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RESEARCH ARTICLE

Intergenerational Subjection

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Abstract
Can the dead subject later generations to their will? Legal and political philosophers have long worried about this question. But some have recently argued that subjection between generations that do not overlap is impossible. Against these views, we offer an account of this kind of subjection and the conditions under which it may occur—the Mediated Subjection View. On this view, legal subjection between nonoverlapping generations occurs when past generations seek to guide the future's behavior, *and* legal officials in the future deem the norms and legal frameworks inherited from the past as reason-giving and action-guiding, and have the effective power to enforce them. Under these circumstances, we argue, future legal officials act as *intermediaries* of the past, enabling past generations to subject later ones to their laws. We first inspect the normative significance of subjection and introduce and motivate the Mediated Subjection View. We next scrutinize four objections to the possibility of legal subjection between nonoverlapping generations and show how our view can answer them.

Keywords: future generations; legal subjection; intergenerational legitimacy; legal theory

The question of whether the dead can subject later generations to their will is not new. Concerned about how a permanent constitution could subject subsequent generations to the founding generation's will, Thomas Paine railed against "the manuscript assumed authority of the dead"[1] and Jefferson likewise argued that "one generation is to another as one independent nation to another."[2] Yet the question has elicited renewed philosophical interest, with many inspecting whether intergenerational subjection, through constitutional or other means, may undermine later generations'

[1]THOMAS PAINE, *Rights of Man*, in RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 83, 92 (Mark Philp ed. 1995).

[2]THOMAS JEFFERSON, *Letter to James Madison, Sept. 6, 1789*, in POLITICAL WRITINGS 593, 596 (Joyce Appleby and Terence Ball eds. 1999).

status as equal authors of the law,[3] their political autonomy,[4] or their freedom more generally.[5]

These worries may be mitigated, some argue, if the benefits of intergenerational subjection outweigh its costs;[6] if the interests of future generations are included in the decisions whereby power over them is exerted, as polities including Finland, Israel, Hungary, and Wales have sought to do through various commissioners in recent decades;[7] or if subjection is removed in the first place—for instance, by rendering constitutions amendable through simple majority procedures or by requiring periodic constitutional revisions, as Jefferson famously championed, and as fourteen US states do by requiring citizens to be regularly consulted on the need to call a constitutional convention.[8]

Crucially, however, both the normative concern that intergenerational subjection prompts and the suggested remedies assume that subjection among nonoverlapping generations is *possible* to begin with. But this is precisely what some have recently questioned. Ludvig Beckman, for instance, has argued that "the idea of one people exercising legal power over some future people [is] incoherent."[9] And Axel Gosseries has similarly argued that future generations cannot be subjected to "enforceable extra-generational jurisdictional claims made by [past] generations willing to impose their own rules."[10] If these claims are correct, intergenerational subjection would be possible among *overlapping* generations but not among generations that do *not* overlap, thus rendering the dead hand of the past unthreatening. It would follow, for example, that the worries of the likes of Paine, Jefferson, and many others are unfounded.

In this paper, we ask whether and how intergenerational subjection among nonoverlapping generations can happen. Our answer is an account of intergenerational subjection that we label the *Mediated Subjection View*. On this view, intergenerational subjection is neither incoherent nor impossible. If we think of legal systems as extending over time, then we can claim that some agents in the future, including legal officials such as judges and law enforcement officers such as policemen, can act as intermediaries of past legal officials, legislators, and drafters of constitutions. When past legal officials sought to guide later generations' behavior

[3]Axel Gosseries. *Constitutions and Future Generations*, 17 GOOD SOC. 32 (2008); NIKO KOLODNY. THE PECKING ORDER: SOCIAL HIERARCHY AS A PHILOSOPHICAL PROBLEM (2023).

[4]Matthew W. Wolfe, *The Shadows of Future Generations*, 57 DUKE LAW J. 1897 (2008); Dennis Thompson, *Representing Future Generations: Political Presentism and Democratic Trusteeship*, 13 CRIT. REV. INT. SOC. POLITICAL PHILOS. 17 (2010).

[5]MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2003); Victor Muñiz-Fraticelli, *The Problem of a Perpetual Constitution*, in INTERGENERATIONAL JUSTICE 377 (Axel Gosseries and Lukas Meyer eds. 2009).

[6]Gosseries, *supra* note 3; Muñiz-Fraticelli, *supra* note 5.

[7]JONATHAN BOSTON, GOVERNING FOR THE FUTURE: DESIGNING DEMOCRATIC INSTITUTIONS FOR A BETTER TOMORROW (2017); Andre Santos Campos, *Representing the Future: The Interests of Future Persons in Representative Democracy*, 51 BR. J. POLITICAL SCI. 1 (2021).

[8]ZACHARY ELKINS, TOM GINSBURG, AND JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 13-14 (2009).

[9]Ludvig Beckman, *Democracy and Future Generations. Should the Unborn Have a Voice?* In SPHERES OF GLOBAL JUSTICE, VOLUME 2 775, 788 (J.C. Merle ed. 2013).

[10]Axel Gosseries, *Generational Sovereignty*, in INSTITUTIONS FOR FUTURE GENERATIONS 98, 101 (Iñigo González-Ricoy and Axel Gosseries eds. 2016).

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and later, nonoverlapping legal officials deem the legal framework they inherit as reason-giving and action-guiding, then such later officials act *partly* as intermediaries of the past.[11] Or so the Mediated Subjection View holds—a view that, we argue, is compatible with many theories about the nature of law and robust across different interpretive standards, albeit to different degrees, as we discuss. The right kind of mediation may obtain, for instance, if legal officials follow the original intentions of lawmakers, as intentionalist views defend that they should,[12] but also if they comply with the broad guidelines of the law seen as a plan, as Shapiro's planning theory of law holds.[13]

Our account seeks to explain how intergenerational subjection among nonoverlapping generations is possible, rather than whether (or how) it would be objectionable as a result.[14] Now, although this paper does not advance a normative position, it is *motivated* by normative concerns. Getting the question about the *possibility* of intergenerational subjection right is of considerable normative significance, given the potential costs of yielding either false negatives or false positives. If intergenerational subjection is possible but we mistakenly rule it out, we risk overlooking potential threats to future generations' political autonomy or status as equal authors of the law. And if, on the contrary, intergenerational subjection is impossible but we mistakenly treat it as real, we risk wasting scarce resources trying to fend off a nonexistent threat or, even worse, unnecessarily curtailing present generations' decision-making powers.[15]

The Mediated Subjection View has three main benefits. First, it offers a nuanced answer to the question of how intergenerational legal subjection can happen—one that avoids extant objections, which we critically review. Second, the Mediated Subjection View also allows us to register different degrees of intergenerational subjection relative to factors including the distance between past legal officials and those in the future, the nature and sources of the constraints that past generations may be able to impose on the *de facto* lawmaking capacity of future generations, or the interpretive standards future legal officials employ. And, third, it illuminates other philosophical debates in which the notion of subjection, and the complaints it can trigger, plays a central role, especially when it obtains through some form of mediation, as it often does.

The paper is structured as follows. In Section I, we review the philosophical significance of subjection and clarify the notion of subjection at issue (to anticipate, we focus on *legal* subjection). In Section II, we introduce and motivate the Mediated Subjection View. Sections III–VI discuss four distinct arguments against the possibility

[11]They act as intermediaries of the past, though only partly because they also act as intermediaries of present people and possess their own agency as well. We thank an anonymous reviewer for a helpful observation on this issue.

[12]*See* RICHARD ELKINS, THE NATURE OF LEGISLATIVE INTENT (2012).

[13]SCOTT SHAPIRO, LEGALITY (2011).

[14]Political philosophers are divided on this question. While some believe that subjection is always pro tanto objectionable, others believe that subjection is *conditionally* objectionable—that is, only objectionable when arbitrary or otherwise unwarranted by additional normative considerations. All agree, however, that subjection *can* be a serious wrong—and that would be enough to render intergenerational subjection, if possible, a potentially serious threat. We are grateful to an anonymous reviewer for pressing us on this point.

[15]We thank the anonymous reviewers and Manuel Valente for inviting us to make explicit what is at stake, normatively speaking, in the paper.

