

AN ADVERSARIAL APPROACH TO THE PROBLEM OF A
PERPETUAL CONSTITUTION

by

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A THESIS

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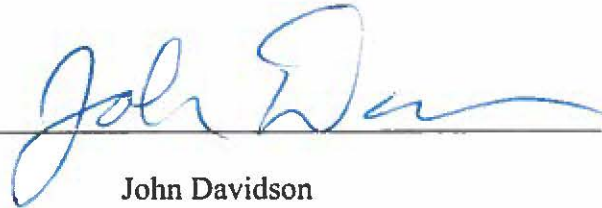
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The Constitution of the United States is intergenerational in nature. The preferences of the founding generation have great impact on the policies and actions of the United States government to this day, occasionally overruling the preferences of modern generations. This thesis will not attempt to render judgment as to the legitimacy of what some identify as a perpetual constitution. Rather, this thesis will outline and subsequently script a fictional trial between those who argue against the continuing authority of the Constitution, and those who defend its legitimacy. The structure of a jury trial allows for a dialogue between the two intellectual camps that highlights some of the areas in which they clash, including the application and defense of the reserved powers doctrine.

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Introduction

The United States Constitution is a formidably important legal document. It defines the structure of American government, outlines the interactions between the three branches of the federal government, and protects the fundamental rights of American citizens. Laws written yesterday are overruled by Constitutional doctrine established hundreds of years ago, yet nobody alive today voted affirmatively for the Bill of Rights. None voted affirmatively to give Congress the power to legislate, to give the President ten days to veto a bill, or to give the people a right to free speech. The current generation of American citizens did not create the Constitution; we inherited the Constitution, from those who inherited it before us. Laws we make today are struck down because the Constitution, written before Mozart wrote *The Magic Flute*, has the power to overrule modern day legislation. Why?

This project will not attempt to definitively answer that question, but will rather dive deeper into the question itself. This project is a simulation of a trial between those who argue that the Constitution harms future generations by ruling them from the grave, and those who defend the Constitution and argue that it provides the necessary structure to allow for a proper democratic society. This trial will not have a judge who renders a ruling in favor of either side; that is for the reader to determine. The trial will take place in two parts; for the first part, both the plaintiff and defense have written briefs outlining the positions and witnesses they will each call in the trial to testify; the second part consists of the script of the trial itself, including opening statements, direct examinations, cross examinations, and closing arguments.

The lawyers and witnesses in the trial will be artistic portrayals of real individuals with real opinions and publications on the issue at hand. This project is an endeavor to simulate what could actually happen in a trial with these individuals testifying on either side of a complex issue. One of the benefits of this project is to illustrate the way in which a simulated trial can highlight the issues at stake in a different way than a standard academic paper, and I am hopeful it accomplishes this goal.

Framing

What follows will be a simulated trial between the plaintiff, who allege intergenerational constitutional harm, and the defense, who deny the allegation. Many of the structures and formalities within the trial itself stem from the United States judicial system and customary trial advocacy techniques. The case is civil rather than criminal, and as such the plaintiffs assume the civil burden of proof of proving their case by a preponderance of the evidence.

The two competing briefs represent briefs filed in motions for summary judgment, one by the plaintiff and one by the defense. In order to further the dialogue in this case, once the trial begins it will be assumed that the judge did not grant either motion for summary judgment, and has moved the case to a jury trial.

There is no named judge in this trial, so as to eliminate another source of potential interpretation bias. Proper jurisdiction, ripeness, venue, and standing have been assumed for the purposes of the trial. Given that the political scientists, activists, and theorists who will be acting as lawyers and/or witnesses in the trial lived during different eras, the trial is not taking place at any one particular moment in time. Both parties have waived all objections based on rules of evidence. Finally, some of the examinations have been truncated to highlight the most important aspects of a given witness's testimony.

Character Bible

This section will provide a brief biography of the lawyers and witnesses who will perform examinations and give their testimony in the scripted trial. These summaries will also include the writings from which I draw many of lawyers' bases for questions and witnesses' bases for testimony. This process of directly linking each lawyer and witness to their own academic writing or work is what allows creative extrapolation as to what each *would* say in a trial about the intergenerational nature of the Constitution.

