the willingness of members of the current generation to enter into such an agreement.

In order to make the DIA an attractive option for parties to social agreements, it is crucial to immunize the agreement from future attempts of the “rich” party to withdraw the agreement as the time of implementation approaches. Thus, in the aforementioned unemployment example, there is a substantial risk that in ten years time, the median voter, who is still employed, would continue opposing the execution of the program, and the law restricting the weekly work hours would therefore be abolished. One way to achieve such immunity is by incorporating the DIA into the constitution. Article One, Section Nine, of the U.S. Constitution, which postponed Congress’ power to prohibit the migration and importation of slaves by twenty years, is one example of such constitutional protection of a "deferred-implementation" clause. Another way to entrench the DIA is to utilize self-enforcing mechanisms that would increase the cost of withdrawal from the agreement. In addition to promoting consensus in society regarding the redistribution of wealth, which might in itself be virtuous, the two effects of DIAs—the possibility that the parties might change sides in the future and the externalization of costs to third parties—also have internal, normative justifications. Firstly, the potential
for changing sides places the parties to the agreement behind a veil of ignorance, or at
least closer to this position, encouraging them to make a less biased decision as to
whether to enter into the social agreement. Secondly, despite the inefficiencies commonly
associated with externalities, the externalization of costs from the present generation to
future generations and to others who are expected to benefit from the agreement might be
an efficient move that also promotes intergenerational justice.

*Parts I and II* of this paper present paradigmatic cases for which the use of DIAs
might be recommended. In *part I* we discuss the *symmetric* situation in which the
deferral of the implementation reduces the costs that one party incurs exactly to the same
extent as it reduces the benefit which the other party receives. *Part II* addresses the
*asymmetric* situation in which the DIA has a disparate effect on the parties. *Part III* turns
to the normative question and substantiates our contention that DIAs can be justified on
grounds of fairness and efficiency. We also discuss the counter-argument, according to
which immunizing DIAs is undemocratic. In *Part IV*, we present several real-world
examples in which DIAs were used, as well as examples of Sunset Laws, which resemble
DIAs, and discuss three major reasons for the rarity of DIAs. The first reason we discuss
is that the parties to DIAs are unable to assure that they will not be repealed in the future.
The second reason is that alternative, less costly mechanisms produce the same outcomes
as DIAs. The third reason is that DIAs increase the uncertainty for the parties. *Part V* is
the conclusion to this paper.

I. The Symmetric Situation

A. Deferred Implementation in General

Consider a seller interested in selling a four-apartment building, and a buyer who
can only afford to purchase one apartment. Should the seller insist on selling the entire
building as a whole, this would conceivably result in no transaction between the seller and
the buyer. On the other hand, assuming the seller would agree to sell one apartment, a
transaction might take place. The seller’s consent to sell less than the complete item in return for reduced consideration coupled with the buyer’s willingness to settle for less than the complete item at a lower price, could ultimately result in a transaction that would otherwise not have taken place.

Let us change the example and assume that the seller only has one apartment and the buyer is unable to meet the seller’s asking price. This time, since it is not feasible to divide the apartment into smaller units, the parties must look for alternative mechanisms to facilitate a smaller deal. One way to achieve this result is to defer the implementation of the deal; for example, the parties could agree that the transfer of ownership would take place in five years. This might prove to be a workable solution for both parties, and would allow a transaction involving a lower price to be finalized.

The solution of deferred implementation in the apartment example is not the only possible solution. In developed countries, parties can also bridge gaps by utilizing the credit market: a purchaser takes out a loan on the market, immediately purchases an apartment and then finances the loan repayment with rental payments he receives for the apartment. These arrangements, however, typify the private market; the credit market is often an unrealistic or ineffective option for bridging gaps between political or social groups.\(^4\) Thus, where social agreements are concerned, deferred implementation is likely to be the preferred technique for achieving consensus.

In the following sections, we will demonstrate how the deferred implementation of social agreements constitutes a particularly effective technique for facilitating social agreements.

### B. Externalization of Costs

Private law adopts various methods for confronting the problem of externalized costs. Contracts that externalize costs to third parties are frequently unenforceable. In certain cases, third parties to whom the costs are externalized could bring tort actions against the contracting parties. Similarly, criminal law often discourages the externalization of costs by imposing sanctions on the externalizing parties.

\(^4\) We discuss the alternatives to DIAs, including the utilization of the credit market, part IV.B., infra.
Social agreements are also liable to cause the externalization of costs to third parties. An effective method of creating externalization is by deferring the implementation of a social agreement. Admittedly, externalization may also occur when implementation is immediate, except that in cases in which implementation is immediate, there is a good chance that the affected third party would oppose it and attempt to prevent the attainment of the social agreement. Deferred implementation, on the other hand, typically externalizes costs to future generations, who are by definition unable to thwart the attainment of the agreement in the present. The following example illustrates this point.

The prohibition of slave trade. In 1787, the states then comprising the United States signed the American Constitution, which determined *inter alia* that Federal Congress would not prohibit slave trade until the year 1808. This compromise between the Northern States and the Southern States was necessary in order to prevent the Federation from breaking up. The compromise consisted of two components: on the one hand, the Northern States undertook not to alter the status quo for a period of twenty years. The Southern States, on the other hand, agreed that in twenty years time Federal Congress would be authorized to prohibit slave trade.

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

6 Section 9 of the first chapter of the Constitution states the following: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or a duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

One explanation for the deferral of the abolition of slave trade is the one suggested in this article: the immediate discontinuation of slave trade would have exacted too high a price for the white population of the South which they were not willing to pay in return for the expected benefits of unification. Thus, the parties agreed to empower Congress to prohibit slave trade but postponed the implementation of this empowerment for a period of twenty years. This deferral entitled the Southern States to benefit from an additional twenty years of slave trade. Concomitantly, the deferral reduced the benefit gained by the Northern States from the prohibition on slave trade.

Clearly the social agreement between the Northern and the Southern states was reached at the expense of third parties and due to the fact that the consent of those third parties was not required. The main victims of deferring the abolition of slave trade were the slaves themselves, who remained tradable objects for an additional twenty years. Arguably, the future white residents of the Southern States, who were denied the "right" to trade slaves, also bore some of the costs of this social agreement. However, whether implementation was immediate or deferred, future slave traders were to become subject to the congressional power to prohibit slave trade. It may therefore be claimed that the deferral had no negative effects on these potential future slave traders. To generalize the

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8 There are alternative explanations for the deferral of the date after which Congress is empowered to prohibit slave trade. See e.g.; P. Finkelman, 'The Founders and Slavery: Little Ventured, Little Gained' (2001) 13 Yale J. L. & Human. 413 (claiming that the founders protected slavery in ways that were unnecessary to create the national compact); J. Oakes, "The Compromising Expedient": Justifying a Proslavery Constitution' (1996) 17 Cardozo L. Rev. 2023 (describing those responsible for the proslavery clause in the Constitution as progressives who compromised with proslavery extremists for the sake of ratification); T. Tetlow, 'The Founders and Slavery: A Crisis of Conscience' (2001) 3 Loy. J. Pub. International. L. 1 (describing the founders’ ideological crisis about the clash of slavery and political ideology and the effect of self-interest on ideology); R. E. Barnett, 'The Original Meaning of the Commerce Clause' (2001) 68 U. Ch. L. Rev. 101 (linking the slave trade to the general Commerce Clause).