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of intergenerational subjection among nonoverlapping generations: that it is up to each generation to uphold the *de facto* authorities without which legal subjection is not even possible (Section III), that future generations can at any time modify the rule of recognition which determines whether present laws are valid for them (Section IV), that present generations cannot enforce current laws in the future (Section V), and that future generations cannot bear legal obligations, as they do not exist yet (Section VI). The last section concludes by summing up the chief elements of the Mediated Subjection View and some of its practical implications.

I. Subjection: Some Clarifications

In this section, we clarify the notion of subjection at issue. Although we focus on *intergenerational* subjection, subjection pervades legal and political philosophy. It impinges on debates, for instance, on political obligation and the right to rule,[16] relational equality and republicanism,[17] intergenerational justice and legitimacy,[18] and democratic inclusion and the "boundary problem"—where some have argued that being subjected to the law is precisely what generates an entitlement to a democratic say over lawmaking.[19] Underneath these debates lies the idea that subjection encroaches on individual autonomy in a particularly salient way, potentially warranting, when unchecked, complaints of the kind mentioned in the Introduction. The notion of subjection, however, is not only normatively relevant. It is also crucial, for instance, to debates in legal philosophy about the nature of legal authority.[20] Our paper purports to prompt a useful dialogue between these, often distant, bodies of literature, and accordingly draws on them.

In this paper, we focus on *legal* subjection—that is, on those forms of subjection traceable to institutionalized systems of norms, including *primary rules* telling us what to do or refrain from doing; *secondary rules* specifying how to identify, change, and adjudicate among primary rules; and *designated officials* playing particular roles

[16]RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN RAWLS, POLITICAL LIBERALISM (1993); A.J. SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (2001).

[17]Elizabeth Anderson, *What Is The Point of Equality?* 109 ETHICS 287 (1999); PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012); KOLODNY, *supra* note 3.

[18]Axel Gosseries, *Can We Rule the Future (and Does It Matter?)* 10 RIV. FILOS. DIRIT. 285 (2021); Anja Karnein, *What's Wrong With the Presentist Bias? On the Threat of Intergenerational Domination*, 26 CRIT. REV. INT. SOC. POLITICAL PHILOS. 725 (2022). Until now, most contributions have focused on how past generations can *affect* future generations, and its moral implications—*see* DEREK PARFIT, REASONS AND PERSONS (1984); Clare Heyward, *Can the All-Affected Principle Include Future Persons? Green Deliberative Democracy and the Non-Identity Problem*, 17 ENVIRON. POLITICS 625 (2008). Now, although being subjected arguably entails being affected, the opposite is not true. Subjection, as a distinctive type of affectance, has received insufficient theoretical exploration.

[19]Eva Erman, *The Boundary Problem and the Ideal of Democracy*, 21 CONSTELLATIONS 535 (2014); LUDVIG BECKMAN, THE BOUNDARIES OF DEMOCRACY: A THEORY OF INCLUSION (2023); Robert E. Goodin and Gustaf Arrhenius, *Enfranchising All Subjected. A Reconstruction and Problematization*, 23 POLITICS, PHILOSOPHY & ECONOMICS 125 (2024).

[20]JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (2d ed. 2009); SHAPIRO, *supra* note 13.

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and performing particular functions.[21] This may not be the only kind of subjection, though. If we keep you in a basement at gunpoint, for instance, you are in some important sense subject to our will. These additional forms of subjection undoubtedly raise important questions. Yet they do not constitute our main target because those who assume the possibility of intergenerational subjection, such as Jefferson and Otsuka, as well as those who have called it into question, such as Gosseries and Beckman, have focused on legal subjection, and we follow suit.

Legal subjection to a particular legal system obtains if the authors of the norms that comprise that system

i) intend to bind and guide the behavior of those subject to the norms, typically by providing or altering the subjected parties' reasons for action,
ii) and can successfully do so, coercively if need be,[22]

and those subject to such norms, in turn,

iii) generally comply with them and see them as reason-giving and action-guiding, either because they deem the norms themselves legitimate[23] or due to "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."[24]

When these three conditions are satisfied, a legal system acquires *de facto* authority, which most see as necessary for genuine legal obligations to arise in the first place. Without *de facto* authority, legal norms become little more than harmless strings of words. Summing up, and for the purposes of this paper, legal subjection requires that the *authors* of the law have the *intention* to guide someone's behavior, as well as the *capacity* to do so, and that those *subject* to the law generally follow it, out of a myriad of admissible motives.

One caveat is in order, however, before we turn to inspecting whether legal subjection thus understood is possible among nonoverlapping generations. Although we assume that a legal system is in place only when a sufficient number of its participants deem it reason-giving, we remain silent on whether, in addition to being *perceived* as such, it must also *be* robustly reason-giving—that is, morally legitimate. This latter addition is both controversial and unnecessary for us because we focus, to repeat, on the question whether a certain form of legal subjection is possible in the first place—rather than on the *normative* question of when different forms of legal

[21] *See* H.L. HART, THE CONCEPT OF LAW (2d ed. 1994).

[22] HART, *supra* note 21, at 198; RAZ, *supra* note 20, at 28; JOSEPH RAZ, *Authority, Law and Morality*, 68 THE MONIST 295, 300-301 (1985); BECKMAN, *supra* note 19, at 28-31. Following Raz, many believe that the authors of the law must also claim the legitimacy to create those norms in the first place, for instance, *see* BECKMAN, *supra* note 19. We sidestep this requirement, however, because it remains controversial, and because the examples we later discuss do arguably incorporate claims to legitimacy. For a discussion of the requirement, *see* KENNETH EIMAR HIMMA, MORALITY AND THE NATURE OF LAW (2019). It therefore matters little, for our particular purposes, whether legal subjection necessarily requires such claims or not.

[23] *See* RAZ, *supra* note 20, at 28; Ludvig Beckman, *The Subjects of Collectively Binding Decisions: Democratic Inclusion and Extraterritorial Law*, 27 RATIO JURIS 252, 256-258 (2014).

[24] HART, *supra* note 21, at 198. We are thankful to an anonymous reviewer for very useful suggestions on how to improve this characterization.

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subjection (or, more generally, the legal systems that underpin them) are morally required or permissible.

II. The Mediated Subjection View: A Primer

In this section, we introduce and motivate the Mediated Subjection View. Even though our focus is on legal subjection, consider a range of cases that do not belong to the legal domain but are nonetheless useful, by analogy, to motivate our view, starting with the following:

> QWERTY: In the 1870s, the QWERTY keyboard layout was introduced by Christopher Latham Sholes. Although there are potentially more efficient alternatives available, QWERTY arrived earlier and has become very widely used, so it would now be too costly to abandon it.[25]

If the above story is right, we have ended up locked in with an inefficient technology due to historical, path-dependent reasons. And yet, regrettable as this might be, we would not say that we are subjected in any sense to Christopher Latham Sholes' will, even though he obviously had a huge impact on us. Surely, Sholes may have constrained our choices. But the example suggests, neither influence nor constraints amount to subjection. What, however, distinguishes subjection from *mere* influence? Consider:

> MOM AND POP STORE: Kim works at a small family-owned business. Pursuant to an internal norm, she is prevented from using the bathroom outside regularly scheduled breaks.

Unlike users of QWERTY keyboards, Kim does seem to be subject to her bosses' will and, we may say, *de facto* authority. But why is Kim, unlike QWERTY users, seemingly subjected to someone else's will? The answer cannot just be that her bosses can influence her behavior, typically, by making deviations from their instructions costly. While this is a necessary condition, it cannot be a *sufficient* one, for it is also present in QWERTY. Subjection requires, we submit, the satisfaction of at least two additional requirements. *First*, subjection is a matter of *commands* (encoded as rules, norms, or just plain orders). Kim's bosses regularly tell her which ends she should pursue—and how, where, when, and with whom she should pursue them. And they also expect the *content* of their commands to guide Kim's behavior. Scholes, in turn, did not issue any command: he just unleashed certain patterns of technological innovation and consumer consumption that increasingly shaped future users' opportunity structures. And, because he issued no command, he could not have expected to guide future users' behavior *in that way*. Bosses' commanding or directive power is something that even those who seek to deflate the distinction between being under someone else's authority and being under someone else's influence recognize as distinctive.[26] *Second*, subjection also requires general compliance with the rules, norms, or orders embodying the relevant commands *because these are deemed as reason-giving and action-guiding*. Kim complies with her bosses' commands on these

[25]Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985).