Thomas Jefferson: Thomas Jefferson is the plaintiff's attorney in this case. Thomas Jefferson was a founding father and principle author of the Declaration of Independence in 1776. The primary source for Jefferson's opinions, arguments, and examinations in trial will be his letter to James Madison, dated September 6 1789. In this paper, Jefferson outlines his concerns with the intergenerational nature of the United States Constitution, and famously suggests the self-evident truth that "the earth belongs in usufruct to the living."¹

R. George Wright: R. George Wright is law professor at the Indiana University Robert H. McKinney School of Law, with a focus on constitutional and administrative law. The primary basis for Mr. Wright's testimony will be his article published in the University of Cincinnati Law Review in 1990, titled "The Interests of Posterity in the Constitutional Scheme." R. George Wright will testify for the plaintiff.

Elisabeth Ellis: Elisabeth Ellis is a professor at the University of Otago in New Zealand, where she primarily teaches philosophy, environmental philosophy, and

¹ Thomas Jefferson, letter to James Madison, Sept. 6, 1789.

economics. The primary source for Ms. Ellis’s testimony will be selected chapters from her book *Provisional Politics: Kantian Arguments in Policy Context*, which was published in 2008. Elisabeth Ellis will testify for the plaintiff.

Michael Otsuka: Michael Otsuka is a professor in the Department of Philosophy, Logic & the Scientific Method at the London School of Economics. The primary source for Mr. Otsuka’s testimony will be selected chapters from his book *Libertarianism without Inequality*, which was published in 2003. Michael Otsuka will testify for the plaintiff.

James Madison: James Madison is the defense’s attorney in this case. James Madison was also a founding father, and served as the fourth President of the United States from 1809-1817. Madison played a critical role during the Constitutional Convention of 1787. The primary source for Madison’s opinions, arguments, and examinations in trial will be his response to Thomas Jefferson’s letter in 1789, wherein Madison outlines his opposition to Jefferson’s points about the Constitution.

Victor Muñiz-Fraticelli: Victor Muñiz-Fraticelli is a Associate Professor of Political Science and Law at McGill University. The primary source for Mr. Muñiz-Fraticelli’s testimony as a witness will be his article “The Problem of a Perpetual Constitution.” His work primarily centers on political philosophy and constitutional law. Victor Muñiz-Fraticelli will testify for the defense.

Edmund Burke: Edmund Burke was a politician and member of the Whig party in Great Britain and was a member of the House of Commons beginning in 1765. Burke was critical of the French Revolution, despite viewing the American Revolution

favorably. The primary source for Burke's testimony in this case will be his essay "Reflections on the Revolution in France." Edmund Burke will testify for the defense.

Kelsey Juliana: Kelsey Juliana is a student at Warren Wilson College, and is one of twenty-one different youth plaintiffs involved in a pending lawsuit against the Federal Government. The primary source for Ms. Juliana's testimony will be the complaint filed by the youth plaintiffs with Our Children's Trust, an environmental organization. Kelsey Juliana will testify for the defense.

Plaintiff Brief in Support of Motion for Summary Judgment

SUMMARY OF ARGUMENT

This is a case concerning intergenerational justice. This case alleges a violation of the fundamental right to self-governance by the United States Constitution itself. The reserved powers doctrine ensures that a legislature can govern itself as it chooses, free of constraints imposed by earlier legislatures. However, constitutional jurisprudence has developed in such a way, since the writing and creation of the United States Constitution, as to limit the power of future generations' ability to govern themselves. We take the position that the Constitution, as written and interpreted, has become a tool of intergenerational harm, and argue in favor of any policy that would allow for periodical constitutional revision. As it stands today, the Constitution governs present and future generations from the grave, and as such it violates the reserved powers doctrine by limiting the legislative options available to the legislatures of future generations.

This brief will be in nine sections. Section II will outline the constitutional theory of our case, and specifically identify that in this case, the harm is not coming from the Constitution itself, but rather from constitutional interpretation. Section III will outline the reserved powers doctrine, and explain how the reserved powers doctrine is more than positive law; it is natural law and must be given consideration over positive law. Section IV will outline the basic tenets of our claim. Section V will respond to certain objections raised by defense counsel during discovery, especially metaphysical concerns. Section VI will begin the outline of our anticipated witness testimony,

beginning with R. George Wright. Section VII will outline the anticipated testimony of Elisabeth Ellis. Section VIII will outline the anticipated testimony of Michael Otsuka. Finally, section IX provides a summary and conclusion of our claim and brief in this case.