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

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

10 It could be claimed that the reduction of the consideration was not symmetric: the residents of the Northern States derived benefit from the actual political and ideological achievement, and possibly, from their perspective, the deferral was not as meaningful as was its non-deferral for the white residents of the
latter point, one should bear in mind that any law that is not limited in time, whether its implementation is immediate or deferred, imposes certain costs on subsequent generations. Therefore, as long as the deferral does not raise the costs which subsequent generations will have to incur, the externalization problem is more or less the same, whether implementation is immediate or deferred. The externalization problem is of particular concern, however, when the deferral itself is the cause of the externalization. We will clarify this point in the following paragraphs.

Any deferral of implementation improves the position of the members of the current generation who would have had to incur the cost of the immediate implementation of the agreement, and worsens the position of the members of the current generation who were supposed to benefit from it. However, when the duration of the deferred law is limited in time, the deferral imposes costs on the last generation that would bear the costs of the deferred law. They would not have incurred these costs if implementation had been immediate. In contrast, when the duration of the deferred law is not limited in time, it is possible that all the future generations incur costs irrespective of whether implementation is immediate or deferred. For example, the empowerment of Congress to prohibit slave trade was an agreement of unlimited duration. Consequently, one could argue that whether the implementation of the ban on slave trade was immediate or deferred for twenty years was irrelevant for the future generations of potential slave traders: in any event they were subject to the power of Congress to prohibit slave trade. The consequence of this deferral was that the slaves paid the price, together with those Northern States interested in the immediate abolition of slave trade, but the deferral had no intergenerational implications. On the other hand, if instead the constitution had obliged slave owners to pay a one-time sum of compensation to the slaves, then the timing of implementation would have generated intergenerational implications. Immediate implementation would have imposed the costs exclusively upon the generation of slave owners in whose time the constitution was adopted and improve only the position of those slaves in whose time the constitution was adopted. Deferring

\[\text{Southern States.}\]

\[\text{11 Nevertheless slave traders who are forced to send their slaves free arguably suffer more than those potential owners who are denied the right to slaves they have never owned. Thus, although the deferred law is of unlimited duration, most of the costs are incurred by the generation in which the agreement is}\]
implementation for twenty years, on the other hand, would have imposed its costs exclusively on the slave owners of the next generation and improve only the position of the slaves of the next generation.\textsuperscript{12}

C. The Change of Sides

In social agreements for the redistribution of wealth, those parties that bear the costs of the agreement, or “the givers”, often eventually become the beneficiaries of the social agreement, or the “receivers”. Similarly, “receivers” are likely to become “givers”. This phenomenon of the changing of sides is characteristic of social agreements, and is rare in the area of private agreements between individuals.\textsuperscript{13} In circumstances where a future change of sides is expected, deferral of the social agreement blurs the distinction between the givers and the receivers. Today’s givers may become tomorrow’s receivers. The following example illustrates the effect of a change of sides.

\textit{Unemployment}. Let us assume that the unemployment rate could be reduced by means of a law that limits work hours, so that those employed will work less, allowing the unemployed to join the work force. For example, after the 1997 elections, French legislature tried to reduce unemployment by adopting a law that restricted the weekly working hours of French employees to 35.\textsuperscript{14}

\textsuperscript{12} This distinction is not always precise: some of the slave owners in the current generation will also be slave owners in the next generation and will therefore have to comply with the duty to compensate their slaves, even if only in twenty years. Furthermore, some of the owners in the current generation will desire to sell their slaves (or the offspring of their slaves) in the present, and the price of these slaves will be affected by the fact that the purchaser will be subject to a new law that will not allow the resale of this slave. Clearly, therefore, slave owners of the current generation bear some of the costs of the DIA. At the same time, it is clear that if implementation of the law were immediate, a larger portion of the cost would have been incurred by current slave owners.

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

\textsuperscript{14} The socialist government that won the 1997 elections in France aimed to reduce the high unemployment rate by way of restricting the number of weekly hours to 35 hours (the weekly hour quota had previously been 39 hours). The government passed two statutes (\textit{Aubry Statutes}): Statute No. 98-461 and Statute No. 37-2000 which determined that as of 1.1.2000 this rule would apply only to those work places that employed more than 20 workers and from 1.1.2002 it would apply to all work places. Note that the implementation of these two statutes was deferred by two years.
Arguably, such a restriction was believed to improve the position of the unemployed and to worsen that of the workers. Let us assume that legislation of this nature requires a coalition of the workers and the unemployed. Let us also assume that for such a concession, workers would demand a high price for which the unemployed do not have the sufficient resources. All the unemployed can offer in return is “industrial peace”, which would not satisfy the workers. Could the gap between the parties be bridged? Could a social agreement be reached which would facilitate legislation?

Suppose that a social agreement is proposed to workers and unemployed in the spirit of the French solution, except that implementation of the law resulting from the agreement would be deferred by fifteen years. Presumably, from their own perspective, the workers would regard this as a “lower” price to pay for industrial peace than its alternative, in which the law would immediately be implemented. Consequently, they would be more willing to accept the social agreement with a deferred implementation clause. One trivial reason why the workers would regard the price as lower than the price they would pay if the law were to be immediately implemented is that the deferred implementation gives them fifteen more years of full employment. But there is an additional reason for workers to regard deferred implementation as cheaper than the option of immediate implementation. Every worker knows that without this particular law, she may find herself unemployed in fifteen years time, whereas every unemployed person knows that in fifteen years he is likely to be working.\(^\text{15}\) Accordingly, deferred implementation entails that a significant part of the law’s costs are actually incurred by today’s unemployed, and some of its benefits are conferred on today’s workers.\(^\text{16}\)

\(^{15}\) Notice that the parties to the agreement are actually creating an insurance cooperative that will start operating in fifteen years. The benefits reaped from the agreement are considerable for both parties since no complete insurance market exists for the risks of unemployment (unless caused by accidents or diseases). Moreover, since the harm of unemployment is not only of an economic nature but also has intangible characteristics, the solution we propose provides a service that cannot be provided by regular insurance.

\(^\text{16}\) Admittedly, even if the implementation of the law was immediate, it could still benefit the workers because every worker might become unemployed in the future. But it is reasonable to assume that at the time the law is enacted each worker’s chances of losing her job in the distant future are higher than in the near future. As a result, deferred implementation increases the workers’ chances to benefit from the law.
It should be noted that the deferred implementation in the above example operates symmetrically on the workers and the unemployed. Deferred implementation for fifteen years does not merely reduce the consideration given by the workers but also reduces the consideration received by the unemployed. Prima facie, this entails the conclusion that society as a whole has nothing to gain by deferred implementation and would prefer immediate implementation. However, since we assume that obtaining an agreement for immediate implementation is not possible, deferred implementation of the plan is an effective mechanism that would facilitate an agreement.  