[26]NICOLAS VROUSALIS, *Workplace Democracy Implies Economic Democracy*, 50 J. SOC. PHILOS. 259, 264 (2019).

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grounds, either because she genuinely regards the relevant commands as legitimate or because she acknowledges that disobedience would be too costly for her.[27] Again, this distinguishes Kim from current QWERTY users, who regard no rule, norm, or order as legitimate or reason-giving, since, again, there are no commands in the first place. Some might want to add a third feature: that, unlike Scholes, Kim's bosses *claim to possess legitimate authority*. Kim's bosses, that is, not only have commanding power, but they also regard such power as justified or warranted in the first place. So, plausibly, what distinguishes mere influence from subjection is the presence of commands, encoded as norms or rules, which are generally followed and regarded as reason-giving and action-guiding by those falling within their scope, as well as, possibly, a claim to legitimacy by the authors of the relevant norms and rules.[28]

But now consider:

> LINE MANAGER: Patty works for a renowned big corporation. Following instructions from the upper management, her line manager forbids Patty and her coworkers from using the bathroom outside of regularly scheduled breaks.

Both LINE MANAGER and MOM AND POP STORE seem to be clear cases of subjection, rather than *mere* influence. But, importantly, subjection proceeds differently in both cases. Whereas in MOM AND POP STORE, Kim is directly subjected to her bosses, in LINE MANAGER Patty seems directly subjected to her line manager's will and authority—*and, indirectly, to those of her upper manager*. Her subjection to the upper manager is *mediated*—that is, it is only possible insofar as her line manager acts as the upper managers' intermediary. And, arguably, the line manager becomes an intermediary when she accepts the instructions of the upper manager *and ensures their enforcement*. Without mediation, the upper management's capacity to subject Patty to its commands would be much weaker, or perhaps even nonexistent. In this case, in sum, we have:

> MEDIATED SUBJECTION: Subjection obtains if (i) a principal (e.g., the upper management) seeks to guide someone else's behavior (e.g., Patty's) by issuing certain rules, directives, or norms, (ii) an intermediary (e.g., the line manager) takes the principal's instructions as reason-giving and action-guiding, and (iii) has the effective power to make others comply with them, coercively if need be.

This is all quite uncontroversial—and perhaps trivial as well, some readers might think. What we shall now argue, in this section and the remainder of this paper, is that

[27]Note, importantly, that we do not claim that these costs suffice to distinguish MOM AND POP STORE from QWERTY, since, *ex hypothesi*, deviations are costly in both cases. Rather, the costs explain why Kim *might regard certain commands as reason-giving and action-guiding* in MOM AND POP STORE, which, alongside the very existence of commands, and perhaps a claim to possess legitimate authority, is what distinguishes both cases. Users of the QWERTY cannot regard any command, norm, etc. as reason-giving or action-guiding, since there are none in the first place. We thank an anonymous reviewer for pressing us on this point.

[28]Suppose Scholes had indeed issued commands, sought to guide future users' reasons for action, and deemed his power legitimate. Suppose, in addition, that we also generally followed his commands and took them to be action-guiding and reason-giving. Would we be subject to Scholes' will then? We are inclined to answer affirmatively. At the very least, it does not seem such a hard bullet to bite as in the original QWERTY scenario. We thank an anonymous reviewer for raising this question.

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this general framework, which we have illustrated with nonlegal cases involving *intra*generational subjection, can be exploited to account for the possibility of *inter*generational subjection among nonoverlapping generations. Consider first:

> PATENTS: Nineteenth-century patenting laws constrained emerging technologies in the early 2000s.[29] But because these laws were long adopted, and due to the law's path-dependency, they are now very costly to change and repeal.

PATENTS, like QWERTY, involve costs that shape future persons' opportunity and incentive structures. Unless we can find a significant disanalogy, we should extend the lesson we extracted from QWERTY: influence and constraints, even if exerted through the law, *do not amount to legal subjection*. Skeptics about intergenerational subjection will probably be happy to grant this point. The relevant question, they will rightly point out, is not whether, in the legal domain and across generations, we find cases structurally like QWERTY, but whether we find cases structurally like LINE MANAGER. We think we do. Consider:

> CONSTITUTION: The U.S. Constitution, drafted in 1787 and ratified in 1788, is notably hard to change. In deciding cases, Supreme Court justices often refer explicitly to the founding generation's intentions—and, even when they do not, they generally abide by the latter's terms, broadly understood.

CONSTITUTION clearly pertains to the legal domain. So let us see if the conditions of subjection developed above—particularly, those outlined in MEDIATED SUBJECTION—obtain in this case as well. First, do the members of the founding generation—or whatever the relevant agent in the past may be—seek to guide the future's behavior? Very plausibly, they do. When drafting and ratifying constitutions, the founding generations quite often explicitly sought to bind future generations, which seems the most readily available explanation of why lawmakers rarely use tools such as sunset clauses, whereby they could limit how long the laws they enact are to be in place. Although we need not go as far as the late Justice Scalia, for whom the "whole purpose [of constitutions] is to prevent change,"[30] it seems hard to deny that constitutions are typically designed to severely constrain the will of future generations—perhaps even to entirely replace it, when they introduce eternity clauses. Though skeptical that future generations can be legally subjected by past generations, for reasons to be discussed below, Ludvig Beckman has nevertheless defended something along similar lines, characterizing constitutional provisions as "instructions to be carried out by the judiciary and other officials in the future." In this sense, he contends, "the past has the capacity for potential interference in the future by means of its instructive power."[31]

Second, can legal officials in the future, such as Supreme Court justices, be seen as intermediaries of past generations? An intermediary, we noted when discussing LINE

[29] *See* Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REVIEW 101, 132 (2001).

[30] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997).

[31] Ludvig Beckman, *Power and Future People's Freedom: Intergenerational Domination, Climate Change, and Constitutionalism*, 9 J. POLITICAL POWER 289, 301 (2016).

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MANAGER, takes a set of rules, directives, or instructions as reason-giving and action-guiding and has the power to make others comply with them, coercively if need be. Legal officials in the present do often deem the legal framework they have inherited—the past's terms, as it were—as reason-giving and action-guiding, thereby adopting the framework's internal point of view, and clearly have the power to make citizens comply with the rules. This is perhaps most clearly the case when legal officials follow intentionalist interpretive standards, whereby judges interpret constitutional norms by appealing to the intentions of lawmakers.[32] But it is also the case, albeit to a lesser degree, when legal officials abide by the general terms of the legal system understood, as Scott Shapiro does, as a plan extended over time.[33] When present legal officials accept, due to genuine conviction or strategic motives, the legal framework (or particular norms) set by future generations, they adopt the internal point of view. And, in doing so, they help carry out past generations' instructions, goals, values, and orders, thus acting as their intermediaries.

Unless we find relevant disanalogies, which later sections will discuss, we can apply and extend the lessons we have extracted from LINE MANAGER and MEDIATED SUBJECTION to outline an account of the conditions under which subjection across nonoverlapping generations could happen:

> MEDIATED SUBJECTION VIEW: Subjection among nonoverlapping generations obtains insofar as (i) past generations seek to guide later generations' behavior through legal norms, rules, and directives; and (ii) legal officials of later generations, such as judges and other legal officials, abide by and deem the terms, instructions, norms and/or rules set by such past generations as reason-giving and action-guiding; and (iii) have the effective power to enforce them, coercively if need be.

In the remainder of this paper, we discuss some potential disanalogies, based on the idea that there is something special about the legal case that cannot be applied across generations. Before turning to this, however, we close this section by clarifying five distinctive features of the Mediated Subjection View.

First, even though we have motivated the Mediated Subjection View by appealing to constitutions, we do not think the view should be restricted to constitutional norms, at least not necessarily. It could apply, for instance, to ordinary laws, provided, as noted, that their authors sought to guide posterity's behavior *and* present legal

[32] *See* Elkins, *supra* note 12. For a discussion of intentionalism as a requirement for legal intermediacy, *see* Beckman, *supra* note 31, at 302.