CONSTITUTIONAL THEORY

To begin to challenge the Constitution, we must first consider constitutions in theory. What makes a constitution different than legislation? For this brief, we will argue that constitutions are written as coordination devices, unlike a given piece of legislation. After all, a constitution's status as super-legislative is what grants a constitution authority. Specifically, constitutions allow for legislative acts to work and function together. A constitution "provide[s] the ground rules that facilitate and enable cooperative political and social action on the part of those who live under them."² In this sense, a constitution, operating in a vacuum, only defines the rules of the game. A constitution, in our view, does not *inherently* violate the rights of future citizens or legislatures; in fact, a constitution ensures that the rights of future persons are secured to the best of (well-intentioned) framers' abilities. We do not claim that all constitutions, or that any hypothetical or theoretical constitution is a tool of intergenerational harm. Rather, the harm in this case is specified to be a result of the interpretation of the U.S. Constitution. Before outlining the mechanisms of this harm, we will outline the basics of the rights that are being violated.

² Keith E. Whittington, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 291

RESERVED POWERS DOCTRINE

A citizenry must be able to govern itself. Inherent in the structure of an organized democracy is this principle; that a legislature can legislate for itself, with no limits placed upon it from outside sources. A citizenry must have its own say in its policies. In American constitutional law, this has been codified as the reserved powers doctrine. In simple terms, “the reserved powers doctrine recognizes that one legislature may not legitimately infringe upon the equal sovereignty of later legislatures.”³ This doctrine, however, is more than codified law; it is natural law, a principle that has been endorsed by Bacon and Blackstone. Bacon explained simply that one parliament may not “by an act of parliament...bind or frustrate a future (parliament).”⁴ Similarly, Blackstone endorsed the principle by explaining that “Acts of parliament derogatory from the power of subsequent parliaments bind not” a given legislative body.⁵ We contend that the U.S. Constitution violates the reserved powers of future generations legislations.

While the reserved powers doctrine exists within constitutional jurisprudence, it is natural law first and foremost. To discuss the reserved powers doctrine is to first understand legislative power. Prior to legislating, a legislature must first receive its power to do so. In the United States, this power is yielded to Congress by the Constitution itself, which outlines that “All legislative Powers herein granted shall be

³ Brief of Alec L., *et al.*, at 7, *Alec L., et al. v. Gina McCarthy, et al., & The National Association of Manufacturers, et al.*, No. 13-5192 (D.C. Cir. Nov. 12, 2013)

⁴ Francis Bacon, *The History of the Reign of King Henry VII*, ed. Brian Vickers (Cambridge: Cambridge University Press, 1998), 122

⁵ William Blackstone, *Commentaries on the Laws of England*, (South Australia: The University of Adelaide Library, 2014), <https://ebooks.adelaide.edu.au/b/blackstone/william/comment/index.html>

vested in a Congress.”⁶ A limit of this power to legislate is the reserved powers doctrine, a doctrine which allows not only for a legislature to legislate, but for a legislature to legislate for itself and only for itself; each successive legislature, under the reserved powers doctrine, may and must legislate without interference from a prior legislature. The reserved powers doctrine has critical policy implications, as it “limits the ability of any one legislature to take action that will bind a future legislature in any crucial sphere of government concern.”⁷ The Supreme Court itself has commented on how this natural law of reserved legislative power must supersede positive law. In rendering its opinion in the landmark *Illinois Central Railroad Co. v. Illinois*, Justice Field noted that a legislature must not impose limits on future legislation. In *Illinois Central*, Illinois Central Railroad Co. had made an offer to the city of Chicago to purchase acres of shoreline on which to develop railroad tracks, and the Illinois state legislature passed the Lake Front Act, which gave the railroad the right to use and control the property. This act was challenged and taken to the Supreme Court, where Justice Field rendered the court’s decision, holding that “the legislature could not give away nor sell the discretion of its successors...The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day.”⁸ This ruling was influential in beginning to cement the reserved powers doctrine into American jurisprudence, outlining that legislatures may not “sell the discretion” or limit the choices of future legislatures in matters of public importance.