II. The Asymmetric Situation

A. Deferred Implementation in General

Contracting parties may agree to defer the implementation of a contract when the benefit that one party receives from the deferral exceeds the costs it creates for the other party. That could happen for three main reasons.

One reason pertains to the objective costs and benefits of the deferral for the parties. Thus, returning to the example of the buyer and seller of an apartment, for the next five years, the seller might need the apartment for a particular purpose which is more valuable than that for which the purchaser would use the apartment. In such circumstances, one could expect that should the parties enter into a contract, they would defer its implementation for five years.

A second reason due to which the parties might defer the implementation of their agreement relates to their different subjective assessments of what the future holds. The

\[17\] Here too, it could be argued that the parties can reduce the consideration in another manner. For example, instead of the workers waiving a day of work as of a particular date in 15 years time, the parties could agree on an immediate waiver on the workers’ part of half a day’s work. Nonetheless, the implicit assumption in this example is that just as it is not possible to agree to sell half of an apartment, or on the partial abolition of slavery, so too is it impossible, or at least most inefficient, to divide a work-day into two. This assumption could of course be challenged. For example, it could be claimed that even if one cannot split a work day into two, one could alternate the length of the worker’s week so that he is employed for five days one week and for four days the next week, so that the final result would be an average of four-and-a-half days a week. Alternatively, one could limit the numbers of hours in a week, which is what was actually
parties would therefore have different assessments of the respective costs and benefits of the deferral. Thus, suppose that in the example of the seller and buyer, the buyer believes that over the next five years taxes will be imposed on the rental of apartments, whereas the seller does not believe that taxes will be levied. Even though the buyer and seller’s actual benefit from the asset for the next five years is identical (since both parties designated the apartment for rental over the next five years), their assessments of the future are contrasting, thus warranting a deferral in the transfer of ownership of the apartment.18

_A third reason_, which could induce the parties to agree to defer the implementation of the agreement, is that they might have different attitudes to risks. For even if the receiver and the giver derive identical benefit from immediate or deferred implementation respectively, and even if they share identical assessments with respect to what the future holds in store, their different attitudes to risk could justify deferring the implementation of their agreement. Suppose that in the example of the seller and the buyer, both parties have a shared assessment regarding the chances of taxes being imposed on the income from the apartment; they both estimate a likelihood of 50% that taxes will not be imposed at all, in which case their income from the apartment would be 100, and a likelihood of 50% that taxes will be imposed, thus reducing the income to 50. The expected income over the next five years would therefore be 75 according to both parties’ assessment. Despite this symmetry, if the buyer's aversion to risk is higher than the seller's, both parties would prefer to defer implementation of the contract for five years.

In the following sections we demonstrate how cost externalization and the potential change of sides may also cause an asymmetry between the costs and benefits of the DIAs.

**B. Cost Externalization**

Occasionally, the deferral of the agreement enables one party to externalize a large

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18 Or the parties could transfer ownership immediately and agree that should tax be imposed, the seller would be charged for it.
portion of his costs while the second party expects to receive most of the benefits even if implementation is deferred. In these asymmetrical cases, the deferral of implementation increases the chances of reaching a social agreement. The following example illustrates this claim.

The Pension Program. The legislature of State XYZ is considering the adoption of a national pension insurance program, under which every person over the age of 65 would be entitled to a pension while all people aged 18 to 65 would pay a tax which would finance the pension payments. On average, the older the person is, the lower the tax he would pay and the more annuities he would receive. Obviously, there is a certain age at which the expected cost of the tax equals the expected benefits from the pension program. We shall assume that this age is 30, and therefore people under 30 years of age (“the youth”) would lose out in the arrangement and those above 30 years of age (“the adults”) would benefit from it.

In order to legally adopt the pension program, let us suppose that an agreement must be reached between the ‘youth’ and the ‘adults’. This necessitates an arrangement, which increases the willingness of the youth to partake in the agreement. Immediate implementation of the program would aggravate the position of the youth and would evoke objections on their part. On the other hand, deferring implementation for 12 years would appreciably reduce the price to be paid by today’s youth. In another 12 years, the youth will have become adults and the program would improve their position. The ones required to pay the costs of the deferral are the “children”, currently below 18, who in 12 years time will have to bear the costs that are greater than the benefits they stand to gain.

19 In this situation, the “youth” cannot be consoled by the possibility of receiving a return of part of the pension paid to “adults” in the form of a future bequest. Empirical studies have shown that increased annuitization of resources to “adults” means that “adults” have less reason to fear that they will run out of resources if they live longer than expected. Consequently, they are likely to choose to spend a larger proportion of their income (see L. J. Kotlikoff, J. Gokhale & J. Sabelhaus, 'Understanding the Postwar Decline in U.S. saving: A Cohort Analysis,' Essays on Savings, Bequests, Altruism, and Life-Cycle Planning (Cambridge, Mass., on: The MIT Press, L. J. Kotlikoff (ed.), 2001) at 17, 55; D. Shaviro, Do Deficit$ Matters? (Chicago, on: University of Chicago Press, 2000) at 125).
through the program. Deferred implementation therefore creates a situation in which some of the costs potentially borne by the youth in the event of immediate implementation are externalized and imposed on today’s children.\(^{20}\)

In the pension program example, externalization of costs operates asymmetrically on different age groups. The youth as well as some of the adults (primarily those under the age of 53)\(^ {21}\) will profit from the deferral. Those approaching pension age would lose out from the deferral and would prefer the national pension program to be implemented immediately. The reason that the latter agree to the deferral is that without such a deferral, there would be no pension program at all. The fact that the children, who were not party to the agreement, are financing a substantial part of the program entails that the benefit that the youth stand to gain from the deferral exceeds the loss to the adults, this being the basis for the asymmetry created by the deferral.\(^ {22}\)

Unlike the pension program example, in the ethnic minority conflict example discussed below, deferral of the implementation of the social agreement externalizes costs and benefits in what seems a symmetrical manner. Nonetheless, due to the different subjective values attributed by the parties to the externalized costs and benefits, an asymmetric situation emerges. Consequently, deferring implementation increases the chances of reaching an agreement.

**The Ethnic Minority Conflict.** A disadvantaged ethnic minority in country XYZ demands civil rights and liberties as well as communal privileges. Fulfilling the minority’s demands would be costly to the majority in both monetary and non-monetary terms. While the government in power primarily represents the interests of the majority, it also wishes to placate the minority and attain its cooperation. At the same time, the government perceives the price requested by the minority as too high, and it is neither

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20 It is important to emphasize here that we assume that members of the present generation are self-interested, in the sense that the interests of members of next generation are not as important to them as their own. See supra note 5.

21 Adults 53-65 years of age would save the tax costs, but would also lose pension payments. Within that sub-group, to the extent that a person is closer to pension age, his profits from the deferral diminish, and at a certain stage, the deferral begins to be detrimental to him.

22 Notice however, that under certain circumstances, the credit market can also be utilized to bridge the gaps between the youth and the adults. For further discussion of the credit market as an alternative solution, see part IV.B., infra.
able nor willing to pay it.