[33] Scott Shapiro, *What Is the Rule of Recognition (And Does It Exist)?* In THE RULE OF RECOGNITION AND THE US CONSTITUTION 235 (Matthew D. Adler and Kenneth Einar Himma eds. 2009). In Shapiro's view, a legal system—and, most particularly, the basic structure of the constitutional order—can be conceived as "*a plan for governance*" determining "which goals and values a particular system should pursue and realize." Given that, on this view, legal activity is a kind of shared activity, with those engaged in it "carrying out a shared plan," future law enforcers and legal officials can be seen as carrying out a plan at least partly shaped by past generations—reference is from David Plunkett, *The Planning Theory of Law II: The Nature of Legal Norms*, 8 PHILOS. COMPASS 159, 167 (2013). As long as they ensure that the goals and values past generations contributed to introducing within the law's general plan are realized, they act as intermediaries of the past. Crucially, though, legal officials need not have the intention to further any past plans: it is enough, notes that they intend "to do their part and not to interfere with other officials doing their parts"—*see* Shapiro, *supra* this note.

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officials took the past's terms as reason-giving and action-guiding. When these conditions are satisfied, norms enacted in the past, constitutional or otherwise, can be understood as instructions that legal officials in the present carry out here and now, thus enabling the dead to indirectly exercise authority over the living. Similarly, the Mediated Subjection View need not only count judges as intermediaries of past generations. The executor of a deceased person's will, for instance, may be seen as their intermediary, enabling the deceased person to indirectly subject their heirs to their will. To motivate the Mediated Subjected View, however, we have focused on constitutions. One reason is that constitutions often offer good enough evidence that past generations sought to guide posterity's behavior, especially, as noted, when they are rigid or, most clearly, introduce eternity clauses.[34] Another reason is that extending the Mediated Subjected View to ordinary laws, legal executors, and so on may require addressing different disanalogies, vis-à-vis the general, not specifically legal examples we have used to motivate the view, such as LINE MANAGER. Given the inevitable constraints, we therefore think it is appropriate to zoom in on one particular case and carefully inspect its specific challenges, as we do below. After all, if we can show that intergenerational subjection can obtain through constitutions and constitutional practice, we will have shown that intergenerational subjection is possible, and precisely in the domain that has historically concerned authors such as Paine and Jefferson and that still concerns democratic and constitutional theorists today.[35]

Second, ours is a qualified defense of the possibility of intergenerational subjection, as the Mediated Subjection View does not treat subjection as an all-or-nothing matter. Rather, it sees legal subjection as coming in different degrees, including its complete absence depending on the circumstances. On this view, for example, intergenerational subjection does not obtain if the continuity of a legal order is interrupted after a regime change or revolution,[36] and it is weaker the more changes

[34]This response allows us to address an important question raised by an anonymous reviewer. If a generation misunderstands the intentions, or the terms, of a long past generation, can intergenerational subjection obtain? In response, it is important to distinguish between two questions. First, there is the question whether indeterminacy about the intentions of past generations undermines legal subjection. The answer, we think, is no. As we argued above, legal subjection does not require that future generations know the intentions of past generations. Admittedly, though, indeterminacy about the past's intentions might impinge upon the *intensity* of legal subjection. Second, there is also the question whether indeterminacy about the intentions of past generations undermines *our ability to identify* instances of legal subjection? Here, we think the answer is yes. What we would say in reply is that, as long as there are some clear cases, this worry is just an instance of a general problem affecting most notions in political and legal philosophy—after all, there is also indeterminacy about whether something is a case of domination, or of subjection more generally. Constitutions (especially when rigid) constitute clear cases, offering sufficient evidence of past generations' intentions. We thank an anonymous reviewer for raising this point.

[35]MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE (2007); RICHARD ALBERT. CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019).

[36]An anonymous reviewer wonders whether his caveat fits our model. Provided that the past intended to guide posterity's behavior, and present legal officials take, e.g., such intentions, terms, and norms as reason-giving and action-guiding, the continuity of the legal order might seem immaterial. However, if the legal order is interrupted, it is not clear how present legal officials (and citizens more generally) can see the past's legal framework as reason-giving and action-guiding. The essence of such interruptions seems to be, precisely, that the terms of the past are repudiated, at least in their broad outlines. In paradigmatic cases, interruption and repudiation come together. If, however, these two things can come apart, we would be happy to refine our account accordingly. Since this is a first attempt to formulate the Mediated Subjection View, it is enough—we think—if we can capture the paradigmatic cases. We are grateful to the anonymous reviewer for useful feedback on this issue.

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the legal order goes through—changes that typically grow in number as time passes and generations succeed one another.[37] Intergenerational subjection is also weak in legal systems with flexible constitutions, when constitutional provisions are formulated as general principles, such that they can easily adapt to changing circumstances, or when judges interpret such provisions according to the "living tree" doctrine, which says that a constitution is an organic text that should adapt and evolve with societal changes and values.[38] Conversely, intergenerational subjection is stronger when constitutions are rigid, have undergone few amendments, their provisions are formulated as precise rules, and judges interpret them according to originalist or intentionalist standards. Note, however, that even when this occurs, the kind of intermediacy typical of *inter*generational subjection is weaker than that of *intra*generational subjection, given that the dead cannot threaten currently living legal officials, as those living today surely can. These variations in the intensity of the links between past and future—and of intermediacy in general—the Mediated Subjection View is well suited to register, which is an important virtue of the view.

Third, legal intermediaries may perform many different kinds of legal action *qua* intermediaries. In this paper, we do not attempt to provide a complete list, and rather focus on three paradigmatic kinds of action: the application, interpretation, and coercive enforcement of the law. As far as we are concerned, it might be that, as long as the two conditions that the Mediated Subjected View requires are met, any legally relevant action—that is, any action that officials are legally entitled to perform *qua* legal officials—may qualify. But here we stick to the three least controversial cases of the application, interpretation, and coercive enforcement of the law, and remain noncommittal about the rest.

Fourth, legal intermediaries, as we argue with greater detail in later sections, *enable* past generations to exert *de facto* authority over future generations. This is important because, as noted in Section II, there cannot be legal subjection without *de facto* authority. One might wonder, then, whether future legal officials themselves can be subjected by past generations, if the ability of such past generations to subject anyone beyond the overlap is up to them. We think they can, insofar as each individual legal official remains subject to a legal framework that is partly inherited from the past and that can be enforced against them *by other legal officials*—who, insofar as they take the directives, norms, and rules adopted by past generations as reason-guiding, act as intermediaries of the past, too. While present citizens can, on our account, be subject to past generations *through the mediation of present legal officials*, legal officials themselves can be subjected to past generations through the mediation of *other present legal officials.* Of course, this kind of subjection across intermediaries would disappear if they jointly and unanimously disallowed the legal framework inherited from the past. As we will argue in the next section, where we discuss this possibility in great detail, this is possible in theory but unlikely in practice.

[37]In this paper, we assume that legal orders can survive over time. However, we do not offer any precise account of the identity/persistence conditions of legal systems. We take it as given that the same legal system has existed in, for example, the U.S. since at least roughly 1787-1789, Spain since at least 1978, or Italy since at least 1947. This, we think, should not be excessively controversial. And it also leaves open the possibility that the system might be older, insofar as some—say, criminal, civil—laws had been passed even earlier. We thank an anonymous reviewer for calling our attention to this issue.

[38]WILLIAM J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2007).

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Finally, although the Mediated Subjection View appeals to normative attitudes—for legal officials must *accept* the legal rules or the legal framework inherited from the past—it does not depend on the moral correction of the relevant legal rules. The Mediated Subjection View, then, has no direct bearing on the question whether the intermediaries *must* act as such, although, of course, in order to be intermediaries at all, they must first possess certain powers inevitably derived from the legal framework in which they enter. Suppose, for instance, that present legal officials accepted morally abhorrent rules, they are under a moral duty to disobey. This, for us, would be both a case of objectionable rule-following *and* potential intergenerational legal subjection.