⁶ U.S. Const. Art I, § 1

⁷ Mary Christina Wood, *Nature’s Trust* (New York: Cambridge University Press, 2014), 130

⁸ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892)

Natural Law and the Constitution

Natural law exists regardless of whether it is codified into positive or constitutional law. However, natural law and constitutional law are not always without conflict. Natural law is more than codified or constitutional text; it is guiding principle. Natural law is law that “so necessarily agrees with the nature and state of man, that without preserving its maxims, the peace and happiness of society can never be preserved.”⁹ This means that natural law *must* overrule positive, written law when in conflict. Our argument that natural law overrules positive law during conflict is not without legal precedent; as seen in *Illinois Central* and outlined in section III of this brief, the Supreme Court has demonstrated the importance of the reserved powers doctrine. This case will show that the natural law of reserved powers, the natural law of simple generational sovereignty, has been overruled by constitutional text and interpretation. This is a harm against the present generation and all later generations.

However, to some extent the reserved powers doctrine has become accepted constitutional law through case law. Specifically, in *Stone v. Mississippi* the Supreme Court upheld the importance of the reserved powers doctrine, explaining that the “power of governing is a trust committed by the people to the government, no part of which can be granted away.”¹⁰ That this natural law can also be grounded within constitutional law establishes its importance and relevancy.

⁹ Steven H. Gifis, *Barron’s Law Dictionary*, (New York: Barron’s Education Series, Inc., 2010), 354

¹⁰ *Stone v. Mississippi* 101 U.S. 814 (1879)

CLAIM

In this case, we allege that the United States Constitution (hereafter referred to simply as the Constitution) itself violates the reserved powers doctrine. The Constitution legitimizes and institutionalizes political mechanisms which serve to limit the legislative powers of each successive generation of legislatures. In this way, we argue that the Constitution violates the reserved powers of future generations. To clearly demonstrate the extent of this harm, we will present before the Court three witnesses: R. George Wright, Elisabeth Ellis, and Michael Otsuka. The following sections of this brief will outline the ways in which each witness will argue how the Constitution violates the reserved powers doctrine. At this moment in the argument it is critical to note that we are not contesting that the rights of *all* persons of each future generation are being violated by the Constitution. Rather, we are arguing that a specific groups rights are being violated; we suggest that the Constitution is violating the rights of the *legislatures* of future generations. To this end we are focusing on exploring how the Constitution violates the reserved powers doctrine. First however, we feel as if it is important to address potential defense objections to our case.

METAPHYSICAL CONSIDERATIONS AND OBJECTIONS

Anticipated Defense Objections

To this end a clear objection arises: identity. We do not yet know who will legislate 20, 50, or 100 years from now. We anticipate many objections to our case; how then can we possibly argue that their rights are being violated? Does one not need to exist to have their rights violated? We the plaintiff answer in the negative, and will here

attempt to discuss these potential objections in brief. While this argument will now dive into the metaphysical, we nonetheless find it illuminating to the issue at hand.

How can a future person be said to have a claim, in general, against a living person? This very question is difficult to approach, and has elicited strong responses that a future person in fact cannot have such a claim. Obligations and acts that benefit future generations then become not a result from a mutual relationship, but rather are reduced to acts of generosity or mercy. The defense in this case may counter along these lines, as they already have throughout the discovery process, by arguing the following; that a current generation may act in such a way to benefit future generations is *not* derived from a moral or legal obligation to do so, for a future generation cannot have a claim against a current generation. Rather, as we anticipate the defense counsel will argue, for a current generation to act to benefit a future generation is simple generosity. We find this position to be derogatory of the rights of future generations.

Some philosophers suggest that the identification of clear obligations to living but still future generations, such as children and grandchildren, can lead to the moral requirement for “actions at least indirectly promoting the likely interests of future generations.”¹¹ However, this is, in our view, an incomplete and morally unjustifiable approach to intergenerational justice. Simply put, this approach prioritizes interests in a discriminatory fashion; we cannot let our moral responsibilities and actions be confined to just those descendants with whom we will interact, such as the generations of our children and grandchildren. We must expand our sphere. We argue there does exist potential to recognize, both morally and legally, rights of those unborn.