One possible solution to the conflict is that the government fulfills only some portions of the minority’s demands. However, such a solution would not necessarily gain the support of the minority: Whereas the majority is troubled only by the effect of the deal on their standard of living, the minority strives to achieve individual, communal and political equality and therefore cannot support a deal that offers them any less than full equality.

Our claim is that, in such cases, it might be easier to reach a compromise with regard to the time of implementation rather than with respect to the price to be paid. The minority would prefer a scheme promising them full equality within fifteen years over a scheme that ensures them an immediate, but moderate change in their status. From the majority’s perspective, they would also opt for deferral as this externalizes some of the costs to future generations.23

Prima facie, the example of the ethnic minority conflict illustrates symmetric externalization: Just as future generations of the majority will incur part of the costs of the agreement in place of members of the majority living today, so too the minority’s future generations will receive part of the consideration instead of members of the minority living today. Objectively, therefore, deferral operates symmetrically on both populations. However, there might be subjective differences in terms of how the deferral affects each group. Whereas the majority might mainly consider the effect of the deal on their standard of living as individuals, the minority might ascribe a very high value to the state’s recognition of their equal status as a community. Hence, whereas deferral of the scheme would be very beneficial for the majority, its cost would be of less significance to the minority who might regard this social agreement as a “constitutional moment”24 for their ethnic community. In constitutional moments such as this, the present generation tends to rise above its own current particularistic interests and ascribes greater importance to the

23 Notice, however, that individuals from the current generation will presumably still be living in fifteen years and will therefore bear part of the costs. Still, it is clear that a large portion of the cost will be externalized to their children and to newcomers who will join the majority over the next fifteen years.
24 The expression “constitutional moment” is borrowed from B. Ackerman, We the People (Cambridge Mass., on: Harvard University Press, 1991). The features of the “constitutional moment” are discussed in Ackerman, ibid., at 170.
effects of its decision upon the community as a whole, including its future generations.

Thus, taking into account the subjective values of the parties, one might envisage circumstances in which the costs of deferral to the present generation of the minority would be lower than the benefits it grants to the present generations of the majority.  

C. Change of Sides

Prima facie, a deferral leading to a change in sides would always operate symmetrically on both parties: the deferral reduces the consideration given by one party at exactly the same rate as it reduces the consideration received by the other party. Nevertheless, in some circumstances, the benefits that one segment of society expects as a result of the deferral is higher than the costs it imposes on another segment of society, thus increasing the joint benefit created by the agreement.

An example of a deferral which has such an asymmetric effect on the parties is the case of the People with Disabilities Act.

The People with Disabilities Act. State XYZ is considering the enactment of a law that imposes an additional tax on the healthy to subsidize the disabled population. The healthy population opposes such a law because it exceeds what they are willing to pay to support the disabled population.

Deferring the implementation of the law may increase the healthy population’s support of the law, as every healthy person can foresee the possibility of becoming disabled in the future. Since the probability of such an undesirable contingency, as estimated in the present, increases with time, it follows that every healthy person knows that when the time comes for the future implementation of the law, he or she may well be on the receiving end. Admittedly, the disabled population is interested in the immediate implementation of the law, but since such an agreement cannot be attained, the real choice the disabled are faced with is between a DIA and no such law at all. Under these circumstances, the disabled population is likely to settle for a deferred-implementation-
law. The healthy population, on the other hand, would support a law the implementation of which is deferred not only because they would not be required to pay anything during the period of deferral, but also because by the time of the implementation date some of them might become disabled and would thus benefit from the law. This example illustrates an asymmetric case, as the possibility of a change of sides is mostly one-sided: healthy people may become disabled, but many disabled persons are doomed to remain in the same unfavorable position.\textsuperscript{26}

In other cases, the potential of a change of sides is objectively symmetric but the sides differ in their assessment of the cost and benefits of such a change. In the unemployment example, it seems as if the deferral of the law operates symmetrically on the employed and the unemployed. But although the consideration offered by the workers decreases because of the deferral at the same rate as the reduction of the consideration received by the unemployed, due to the endowment effect the benefit the workers derive from deferral is expected to be higher than the cost the unemployed incur from the same deferral. The endowment effect mandates that owners of an asset tend to ascribe it greater value than others.\textsuperscript{27} Likewise, it is conceivable that workers attach greater value to their right to work than the value that the unemployed assign to such a right. Nonetheless, workers know that, as time passes, the potential for a change of sides increases, and they might eventually lose their jobs. Therefore, from their perspective, the deferred arrangement preserves part of the asset currently in their possession and does not only

\textsuperscript{26} See the European Council Directive 2000/78/EC of November 27, 2000, establishing a general framework for equal treatment in employment and occupation. According to Article 18 of the Directive, the member states are required to take steps to implement the Directive within three years. However, the Article allows a deferral of three more years with respect to the implementation of the provisions of the Directive on age and disability discrimination. As in many other cases, it is hard to know whether the deferral is motivated by reasons suggested by us in this article or by other reasons, such as allowing the member states to gradually adapt to changes brought about by the Directive.

endanger it. On the other hand, at the time the agreement is reached, the unemployed are by definition not subject to the endowment effect, and therefore, their subjective costs as a result of the deferral are lower than the subjective benefits that the employed derive from the deferral.

III. The Normative Justifications for Deferred Implementation

In previous parts of the paper we argued that deferring the implementation of social agreements could be an effective technique for reaching wide support for the redistribution of wealth. Occasionally, the deferral leads to a change of sides or externalizes part of the implementation costs to third parties. In this part of the paper, we turn to the normative objections to DIAs and the various justifications for their adoption.

A. The Apparently Undemocratic Aspect of DIAs

The mutability of a DIA before its implementation may render its initial attainment superfluous. Consider first the example of the French solution to unemployment. Arguably, society was unable to reach an agreement on such a solution, since the majority of people in society were employed. Assuming the unemployment rate would not change dramatically by the time the law is implemented, the working group would still outnumber the unemployed and hence, just as the majority at present refuses immediate implementation, the majority in the future would support the law’s repeal. Similarly, the externalization of costs to future generations might be thwarted by future generations which would refuse to incur the costs, thus leading to the termination of the social agreement before it is actually implemented. The power of the present majority to thwart any attempt of the future majority to terminate the DIA is therefore a precondition for the effectiveness of deferred implementation.

In this section, we assume that there could be effective techniques to immunize DIAs from repeal by future generations. We later discuss the validity of this assumption.\(^{28}\)

\(^{28}\) Part IV.A., infra.
Still, a normative question arises under this assumption: is such immunity from future repeal consistent with the basic tenets of democracy?29

One of the most powerful justifications for recognizing the power of the current majority to harness the majority’s power, both current and future, is that such constraint enables the majority to commit itself to the minority, and thus merits the cooperation of the minority, for the benefit of both sides.30 Since legislative power resides in the majority, the minority may have the niggling suspicion that at some stage in the future the majority might exploit its legislative majority power and deprive the minority of the consideration it was promised in return for its cooperation. In order to allay this justified fear there must be an effective way for the majority to ensure the rights of the minority against future infringement by the majority. The overwhelming interest of the majority is therefore to deny itself and any other future majority the power to change the law in a way that deprives the minority of the protection it was promised.