With these clarifications in mind, we are now ready to inspect the various difficulties that legal subjection among nonoverlapping generations faces, and how the Mediated Subjection View may address them. To anticipate, we will discuss four objections. The first three objections are linked to three commonly accepted features of legal systems. A legal system, first of all, must possess *de facto* authority—understood, minimally, as the ability to successfully engender general compliance. Second, although more controversially, some believe that the right kind of de facto authority specifically requires the ability to secure general compliance *through coercive means*—that is, enforcing norms, and sanctioning those who disobey them.[39] And, third, many believe that, besides possessing *de facto* authority, legal norms must also be valid, with the validity of the norms being determined by a *rule of recognition* followed by legal officials.[40] None of these features, the objection goes, obtains across generations, and thus there cannot be legal subjection among nonoverlapping generations. The fourth objection is grounded in a concern about the very possibility of intergenerational obligations, of which legal obligations would be a subset.[41] In what follows, we inspect each of these in turn.

III. Future Generations are not Subject to Present *De Facto* Authorities

As noted earlier, legal subjection requires *de facto* authority. And possessing *de facto* authority involves being capable of *successfully* guiding the behavior of those subject to a norm, who must generally comply with it—again, because they see it as genuinely legitimate, or due to instrumental calculations. But it is not clear, or so the objector will claim, whether past generations can successfully guide the behavior of future generations. Consider the following test:

> CONFLICT OF NORMS: If, whenever two norms conflict, Party A systematically prevails (while Party B *cannot* prevail), then only Party A possesses *de facto* authority.[42]

[39]*See* Robert C. Hughes, *Law and Coercion*, 8 PHILOS. COMPASS (2013).

[40]*See* HART, *supra* note 21.

[41]Of course, those who deny that coercion is not essential will find Section V unnecessary, whereas those who think that *de facto* authority must necessarily involve the power to coerce will find the separation of Sections IV and V puzzling. Our aim, however, is to shield the Mediated Subjection View from different arguments grounded in different conceptions of what a legal system requires. Since *de facto* authority and coercion may independent, we address them separately—but since we address both at the end of the day, we are also responding to those who think there is no separation.

[42]This follows from the fact that, under such a scenario, Party B cannot successfully guide the behavior of those the norms target.

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A critic might hold that, whenever there is a conflict between any norm inherited from the past and any new norm future generations want to pass, that is exactly what we find: future generations will systematically prevail, while past generations *cannot* prevail. Norms only enjoy *de facto* authority if they are generally followed, which requires accepting them, or at least not actively resisting them. But future generations —including both legal officials and ordinary citizens—can at any time *withdraw* such acceptance. And, when that happens, there is not much that past generations can do about it. According to this objection, whether constitutions (or ordinary laws, or executors …) have authority is essentially a matter of whether we, here and now, generally accept the law of the land, for it is in virtue of our acceptance that the latter can have any bite at all.[43] As Ludvig Beckman puts it, "[i]f future people do not modify [laws enacted in the past], this is presumably because *they* do not want to."[44]

We think this objection is partly correct. If present generations unanimously decided to withdraw their support of, or cease to comply with, a legal system, that system would no longer be generally followed. And if present generations could do so *costlessly*, then it would also follow that the authors of the legal system no longer have the capacity to successfully guide the behavior of those falling within the scope of the relevant norms. Both of which, as we noted above, are conditions of *de facto* authority —and, by extension, of *legal subjection*. Present generations enjoy, in sum, a kind of veto power.

We do not believe, however, that the existence of such a veto power undermines the possibility of intergenerational subjection. Our response, developed in what follows, is twofold. First, we argue that *having the possibility* of unanimously withdrawing support, or ceasing compliance, with a legal system does not undermine the authority of the system *while there is support and general compliance*. Second, we also argue that it is indeed costly for present generations to unanimously withdraw their support of, or cease complying with, legal systems partly inherited from the past.

To see why the mere capacity to cease compliance with a set of norms does not undermine their authority, nor necessarily extinguishes subjection, let us go back to the LINE MANAGER. Like present generations, line managers enjoy a kind of veto power: should they unanimously decide not to comply with the upper management's instructions, the upper managers would be left with no *de facto* authority at all. But it would seem mistaken to conclude that, because this is always a live option in every hierarchically arranged firm,[45] then the upper managers have no authority. Similarly, rank-and-file workers can unanimously cease to comply with the upper management's instructions. But, again, it would seem mistaken to conclude that, because this is always a live option, there is no authority within firms. In any scheme involving a pecking order of authority, we will find this kind of dependence, whereby if those in the lower ranks cease to comply with their superiors' instructions or to abide by their terms, their superiors' *de facto* authority would automatically disappear.

We suggest seeing this dependence as a general feature, rather than a bug, of mediated subjection. Mediated subjection obtains, then, when the involved parties relate, as noted, *in the right way*. First, the principals must seek to guide someone's behavior. Second, the intermediaries must take the relevant directives as action-

[43]We are thankful to Axel Gosseries, Andre Santos Campos, and an anonymous reviewer for this journal for presenting us with versions of this objection.

[44]Beckman, *supra* note 9, at 718 (his italics).

[45]Or, more generally, in any organization with a complex chain of command.

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guiding and enforce them downstream. And, third, those in the lowest rung—the ultimate addressees of the commands—must also take them as action-guiding and generally comply with them. When those conditions are satisfied, and the involved parties act in the right way, there is subjection—that is, even if the different parties could, *at any given point in time*, act differently.

One might object, however, that in the workplace, there are mechanisms in place that make it likely that the involved parties will act in the right way, so that there is authority and subjection—mechanisms that the objector might claim are absent in the intergenerational case. This leads us to the question of whether past generations can successfully guide the behavior of present generations, including both present legal officials and present lay citizens.

There are two possible arguments the objector might offer. First, she might argue that upper and line managers, unlike past generations, can *enforce* their norms, rules, and so on. Second, she might argue that there are *systemic factors* that make it costly for line managers or rank-and-file workers to (unanimously or even very widely) stop complying with their bosses in practice, even if perfectly possible in theory. Systemic constraints, again, are allegedly lost beyond the generational overlap.

The first claim, about the possibility of intergenerational enforcement, will be carefully inspected in the next section, where we address a more general objection to the possibility of intergenerational subjection, based on the alleged necessity, for legal subjection, of a capacity to *coercively* enforce the law. In this section, then, we focus on the second claim, about the existence of systemic constraints beyond the overlap.

While possible in principle, both line managers and rank-and-file workers cannot unanimously stop complying with their bosses in practice, not, at least, without incurring significant costs. One could appeal, for instance, to the existence of a "reserve army of labor," quick to replace dissenting workers, as offering a powerful incentive to support and comply with existing rules, directives, and norms—a traditional thesis of Marxist economics that authors from different traditions, such as Shapiro and Stiglitz, have also echoed.[46] While such exact factors are, obviously, absent in the intergenerational case, different systemic constraints do nevertheless obtain. As Douglass North[47] and Ona Hathaway,[48] among others, have persuasively argued, laws have *increasing returns.* That is, the continued adoption of a legal pattern delivers increasing benefits and, by the same token, increases the costs of departing from that pattern. One likely result of this is *legal lock-in*: once a legal system has been implemented, a constitution founded, a law enacted, or a precedent in common law systems set, it will become increasingly costly to adopt alternatives. And this is relevant because founding generations are typically better equipped to determine the shape and content of a legal system than generations down the line are. For example, the nineteenth century's patenting laws constrained, as noted above, emerging technologies in the early 2000s.[49] And, according to some, master-and-servant laws likewise managed to survive until the twentieth century because of courts' long-standing reliance on them.[50] Besides laws' path-dependent-related costs, we also

[46]Carl Shapiro and Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 AM. ECON. REV. 433 (1984).

[47]DOUGLASS C. NORTH, *Institutions, Institutional Change and Economic Performance* (1990).

[48]*See* Hathaway, *supra* note 29.

[49]*See* Hathaway, *supra* note 29, at 132.

[50]*See* KAREN ORREN, LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

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find the quite familiar political costs of modifying laws, and especially constitutions, which make it harder to form broad political alliances and draft laws able to gather the assent of the involved parties. Because creating new laws is often quite costly, present generations have an incentive to defer to (or draw upon, to the largest possible extent) existing laws, thus allowing past generations to gain an edge on the issue. These observations, first, qualify Beckman's claim that, if future people do not modify the laws enacted by past generations, it is "presumably because *they* do not want to." Second, they also call into question the claim, stated above, that in cases of conflict of norms, past generations *cannot* prevail. And third, they show why present legal officials can have strong incentives to act as intermediaries, given the costs of deviating and/or adopting radically different legal frameworks. If the costs imposed by past generations are sufficiently high, present generations might find it very hard to twist the dead hand of the past.