It would appear that this justification does not hold for the DIAs we advocate in this paper. In cases where the parties anticipate the possibility of a change of sides, the motivation for the deferral of the agreement is to serve the interests of the individuals comprising the majority who are likely to comprise the minority in the future and benefit from the agreement rather than incurring the costs of the agreement. Similarly, in cases involving cost externalization, both the majority and the minority agree to defer implementation because they know that third parties, who may be the majority in the future, would bear the costs of the social agreement, while the present majority would be its prime beneficiaries.31


30 See e.g., E. Garrett, The Purposes of Framework Legislation' (2005) J. Contemp. Legal Issues (forthcoming), s. II.D (claiming that a minority block crucial to passing a law may demand an entrenchment in the hope that it will bind the current majority in subsequent related decisions).

31 See also D. Chang, 'A Critique of Judicial Supremacy' (1991) 36 Vill. L. Rev. 281 at 290-293 (describing the motives of one portion of the electorate to create entrenched constitutional provisions exploiting “an extraordinary political advantage over another portion of the electorate”).

Prima facie, there is nothing wrong with the fact that the motive of the majority in protecting the minority is its fear that the majority may eventually become the minority. Hence, for example, there is nothing
If the current majority is motivated by its desire to protect the constituents of the majority and not the minority, then the protection of the minority cannot serve as the justification for restricting the legislative power of future generations. Furthermore, the current majority’s motivation for protecting its own constituents and only its own constituents increases the illegitimacy of the immunization of the agreement from future repeal: The present majority imposed an onus on future generation which it was not prepared to shoulder. The pension example is a case in point. According to that example, the adults and the youth would not have been able to reach agreement on the immediate implementation of the pension arrangement because the youth was unwilling to shoulder the burden of the adults’ pension. The only way of reaching such an agreement was by deferring implementation and imposing the main burden on the children who, at the actual commencement of the pension arrangement, would be the youth. One can definitely presume that at implementation time, the youth would deny the legitimacy of the actual arrangement and would criticize the adults of that time, claiming that they are not willing to incur the burden for the benefit of those adults who had displayed a lack of interest in their welfare in the past, and who were unwilling to shoulder a similar onus.32

Although the common justifications for one generation’s power to restrict the legislative power of future generations may not support the deferred-implementation schemes we advocate in this paper, we believe there are alternative justifications for it. These justifications are discussed in the following sections.

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32 Prima facie, the deferral of the pension arrangement creates a problem similar to that created by the deferral of the prohibition of slave trade. In both cases, the deferral imposes costs on groups that were not parties to the social agreement. In the first case, the costs are imposed on ancestors of the current generation and in the second case the costs are incurred by the present slaves. Clearly, both the ancestors and the slaves could be expected to object to the deferral agreed on. A basic difference, however, separates the cases: in the former case, when the ancestors grow up, they will wish to revoke the arrangement and release themselves from the onus imposed on them by the previous generation. The slaves, on the other hand, will support the proscription of slave trade when the deferred time arrives, regardless of whether they were slaves at the time of the constitution’s adoption or born thereafter.
B. A Change of Sides—Making Decisions Behind the “Veil of Ignorance”

An individual behind the veil of ignorance does not know whether he or she is rich or poor, strong or weak, or of high or low social status. Behind the veil of ignorance, an individual would choose rules and principles to apply to society devoid of any bias or self-interest, in a state of pure neutrality. In the spirit of Rawls' theory of justice, it could be claimed that rules and principles adopted in this manner would be just and fair.\(^{33}\) In reality, legislators are not free of self-interest, and would be presumably biased in favor of their own interests or the interest of their constituents. Thus, a veil of ignorance is a metaphor for impartiality and neutrality to which decision makers should aspire.\(^{34}\)

The potential for a change of sides triggered by deferred implementation is that it tends to bring the individual members of the groups closer to the “veil of ignorance”. As a result, it increases the likelihood that the social agreement that contains a deferred implementation clause will fulfill the Rawlsian criteria for fairness.\(^{35}\) In its ideal state,


\(^{34}\) A limit on the information available to the decision makers is one of the methods for creating a “real-world” veil of ignorance, see M. A. Fitts, 'Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions' (1990) 88 Mich. L. Rev. 917 (suggesting that less information can sometimes promote efficiency by overcoming various collective action problems. Vagueness about the political position of different groups can promote public acceptance of resource distribution and help stimulate a rational dialogue, and even further political consensus); A. Vermeule, 'Veil of Ignorance Rules in Constitutional Law' (2001) 111 Yale L. J. 399 at 428-29, observed that there is an information-neutrality tradeoff: supplying decision makers with more information produces more decisional bias; restricting information produces impartial but poorly-informed decisions; see also Garrett, supra note 30, s. II. B, (describing budget rules and the Electoral Count Act considering the tradeoff).

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

\(^{35}\) Rawls, supra note 33 60-108. Our utilization of the Rawlsian theory of justice is by way of analogy or inspiration, and is not a direct application of this theory. For a discussion of different methods (including deferring implementation) that can be used in order to approximate legislators to the veil of ignorance, thereby moderating conflict of interests, see Vermeule, supra note 34. These methods attempt to introduce uncertainty about the distribution of future benefits and burdens that will result from a decision. Amongst them, the delay takes advantage of the inherent unpredictability of the decision maker's long-term interests. By confining the range of the decision's application to cover only the period in which decision-makers' interests are unpredictable, a delay ensures that the only period current decision makers can affect is subject (from their standpoint) to a veil of uncertainty (ibid., 419-420); See also, Garrett, supra note 30 (suggesting that while enacting framework laws, lawmakers act behind a partial veil of ignorance, as they are uncertain about which of the procedures they prescribe will help them and which will be detrimental to them in the future.).
deferred implementation produces a situation in which all members of either group anticipate that they have an equal chance of being the beneficiaries or bearing the costs of the deferred redistribution plan.\textsuperscript{36} For example, in the unemployment case, if deferred implementation creates a situation in which all members of both groups (the workers and the unemployed) share an identical assessment of the likelihood of their being workers or unemployed at the time of implementation, then their decision on the number of work hours is in effect an unbiased decision, adopted from behind a veil of ignorance. Obviously this does not mean that they would necessarily agree to adopt the French solution, for it may have its shortcomings (e.g., the reduction of incentives to invest in work). At any rate, the decision of each of the individuals in the groups would not be affected by whether she is \textit{currently} employed, for as assumed, she has no way of knowing which group she will belong to at the time of implementation.

In reality, the likelihood that a person working today will still be employed in 15 years time probably exceeds the chances that a person currently unemployed will be working in 15 years. The workers’ attitude towards the French solution – even if implemented in 15 years – will therefore not be the same as it might have been if they had been positioned behind a veil of ignorance. Still, because of the deferral of implementation, their individual interest in opposing it would be moderated by the superior prospect of becoming unemployed, rendering it easier for them to agree. The deferred agreement achieved would be close, though not identical, to the agreement that would have been reached by people deciding from behind a veil of ignorance.

\textbf{C. Externalizing Costs—Sharing the Burden of the Agreement with all its Beneficiaries}

Can deferred implementation be justified when such deferral externalizes costs to third parties? The philosophical and legal literature discusses the risk that the present

\textsuperscript{36} See also, Fitts, supra note 34, at 966-967; J. Elster, \textit{Ulysses Unbound} (Cambridge, on: Cambridge University Press, 2000) 144-146 (Fitts and Elster argue that by increasing uncertainty, delays create a veil of ignorance that forces an agent to put himself in everybody’s place).
generation would externalize costs to future generations very thoroughly. However, these writings tend to downplay the mirror problem, which is just as prevalent as the risk of cost externalization, namely, that the present generation is often forced to confer benefits upon future generations and is unable to charge them anything in return. Deferred implementation is one mechanism which allows the present generation to charge the future generations for benefits the latter will receive, thereby promoting intergenerational justice and motivating the present generation to adopt social agreements desirable to both present and future generations which they would otherwise never have adopted. In the following paragraphs we discuss the goal of promoting intergenerational justice (“the fairness justification”) and the goal of motivating the parties to adopt desirable agreements (“the efficiency justification”).

Let us begin with the fairness justification. Deferring the implementation of a social agreement for redistribution reduces the burden that the redistribution scheme imposes on the well-off group in the present generation and allows them to share part of the burden with the well-off segment of the future society. Such externalization to future generations is particularly justified in those cases where immediate implementation imposes a particularly heavy burden on a certain group in present society but would benefit future generations. Allowing the givers in present-day society to transfer some of its costs to future generations who are expected to benefit from the implementation of the agreement, while shouldering some of the costs themselves, is justified on grounds of fairness, as it burdens all the beneficiaries of the agreement with its costs.

Having said that, we are aware of the risk that DIAs might be abused by present

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37 See e.g. J. Locke, Two Treatises of Government (Cambridge, on: Cambridge University Press, P. Laslett (ed.), 1964), book 2, ch. 8, s. 116, at 364 (“‘Tis true, that whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but cannot by any Compact whatsoever, bind his children or Posterity”); T. Paine, ‘The Rights of Man,’ Political Writings (Cambridge, on: Cambridge University Press, B. Kuklick (ed.), 1989) at 63 (“every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it”); T. Jefferson, Basic Writings (Garden City, N.Y, on: Alcyon House, P. S. Foner (ed.), 1944) at 590 (“by the law of nature, one generation is to another as one independent nation to another”); A. Smith, Lectures on Jurisprudence (Oxford, on: Clarendon Press, R.L. Meek, D.D. Raphael & P.G. Stein (eds.), 1978) at 468 (“A power to dispose of estates for ever is manifestly absurd. The earth and the fullness of it belong to every generation, and the preceding one can have no right to bind it up from posterity”).

38 The generational accounting theory suggests that modern fiscal policy generally has transferred wealth from younger to older Americans (Shaviro, supra note 19, at 122-128). When this is true, a DIA might help in balancing the redistribution of wealth among younger and older people.
generations, who will over-burden the next generation beyond a level that would be fair. Therefore, a DIA which externalizes costs to future generations would be fair if it secures a correlation between the costs and the benefits externalized to future generations. Thus, the pension example discussed above would satisfy the fairness requirement only if the costs and the benefit of the plan are equally distributed among the various generations. The pension program would not satisfy this condition if the whole burden is externalized to the next generation.

Let us now turn to the efficiency justification. The legitimacy of the deferred agreement can be justified on the basis of an anomaly innate to the democratic system—the present generation does not have sufficient incentives to benefit future generations because it cannot charge those generations for the benefits conferred to them. To illustrate, let us assume that the present generation should invest 15 in order to generate benefits of 20, to be equally shared by the present and the following generation. If the current generation cannot charge the next generation at least 5, the former would be reluctant to invest the costs of 15 in the first place. This anomaly could be avoided if all the generations were represented at the legislative body. More realistically, the problem could be solved by allowing the current generation to charge future generations for some of the costs it incurred in creating benefits for future generations. DIAs can be utilized to perform this function.

39 See Elster, supra note 36, at 169-70 (describing this risk as “the minority problem” and “the future-generation problem”, and arguing that no group has an inherent claim to represent the general social interest). Likewise, economists indicate that the American tax system tends to be beneficial to the current generation at the expense of future generations. For discussing generational equity proposals, see Shaviro, supra note 19, at 151-185.

40 This is not to say that notions of fairness mandate that costs and benefits be evenly spread across generations. For example, if future costs are very low, but entering into a social agreement has significant benefits to the present generation, then intergenerational fairness could be maintained even if costs are not externalized to next generations. Similarly, if there is reason to expect that future generations will on average be wealthier than current generations, imposing disproportionate costs on future generations may be appropriate on grounds of fairness, for the same reasons that progressive tax rates seem fair.

41 Put differently, a decision maker will make an efficient decision when she internalizes both the costs and benefits of her decision. Since in our case internalization of all the benefits by the current, decision-making generation is impossible, the only realistic option to motivate the current generation to make an efficient decision is to allow it to externalize some of the costs to future generations.
IV DIAs in the Real World and the Reasons for Their Rarity

A. Examples of Real World DIAs

DIAs are quite rare in the real world. Still, they do exist. One example of a DIA is The Amended Proposal for a European Parliament and Council Directive on Company Law Concerning Takeovers Bids,\(^{42}\) aimed at prohibiting the use of “poison peels” as a defense mechanism against hostile takeovers. This bill, proposed in 1999, included a clause which stipulated that the Directive would become effective only in 2010. Initially, the Scandinavian states objected to the Proposal, whereas Germany and France supported it. We speculate that the reason for the proposed deferral was to mitigate the harsh consequences of the law to the states opposing the adoption of the Directive. However, it is hard to verify whether this was indeed the main reason for the proposed deferral and whether either one of the two effects of deferral which we discussed in our paper was relevant in this matter. Eventually, the proposal was rejected by the EU parliament for other reasons.

A second example of a DIA is the 1984 agreement between China and England in the matter of Hong Kong, according to which the transfer of Hong Kong from England to China would take place in 1997. One of the declaration’s appendices states that British rental rights in Hong Kong territories would be extended by another fifty years after the day of their transfer to China, i.e. until 2047.\(^{43}\) A most plausible explanation for the deferral in this case is that the parties wished to externalize much of the agreement’s costs to subsequent generations and to other third parties.

A third example of a DIA is the European Council Directive 2000/78/EC establishing a general European framework for equal treatment in employment and occupation. According to Article 18, the member states are required to take steps to implement the Directive within three years. However, the Article allows a deferral of three more years with respect to the implementation of the provisions of the Directive on age and disability discrimination. As in many other cases, it is difficult to determine

\(^{42}\) (unpublished draft, 1999)

whether the deferral was motivated by reasons which we suggest in this article or by other reasons, such as allowing the member states to gradually adapt to changes brought about by the Directive.