Of course, creating new laws or merely changing existing ones can be more or less costly depending on many factors, such as a country's level of ideological and affective polarization, textual and nontextual sources of constitutional amendment difficulty, the interpretive standards used by judges, or whether a country adopts a common-law or civil-law legal system. Thus, in highly polarized societies, interpartisan agreement becomes less likely; in countries with strong nontextual sources of amendment difficulty, amending the constitution can become harder regardless of the formal rigidity of their constitutional text; in common-law systems, bound by precedent, the path-dependent effects of law cast a longer shadow; and in countries where constitutional court judges employ originalist interpretative standards, deviating from the intentions expressed by the founding generation can be more difficult. Because, as noted in the previous section, we see subjection as a matter of degree, the Mediated Subjection View can nicely register these variations.[51]

Present generations, in sum, enjoy a certain kind of veto power. But this does not render irrelevant the actions of past generations, nor does it undermine the idea that present legal officials can act as their intermediaries. Without the present generation, there can be no *de facto* authority. And, without *de facto* authority, there can be no intergenerational subjection. But if present legal officials act as intermediaries of the past, and citizens generally comply with the relevant norms, then the past can come to acquire *de facto* authority, and thus the ability to legally subject present generations, thanks, again, to the mediation of present legal officials.

[51]It might be wondered, as an anonymous reviewer does, whether intergenerational subjection is possible if it partly depends on the choice of interpretive standards, which is not regulated by the constitution. We take this to be a version of the "veto power" objection, and so our answer is that, to the extent that legal officials appeal to the intentions of past generations or, alternatively, largely abide by their terms, there is some degree of intergenerational subjection—regardless of the fact that it is always a live option for judges to adopt a different interpretive standard, just as it is always a live option for line managers to disregard the upper management's instructions. It is important to stress, though, that mediated subjection does not only obtain when judges adopt originalist interpretive standards. To be sure, when judges adopt the most conservative/originalist standards—which seem alive and kicking, for instance, in the current U.S. Supreme Court—mediated subjection is more intense. But when they do not, because judges follow progressive and evolving interpretive standards, as long as they lean on, and take as action-guiding, the *framework* inherited from the past, the conditions of mediated subjection can be nonetheless satisfied to some extent.

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IV. Future Generations cannot be Sanctioned

If legal systems must involve norms that are generally followed, as we are assuming, and if persons cannot be expected to be fully motivated to comply with legal norms, as seems plausible to suppose, then a legal system can reach no further than its capacity to enforce legal obligations, coercively if need be.[52] But if past generations cannot enforce legal obligations after their members die, then they cannot legally touch the future and, therefore, cannot subject them to the law. Or so the second objection to the possibility of intergenerational subjection holds. Whereas the first objection focused on the importance of present generations' general acceptance of legal norms and systems for securing *de facto* authority, this second objection focuses instead on legal systems' coercive power, which might just be another way to secure *de facto* authority. It is an open question, of course, whether a legal system must *necessarily* be coercive, which some deny.[53] But we here grant that securing the effectiveness of a legal system does require a certain degree of coercion. As Hughes puts it, "it is safe to assume that an entirely noncoercive legal system would be impracticable for a large society of flawed human beings."[54] And, once this assumption is granted, it is plausible to argue that, given that current generations cannot force posterity to comply with their laws, the power of a generation expires when its members die. "Only the future can enforce the law on the future," Beckman, for example, claims.[55]

The crucial question, then, is whether current generations can enforce laws in the future in any meaningful sense. One possibly uncontroversial sense in which Beckman's above claim—"only the future can enforce the law on the future"—is true is that the *most proximate* enforcers of laws in the future must physically coexist with those on whom the laws are enforced. This seems necessary for at least two reasons. One is that enforcing the law can require, in some cases anyway, that those who disobey it be physically restrained, which requires physical coexistence. Another is that enforcing legal obligations also requires identifying whether such obligations have been breached, which is something that we can only know *in the present.* As Gosseries claims, "assessing whether a duty to act has not been complied with and deserves sanctions presupposes coexistence."[56]

Now, if law enforcement could be reduced to the actions of its most proximate agents—that is, law enforcement officers—the claim that present generations cannot enforce the laws in the future would be correct. Exploring the analogy between nations and generations, Gosseries, for example, notes that one essential prerequisite of the *extraterritorial* enforcement of laws is the possibility that law enforcers move across countries—what he calls the *geographical mobility of persons.*[57] But this requirement, he argues, cannot be satisfied in the intergenerational domain because persons cannot move across generations. Both in the extraterritorial and intergenerational domains, the argument assumes, enforcement is essentially and exhaustively determined by the actions of its most proximate enforcers: the persons whose geographical mobility is relevant to begin with.

[52]Gosseries, *supra* note 10; Gosseries *supra* note 18.
[53]JOSEPH RAZ, PRACTICAL REASON AND NORMS 157-161 (2d ed. 1999); SHAPIRO, *supra* note 13.
[54]HUGHES, *supra* note 38, at 237.
[55]BECKMAN, *supra* note 9, at 781.
[56]Gosseries, *supra* note 10, at 104.
[57]Gosseries, *supra* note 18.

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We concur with the claim that law enforcement, narrowly conceived, must be carried out by coexisting agents. But we disagree with the assumption that enforcement officers' actions *exhaust* the scope of legal enforcement. For such actions are best conceived of as part of a broader *system of law enforcement* in which many agents beside the law's most proximate enforcers are involved. To work effectively, legal systems no doubt require agents capable of issuing threats, exerting physical force, or determining whether legal norms are complied with. But it also requires agents that establish the basic rules of the game, specify which kinds of norms can be enacted and how they are to be interpreted and enforced, and define law enforcement officers' roles, powers, and liabilities. Both kinds of agent seem essential to a well-functioning system of law enforcement: without the former, no enforcement of the law would be possible; without the latter, no law enforcement officer would know what to enforce in the first place.

Crucially, though, whereas employing direct physical force or determining whether legal norms are being complied with must be carried out by temporally coexisting agents, setting and interpreting norms or establishing the basic architecture of a legal system can be done by agents belonging to past generations. The setting of constitutions, laws, and interpretive standards does *not* require physical coexistence. And, when law enforcement officers and legal officials in the present accept and apply the laws and interpretive standards set by those agents in the past, law enforcement acquires an intergenerational dimension. Under such circumstances, the laws' most proximate enforcers can be seen, as the Mediated Subjection View would predict, as intermediaries of the dead—as agents that endorse the past's norms and legal frameworks as action-guiding and reason-giving and who, in enforcing them, carry out the directives of past generations, and abide by the dead's terms. When future generations enforce those laws, according to at least some of those interpretative standards and pursuant to the existing constitution, they are doing, in a sense, what past generations wanted them to do.[58] Future generations need not be primarily motivated by a desire to follow the past's future-oriented wishes. Perhaps they are just motivated by a desire to satisfy their contemporaries, who happen to like the laws enacted in the past, and who have the power to remove them from office. But intermediaries need not be explicitly motivated to pursue the past's wishes. As we saw when introducing the internal point of view, laws and legal frameworks can be deemed action-guiding and reason-giving for a myriad of reasons including, as Hart put it, "calculations of long term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do." All that

[58]This, we reckon, may be ambiguous. For law enforcement officers respond both to norms establishing *what* they ought to enforce and to norms regulating *how* they can enforce those others norms. When present law enforcement officers enforce a law adopted in the past, but do so according to enforcement standards adopted in the present, they are only *partly* doing what the past wanted them to do—that is, to ensure that the norms are complied with in the future. But they are not doing it as past generations might have wanted them to, perhaps because they established no enforcement standards or because the standards they established have been superseded by new standards. It is important to stress that even in those cases, however, present law enforcement officers are *partly* acting as the past wanted them to and, in doing so, acting as the past's intermediaries. And, at any rate, enforcement standards are sometimes also inherited from the past, and left unchanged. In such cases, present law enforcement officers are both enforcing *what* past generations wanted and *in the way* in which they wanted. We thank an anonymous reviewer for pressing us to clarify this point.