The North American Free Trade Agreement ("NAFTA") consti"tutes another interesting example of a DIA. Article 302 of the NAFTA maintains that "each Party shall progressively eliminate its customs duties." Annex 302.2 of the agreement provides four categories of goods: the first category includes goods for which custom duties would be lifted soon after the agreement becomes effective. The second, third and forth categories include goods for which custom duty would be removed gradually in 5, 10 and 15 equal annual stages, respectively. These provisions may be explained by the need of each party to secure support of its local producers. Typically, such producers and their employees oppose the elimination of custom duties. The deferral of such tariff-lifting mitigates their opposition, not only because it allows them a few more years of protection from competition, but arguably also because they anticipate the possibility that by the date of implementation they would change sides and market their goods abroad.

B. A Comparison of DIAs and Sunset Laws

In contrast to DIAs, some laws, which are known as "sunset laws", contain a
clause according to which the law would expire within a certain period of time. Rather than committing to changing the status quo in the future, a sunset law changes the status quo at present but commits to reverting to the status quo in the future. There is thus a major difference between DIAs and Sunset Laws: While DIAs transfer costs and benefits to future generations, sunset laws aim at retaining the effects of the law as close as possible to the current generation. Therefore, on many occasions, the reasons for enacting sunset laws are completely different from the reasons for endorsing DIAs.

Nevertheless, the structure of a sunset law is similar to a DIA: while society cannot reach an agreement to keep the status quo at present, society can agree to defer the reversion to the status quo to a future date. On some occasions, the similar structure of DIA and a sunset law is evidence of the similar goals of the two mechanisms. To illustrate, suppose that there is a law, in the spirit of the French solution to unemployment, which restricts the number of weekly working hours to 35. Suppose further that a few years after the law was enacted, unemployment decreases significantly and there is wide support for the removal of such restrictions. However, many workers may still anticipate the possibility that unemployment may rise in the future and they would lose their jobs. Proposing a sunset law, which removes the restriction, say, for 5 years only, could convince the workers opposing the change in the status quo to endorse the deal.

An illustrative case of a sunset law is the Ordinance which was enacted by the Minister of Defense in Israel in January 1968, a few months after the end of the Six Day War.\textsuperscript{46} The Ordinance extended mandatory military service in Israel by 6 months, which resulted in three years of service for men and two years for women. The Ordinance gained wide support, arguably because the government declared in the Knesset that it would only be effective for six months, and afterwards its extension would be reconsidered. In actual fact, the Ordinance was reconsidered only after six years. The effect of this sunset law-like arrangement is the mirror image of the effect of a DIA. Whereas a DIA externalizes costs to subsequent generations, the Ordinance imposed costs on current soldiers (and their families), with an implicit promise to future soldiers (and their families), that they would not have to bear the costs of the Ordinance. Ironically, the Ordinance was extended

\textsuperscript{46} The Ordinance was enacted by virtue of Art. 26 to the Defense Service Law [Combined Version], 5765-1959, S.H. 169, see A. Rubinstein & B. Medina \textit{The Constitutional Law of the State of Israel} (Jerusalem, http://law.bepress.com/taulwps/art22
again and again, and ultimately became a law enacted by the Knesset (the Israeli Parliament) which is still valid today.

C. Why Are DIAs So Rare?

Although DIAs do exist, as the above examples illustrate, if DIAs are as efficient and fair as we believe, it is important to investigate the causes of their rarity. One reason deferred implementation laws are seldom adopted might be the fear of present generations that any such law would not sustain the future majority’s will to repeal it.47 This is the ineffectiveness argument which we will discuss first. It is also possible that other mechanisms could be utilized to create similar effects to those created by the deferral of the implementation, rendering the latter redundant. This is the redundancy argument which we will discuss second. Finally, DIAs create uncertainty for the parties, which diminishes its utility. This is the uncertainty argument which we will discuss last.

1. Ineffectiveness

Most laws are implemented shortly after their enactment. Thus, typically, there is no reason the majority would vote down such laws. Moreover, laws with immediate implementation will stay effective as long as the median voter does not change his or her preferences. DIAs are different because the very same majority that supports the law opposes its immediate execution. Therefore, assuming the preferences of the median voter would not change, the median voter would strive to repeal the law before it is implemented. Thus, as long as a simple majority suffices to change laws, DIAs will never be implemented. Due to this ineffectiveness, DIAs would not be supported by the current generation.

Therefore, the effectiveness of DIAs depends on the ability of current legislature to protect it against easy repealing in the future. Arguably, the legislative process,
especially in the United States with its bicameral system, is always costly so that the status quo can never be easily repealed. In fact, Thomas Jefferson's claim that laws should apply for 19 years only was based on the assumption that a simple majority in the following generation would not be able to change a law, because no "form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment."48

However, the regular legislative procedures will often not provide sufficient protection of the status quo, in which case other, more cumbersome mechanisms should be adopted in order to make the repeal of the DIA difficult and costly. In some countries, the legislature is authorized to write an explicit entrenchment clause into its laws. According to this entrenchment clause, any future attempt to repeal the law would be valid only if certain onerous procedures - e.g., a supermajority requirement - are met.49

A DIA can also be entrenched by introducing third parties as enforcers of the DIA. For example, a DIA between two groups in a specific country can be incorporated into an international agreement with another country that has an interest in the enforcement of the DIA. Thus, an Israeli DIA that promises equality to the Arab minority living in the State of Israel can be entrenched by its incorporation into an international agreement between Israel and several Arab countries.

In other circumstances, the DIA may be entrenched by monetary guarantees issued by the government to the future beneficiaries of the DIA.50 For example, the government may issue bonds with a penalty clause stating that the interest rate will be doubled if the DIA is not implemented.51 Since future taxpayers are the ones who will pay the additional

48 Thomas Jefferson, in a letter to James Madison, 6 Sept. 1789 Papers 15:392-97
49 In Israel, for example, laws are enacted by a simple majority in the Knesset, that is, if the number of supporters is larger than the number of opposing votes. However, the Knesset may entrench a certain statute by designating it a "basic law" and adding a clause that defines certain procedures, including supermajority requirements, that should be met by any future legislature that strives to repeal or circumvent that law. In the U.S., Congress may establish certain rules that will shape legislative deliberation and voting with respect to certain laws or decisions in the future (see Garrett, supra note 30).
50 In fact, the entrenchment would be effective even if the guarantees were issued to third parties. The advantage of issuing the guarantee to future beneficiaries is that it ensures that if the DIA is not implemented, the intended beneficiaries will still be compensated.
51 In a recent paper, after presenting our thesis, Lee Fennell suggested that a legislature which wants to strongly commit to policy A, would create "a locking fund" into which its current members would appropriate from their budget an amount representing the strength of their aggregate preferences that the policy not later be undone. This fund would immediately become available to the opponents of Policy A to
interest, this arrangement will increase their costs and deter them from repealing the DIA.

Lastly, in very special circumstances, the DIA can be incorporated into a constitution, or into an amendment to a constitution. Article One, Section Nine, of the U.S. Constitution (the prohibition of slave trade) is one example of the utilization of the constitution as a mechanism by means of which a DIA is entrenched.