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matters is that, at the end of the day, all the relevant agents converge into accepting the relevant norms and act accordingly.

There is a crucial disanalogy, some might object, between ordinary intermediaries and those we here posit. By definition, it is always possible for intermediaries to disobey the instructions they receive. And when principals are alive, they can threaten, sanction, or replace their rebellious intermediaries: they have, in sum, some control over them. Think, for instance, of LINE MANAGER above; although the line manager can in principle disobey the senior mangers' directives, she will be fired if she does that. But past generations, so the objection might go, possess no comparable control over their future intermediaries: they are unable to sanction, threaten, or replace them should they disobey.

Now, although this disanalogy no doubt determines the *reliability* of an intermediary, it does *not* determine whether someone *is* an intermediary to begin with. There is little a deceased person can do to control the executor that will read their will to their loved ones. And yet a notary is a paradigmatic example of an intermediary that follows the instructions of someone else, acting on their behalf.

A similar version of this objection says that if we see intermediaries as representatives of the past, then we have no guarantee that they will reliably advance or follow the past's goals and directives, precisely because the past cannot hold nonoverlapping present generations accountable. We remain agnostic about whether intermediaries are best *conceptualized* as representatives, although this is a fitting description on many prominent theories of representation. A notary, for instance, would count as a *formalistic* representative in Pitkin's framework—that is, as someone who becomes another's representative after being appropriately authorized.[59] And legal officials in the present may be seen as *surrogate representatives* of the past on Mansbridge's view—that is, as those who act on behalf of others with which they stand in "no electoral relationship"[60]—or as *substantive representatives* on Pitkin's view—that is, as those who act "in the interest of the represented, in a manner responsive to them."[61] Regardless of the conceptual discussion, however, we have reason to believe that future generations are reliably incentivized to partly follow the past's directives reliably because, as argued in Section III, it is always difficult to create and coordinate new norms or build a legal framework *ex novo*. So, although past generations cannot sanction future legal officers if they deviate, they can nevertheless constrain their future behavior by making deviation costly.[62]

When discussing and ultimately rejecting the possibility of intergenerational law enforcement, Gosseries admits that if past and present generations could set "intelligent time bombs" capable of reacting to events in the future yet out of the present's reach, then there would be a sense in which past generations can enforce their laws on the future—a possibility he nonetheless rules out as "too far-fetched."[63] But if the above argument is correct, intelligent and flexible time bombs need not be far-fetched at all. In fact, they might be all too familiar: namely, other human beings acting as

[59]HANNAH F. PITKIN, THE CONCEPT OF REPRESENTATION Ch. 2 (1967).

[60]Jane Mansbridge. *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 522 (2003).

[61]*See* PITKIN, *supra* note 59.

[62]We thank an anonymous reviewer for raising this concern.

[63]Gosseries, *supra* note 18, at 104.

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intermediaries of the past, like the notary reading a deceased person's will to that person's heirs.

V. Future Generations Uphold their Own Rules of Recognition

Legal norms, it is widely accepted, must possess *de facto* authority. But they must also be valid. In *The Concept of Law*, H.L.A. Hart famously argued that legal systems consist of *primary rules*, which purport to direct people's behavior, and *secondary rules*, which specify how to identify, modify, and adjudicate between primary rules. Among secondary rules, we find the *rule of recognition*, whose function is precisely to identify which rules are legally valid. A rule of recognition is in place when it is upheld by the legal and governmental officials enmeshed in the practice of law-validation, those who approach the practice from the internal point of view.[64] Legal officials not only sustain a rule of recognition, but they also fix its content. Whatever makes a law valid in a given legal system and at a given point in time is determined, then, by the criteria that legal officials generally accept.

An argument against the possibility of intergenerational legal subjection follows. Each generation of legal officials, we can plausibly assume, must uphold its own rule of recognition; present generations do not seem capable, say, of rendering the Code of Hammurabi legally invalid—that is, unbinding—for those subject to it in the past. *Mutatis mutandis*, one could also argue that current generations can do nothing to render the laws that will subject future generations legally valid or invalid for them, once they come into existence. One way to account for this idea is to claim that the validity of a law at any given moment in time depends on the content of the rule of recognition operative at that moment, which in turn requires the general acceptance of its contemporaries and only of them. Future generations cannot be bound by laws enacted in the past, so the argument might go, because those laws will only be valid *for future generations* if their contemporary legal officials so accept them. In Beckman's words, "the reason why our laws do not bind posterity is that the only laws that apply to posterity are those affirmed by future people themselves."[65]

There are at least two ways of replying to this argument. The first, which we ultimately find unsuccessful, denies that what is crucial about subjection is *successful subjection*, as the argument assumes. Perhaps, one might concede, past and present generations cannot successfully bind future generations because, at the end of the day, only future generations can determine the validity of the rules to which they are bound. And yet, one might insist, they *claim to subject* future generations. Past generations, in other words, purport to bind the unborn, and their rules of recognition assume that they have this power even if, as a matter of fact, they do not.

But this response fails because our focus is, as noted, on forms of intergenerational legal subjection *capable of supporting* the kinds of complaint that concern political theorists and legal scholars. Suppose, for refutation, that my neighbor sincerely believes he is Napoleon about to conquer Europe. Would that warrant any complaint? Surely not. Claims that presuppose the impossible do not seem capable of supporting a valid complaint from those they target. Or if they can prompt a complaint, it will be one of a wholly different kind than those we are considering.

[64] *See* HART, *supra* note 21, at 101-102; MATTHEW KRAMER, H.L.A. HART 78-81 (2018).
[65] *See* BECKMAN, *supra* note 9, at 781.

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Though we might be justified in condemning him as a vicious man, we would not be justified in suggesting, for instance, that an army be assembled to confront him. Similarly, if past generations cannot render the laws in the future valid or invalid, then future generations cannot possibly have any valid complaint of the kind that may warrant the responses mentioned above, such as seeking to outweigh, check, or remove the source of the complaint. At best, future generations could criticize past generations for thinking that they had such power, and for being willing to use it with no due consideration for them.

A second, more promising response is, again, to apply the Mediated Subjection View. To see why, let us distinguish between two aspects of the rule of recognition. The first is that it must be *generally accepted and followed* by legal officials. The second is that it involves certain *standards* whose content, in principle, is open-ended: that is, as long as legal officials widely accept some standards as determining the validity of legal norms within a given legal system, then those standards *constitute* the rule of recognition. The objection under discussion taps into the first aspect. Legal officials, the objection goes, must accept some standards for any legal norms to be valid in the first place. But, because the standards can be altered by each generation, they again possess a kind of "veto power."[66] Structurally, this argument is analogous to the one we discussed in the previous section, and so is our response. The Mediated Subjection View accepts, as noted, that if present generations do not generally comply with legal norms enacted in the past, then those norms lack *de facto* authority, and there is no intergenerational subjection as a result. Similarly, if present legal officials do not regard legal norms enacted in the past as pursuant with the rule of recognition they generally follow, then those norms lack validity and, again, there is no intergenerational subjection as a result. Present generations need not pay attention to the intentions of past generations, or work within their terms, so to speak. But when they do, then there can be intergenerational subjection insofar as, in accepting the terms of the past, they become the intermediaries of the past.[67]

And here is when the second aspect of the rule of recognition—the open-ended nature of its content—becomes relevant to our argument. For it explains *how* and *when* present legal officials can come to accept the terms of the past. Because the content of the standards constituting the rule of recognition is essentially open, they may require, for instance, conformity with a constitution drafted and enacted centuries ago. That is not only a theoretical possibility, but arguably a widespread phenomenon.[68] In sum, the rules of recognition are constituted by the standards

[66]Notice that "altered" need not entail "*deliberately* altered." Legal philosophers disagree about the nature of the rule of recognition—whether it is purely informal, and therefore unregulated, or can be partially codified, and therefore partially regulated—*see* KRAMER, *supra* note 64, at 92-97. We remain agnostic on this issue. If the rule of recognition can be partially codified, then legal officials enjoy at any moment some real veto power. They can add new norms or eliminate existing ones. And if, on the contrary, the rule of recognition is purely informal, then the "veto power" is just metaphorical. But the underlying point remains. Because new standards can emerge, the actions of present legal officials can—in a non-deliberate, unregulated manner—"veto" the reach of the past. We thank an anonymous reviewer for useful comments on this issue.