One way or another, the risk that future generations might rebel against the DIA or find ways to circumvent it always exists. One good example which demonstrates the ever-present risk of rebellion is the fact that despite the provisions in the U.S. constitution, slavery continued to exist after 1808. Thus, parties to DIAs should be very concerned about the recognition of their agreement as legitimate. We believe the chances that such agreement would be respected in the future would be higher for DIAs that meet the intergenerational fairness requirement that we advocated above. Moreover, it would be in the next generation’s best interest to respect such fair DIAs. To see why, envision the enactment of laws which have intergenerational impact as a repeated game between generations. Any generation that ignores the restrictions fairly imposed by the previous generation cuts the chain of repeated games and surrenders its own power to adopt similar arrangements. The fact that the next generation respects the DIAs adopted by the previous generation preserves the power of the next generation to restrain the succeeding generation in the same way.

2. Redundancy

Another possible explanation for the rarity of DIAs is that there may be other equally effective mechanisms that facilitate agreements for the redistribution of wealth. Thus, if the current generation wants to externalize costs to the next generation, it may apply to public projects of their choosing or to save for later use. Later, when Policy A undergoes reconsideration, the policy's opponents would be required not only to win the vote, but also to come up with enough money to repay the ‘locking fund’ amount (which would go to the then-losers on the Policy A vote)." L. Fennell, 'Revealing Options' 118 Harv. L. Rev. 1399, 1487 (2005).

See also E. Burke, 'Reflections on the Revolution in France' Works, vol. III, at 359 (describing society as "a partnership... between those who are living and those who are dead, and those who are to be born").

See also S. Holmes, 'Precommitment and the Paradox of Democracy' Constitutionalism and Democracy (Cambridge, on: Cambridge University Press, J. Elster & R. Slagstad (eds.), 1988) at 222-223 ("To influence a situation, an actual power-wielder must adapt himself to preexistent patterns of force and unevenly distributed possibilities for change. The influencer must be influenced: that is a central axiom of..."ythe..."
simply turn to the credit market. For example, instead of the deferred pension program we discussed earlier, the "youth" and the "adults" could reach an immediate-implementation agreement, and finance it with a long-term loan to be paid by the next generation.

Although we do not dispute that long-term debts could serve similar purposes to the ones we attribute to DIAs, we contend that it does not preempt the need for such agreements.

Firstly, loans will often be more expensive than DIAs because the lender’s risk is higher than that taken by the intended beneficiary of the DIA. For example, an American lender to a third world country assumes the risk that the borrowing country might go bankrupt and may therefore prefer to refrain from giving a loan to such a country. On the other hand, although residents of the borrowing country—the intended beneficiaries of the DIA—face the same risk of bankruptcy, they do not have the alternative of moving to another country and will therefore be less sensitive to this risk.

Secondly, in some contexts, DIAs do not only redistribute wealth but also create non-monetary benefits. For example, in the case of the Ethnic Minority Conflict, the DIA grants the minority civil rights, liberties and communal privileges that cannot be replaced by any monetary equivalent. Consequently, loans could not achieve what the DIA could achieve in this example.

Thirdly, long-term loans do not preempt DIAs in cases where the motivation for the agreement stems from the parties’ belief that they might change sides in the future. Consider, for example, the program to reduce unemployment by reducing the number of weekly working hours. Employees of the present generation support this DIA because it "insures" them against the risk of unemployment. One could argue that the same advantage could be achieved by an immediate-implementation arrangement financed by a loan to be paid back in the future by employees of the next generation. However, notice that compared to a DIA, this immediate-implementation arrangement benefits the

any realistic theory of power”.

54 Part II.B., supra.
55 In fact, Thomas Jefferson himself saw the connection between perpetual laws or constitutions and government’s long-term debt, and thought that both should be limited to 19 years. Supra, note 48. We also see the connection and, therefore believe that just as governments often issue long-term bonds, legislatures should also utilize DIAs.
unemployed segment of current society, and is more costly to the employed segment of current society. Thus, it is clear that the latter group would be more supportive of a DIA than of an immediate-implementation agreement that is backed by a long-term loan.

3. Uncertainty

Another possible explanation for the scarcity of DIAs is the uncertainty these agreements create and the parties’ fear that when the time of implementation comes, circumstances will have changed, rendering the implementation of the agreement either impossible or completely different from what had been anticipated by the parties.\textsuperscript{56} Although uncertainty may be problematic for any law—at least any law that does not include a sunset provision—it is of particular concern for DIAs because, by definition, they must be entrenched against future attempts to repeal it. To illustrate, consider the example of the solution for the problem of unemployment discussed earlier: limiting employment to 35 hours a week may sound like a good solution to the high unemployment rate that prevails when the DIA is signed. However, unemployment might decrease before the law is implemented, in which case the 35-hour limit would be unnecessary and costly. Clearly, the legislature will strive to repeal it but will find it difficult to do so because the law is entrenched.

Even though uncertainty could be a barrier for adopting hard-to-repeal DIAs, there are two mitigating factors that should be taken into account. Firstly, the fact that the DIA is entrenched does not mean that it is immutable. In fact, if circumstances change in a way that renders the implementation of the DIA too costly, we should anticipate wide popular support for its repeal. For example, if unemployment decreases significantly, very few voters would oppose a move to repeal the DIA.

Secondly, the parties to the DIA will often be able to anticipate such a change of circumstances, in which case they could attempt to incorporate certain modification clauses into the DIA. Thus, since the parties anticipate the possibility of a decrease in unemployment, they might stipulate that any future reduction of working hours be

\textsuperscript{56} One should also notice that uncertainty is not always a barrier to reaching a DIA. In fact, the change of sides effect, generated by DIAs, creates uncertainty which is instrumental to reaching an agreement. In other cases, uncertainty could be an advantage for one party and a disadvantage for the other party. It is
dependent on the prevailing rate of unemployment at the time of implementation.

We may conclude, therefore, that although uncertainty may sometimes be an explanation for the rarity of DIAs, there are cases in which this risk can be avoided.

IV. Conclusion

In this article we attempted to show that DIAs frequently allow for a change of sides and externalize costs to third parties, thereby increasing the chances of attaining socially desirable agreements. In many cases, the DIA is more just and fair than an agreement to be implemented immediately, since it often creates intergenerational justice by imposing the costs of the social agreement on all the generations which stand to gain from it, and not just on the current generation. Occasionally, a DIA is the only way to reach an agreement that is beneficial to both present and future generations. In other cases, the DIA enables the individuals composing the contracting parties to adopt less partial decisions, as if they were viewing the subject of the agreement from behind the Rawlsian veil of ignorance.

We believe that the rarity of DIAs stems from the present generation’s concern that the next generations might not respect these agreements and find ways to avoid implementing them. In this paper, we have argued that in many cases this concern is unfounded. We therefore suggest that lawmakers should be aware of the potential advantages of DIAs, and use it broadly for the purpose of promoting wide consensus for redistribution of wealth in society.