[67]To be sure, for our argument to work it is essential that present legal officials accept the terms of the past, *and that the past intends to guide their behavior.* Unless these two conditions are met, there cannot be any mediation, legal or otherwise—*see* Section II above for a more detailed discussion. We thank an anonymous reviewer for raising this question.

[68]For a careful discussion in the context of the U.S. Constitution, *see* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

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followed by present legal officials. But those standards can, in virtue of their content, turn present legal officials into intermediaries of the past and, in so doing, strengthen the (otherwise dead) hand of the past.

And acting otherwise might, once again, be costlier for future generations. Some believe that rules of recognition can be partially codified and that, once codified, they can have feedback effects. Matthew Kramer, for instance, claims that "[w]ithin the system to which the constitutional formulations belong, those formulations can become the foci of the enterprise of law ascertainment undertaken by the system's officials, who may come to justify their determinations … chiefly by drawing upon the constitutional language."[69] Briefly put, if past generations manage to codify the rule of recognition of a legal system, future officials within that system may gravitate around those standards. But even if the standards constituting the rule of recognition are purely informal and unregulated, future legal officials may similarly gravitate around the standards followed by past legal officials, given that informal norms are sticky[70] and, by drawing on past materials, evolve cumulatively.[71]

As mentioned above, one of the intuitions motivating the argument from the rule of recognition is that there is nothing we can do in the present to render, say, the Code of Justinian or the Hammurabi Code valid or invalid for past generations. But, crucially, the Mediated Subjection View has the resources to explain why: while past generations can potentially direct the future's behavior, and future generations can take the norms and legal frameworks of the past as action-guiding and reason-giving, future generations cannot direct the past's behavior, and past generations cannot adopt the future's internal point of view. Intermediation, then, is asymmetrical. But this is a virtue of our view, as it is not only compatible with the Justinian Code and Hammurabi Code intuitions but also explains them. And, importantly, it explains them in a way that does not undermine the possibility of intergenerational subjection, from the past to the future.

VI. Future Generations are not Bearers of Legal Obligations

A final objection to the possibility of intergenerational legal subjection is that unborn generations cannot be genuine bearers of legal obligations until they are born. That is explicitly stated in most, if not all, legal systems. In Spain, for instance, one can only become a bearer of legal rights and obligations by being either a physical person or a juridical person. And both statuses have clear initiation requirements: you become a physical person when you are born, and you become a juridical person when you are constituted as such following the procedures the law establishes. Granted, these requirements set necessary but not sufficient conditions for being considered a bearer of legal rights and obligations, but they seem enough to disqualify future generations, which are yet unborn, and fail to classify as juridical persons.

Legal systems typically include analogous provisions. And they are not unreasonable in doing so. To adapt an argument offered by Arash Abizadeh, who discusses the *geographical*, rather than *generational*, scope of laws, *if* laws were interpreted such that their requirements applied, here and now, to both present and future generations, we would have to conclude that laws are complied with either by obeying some specific

[69] *See* KRAMER, *supra* note 64, at 97.
[70] Katherine Farrow and Rustam Romaniuc, *The stickiness of norms*, 58 INT'L REV. L & ECON. (2019).
[71] JOSEPH HENRICH, THE SECRET OF OUR SUCCESS (2015).

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injunction or by not being born.[72] But this is an absurd implication, as obligations are typically complied with when persons *can* disobey them. Would we say, for instance, that babies are complying with their countries' tax laws simply by being peacefully asleep in their cradles? We think surely not. An objector might conclude, then, that intergenerational legal subjection is not possible because future generations are not subject *right now* to present laws. This objection is general and only targets the Mediated Subjection View. But it must be confronted all the same. For if the objection is sound, then the very idea of intergenerational subjection would be hopelessly nonsensical no matter how one tries to flesh it out.

This objection, however, can be answered. For it overlooks an important ambiguity at the heart of the idea of intergenerational legal subjection. On a strong reading, intergenerational legal subjection *does* require that future generations be subjected to present laws *here and now*—a condition that is undermined by the fact that legal systems routinely specify that future persons cannot be bearers of obligations until they are born or constituted as juridical persons.[73]

But the strong reading is not the only possible interpretation. On a weaker reading, intergenerational legal subjection only requires that future generations, *once they come into existence*, be subject to the laws enacted in the past in virtue of certain nontrivial connections between generations. This is not undermined by the fact that future persons cannot be bearers of legal obligations until they are born or become juridical persons.

The Mediated Subjection View is incompatible with the strong reading of intergenerational subjection, but is perfectly compatible with the weaker reading. On the one hand, the Mediated Subjection View denies, in a non-ad hoc way, that unborn future generations can be subject to legal obligations here and now. It does so because, on the Mediated Subjection View, intergenerational subjection can only obtain through the actions of legal intermediaries that are contemporaries of those bound by the relevant laws. On the other hand, the Mediated Subjection View is perfectly compatible with the weaker reading, as it is precisely an attempt to formulate the nontrivial connections in virtue of which future generations can be said to be subject to the laws enacted in the past (and, by extension, to past generations). Since the Mediated Subjection View is only committed to the weaker reading of intergenerational subjection, which is not undermined by the fact that future persons are not bearers of legal obligations until they are born, the Mediated Subjection View can aptly avoid the objection at hand.

VII. Conclusion

In this paper, we have offered a defense of the possibility of subjection among nonoverlapping generations. On the Mediated Subjection View we have proposed, legal subjection among nonoverlapping generations is possible when legal officials in the future act as intermediaries of past legal officers, legislators, and/or constitution-drafters. Legal intermediacy across generations is possible, in turn, when past generations seek to guide the future's behavior *and* future legal officials deem the

[72]Arash Abizadeh, *The Scope of the All Subjected Principle: On the Logical Structure of Coercive Laws*, 81 ANALYSIS 603 (2021).

[73]More precisely, what this objection would show is not that intergenerational legal subjection is *conceptually impossible*, but that it does not obtain in our world and nearby possible worlds. Nevertheless, this would considerably weaken the complaints that subjection may prompt.

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norms and legal framework inherited from the past as action-guiding and reason-giving, thereby adopting the past's internal point of view.

If this is correct, Paine, Jefferson, and their present heirs have reason to be concerned about the dead hand of the past. But ours is a qualified vindication of such concerns. Intergenerational subjection is possible, we have argued. But it comes in many degrees, and will typically differ from *intra*generational subjection and *unmediated* subjection in general. A constitution, for instance, differs from ordinary legislation in how it may subject future generations to the founding generation, just as rigid constitutions differ from more flexible ones, constitutional provisions formulated as general principles differ from those formulated as specific rules, and constitutions interpreted according to the "living tree" doctrine differ from those interpreted according to originalism. And, by the same token, being under the dictatorial power of a ruling elite that is very much alive differs from being partly subjected to a constitution drafted many centuries ago by people long gone, and which those currently living can always change, however costly. In all these comparisons, the degree of intergenerational subjection differs, and this is partly because the intensity of the links between the past and the future and of the intermediacy relationship in general likewise differs. These variations, we believe, the Mediated Subjection View is well-equipped to register.

As noted at the outset, even though this is not a normative paper, the Mediated Subjection View can illuminate normative debates. For one thing, it can illuminate debates on the legitimacy of intergenerational subjection—insofar as any normative discussion of intergenerational subjection must be informed by an account pinpointing the nature and limitations of this kind of subjection, and when it is possible in the first place. If intergenerational subjection cannot be as pervasive or strong as some may have thought, for example, an adequate evaluation of its normative status must incorporate such insights. For another thing, the Mediated Subjection View may illuminate discussions on domains that, albeit chiefly intragenerational, involve forms of subjection that are not direct but multilayered and indirect, as in workplaces and religious organizations.[74]

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[74]Chiara Cordelli, *Democraticizing Organized Religion*, 79 J. POLITICS (2017); Yunyhae Kim, *Subjection to Authority in the Workplace: A Basic Structural Problem*, 1 POL. PHILOS. (2022).

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