¹¹ R. George Wright, “The Interests of Posterity in the Constitutional Scheme,” *University of Cincinnati Law Review* 59, (1990): 9

Establishing the Rights of Future Generations

This section will argue for the rights of future generations in two parts. First, consider the discrimination issue. Distance in space cannot and should not yield more moral weight to one person over another. Take for example the plight of the hungry. Are we more morally obliged to feed the hungry that reside within our own state or country than those who are in an equal state of hunger a world away? Of course we are not. Singer argues that this principle applies to worldwide famine crises, specifically stating “the fact that a person is physically near to us, so that we have personal contact with him...does not show that we *ought* to help him rather than another who happens to be further away.”¹² We contend that this discrimination argument has clear implications for intergenerational intergenerational justice, and that Singer’s argument can be easily paralleled into a temporal, rather than physical sphere. In the same way, then, that we cannot give more moral consideration based solely on physical distance, we cannot give more moral consideration based solely on *temporal* consideration. Just as we cannot morally ignore those in far away lands from our own, we cannot morally ignore those in far away generations from our own.

Finally, while this may not be an appeal to a clear moral law or standard, it is an appeal to morals itself. Quite simply, we understand that there are no present consequences for a current generation that violates the rights of later generations by consuming natural resources now, for example, and externalizing the cost of doing so onto the future. There is no court, no arbiter, no system of justice that can prohibit the current generation from taking actions that benefit now but harm later. There can be no

¹² Peter Singer, *Writings on an Ethical Life* (New York: HarperCollins Publishers Inc., 2000), 107

punishment for doing so. However, the current generation stands as the last defense of this intergenerational moral. As Wright puts it, “we are inevitably judges in our own case.”¹³ We the plaintiff urge that current generations not shirk this responsibility to later generations.

For the above stated reasons then we find that a future generation does have a right to govern itself. We argue that this right is not hypothetical, imaginative, or speculative. Rather we argue that this right is real, and it mandates that the present generation may not infringe upon the future generations right to self-governance. The following sections will outline the anticipated testimony of each of our witnesses in this case, and further demonstrate how the Constitution violates the reserved powers doctrine.

R. GEORGE WRIGHT

We must first take our argument from the theoretical to the realistic. We must identify and explain the specific ways in which the Constitution specifically violates the rights of future peoples to govern themselves. To this end, you will hear testimony from R. George Wright. Wright will identify the institutionalized disenfranchisement of future generations’ legislatures. Wright will outline how the equal protection clause of the Constitution is violated by environmental regulatory policies on the federal level, such as the National Environmental Policy Act (NEPA). Wright will highlight how “the environmental interests of future generations are not adequately safeguarded by the

¹³ R. George Wright, “The Interests of Posterity in the Constitutional Scheme,” *University of Cincinnati Law Review* 59, (1990): 11

National Environmental Policy Act”¹⁴ which is constitutional under the delegation doctrine.

Wright will connect a bias against future generations as manifesting from constitutional interpretation that has led to the development of the delegation doctrine, which allowed policies such as NEPA to be enacted in the first place. As Article I Section I outlines, “All legislative powers herein granted shall be vested in a Congress of the United States.”¹⁵ However, beginning in the early 20th century, Congress found itself involved in increasingly complex fields, attempting to draft legislation in response to industrial development and booming American economies. This led to understanding “the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly”.¹⁶ In short, this was a critical part of the creation of the delegation doctrine, which constitutionally authorizes federal agencies to legislate with directions from Congress. This doctrine directly ties all federal agency legislation to the interpretation of the delegation doctrine by the Supreme Court in the early 20th century. In *J.W. Hampton, Jr. & Co. v. United States*, the Supreme Court interpreted Article I Section I to include the power to delegate legislative authority. As Justice Taft wrote in the court’s opinion if Congress simply “lay down by legislative act an intelligible principle” to which the body authorized to legislate must conform, then “such legislative action is not a forbidden delegation of legislative power.”¹⁷ This intelligible principle was not explicitly outlined in

¹⁴ R. George Wright, “The Interests of Posterity in the Constitutional Scheme,” *University of Cincinnati Law Review* 59, (1990): 9

¹⁵ U.S. Const. Art I, § 1

¹⁶ *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935)

¹⁷ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)

constitutional text, but rather has developed as constitutional jurisprudence to allow for the delegation of legislative function. Wright will outline this delegation doctrine, and explain that it is this delegation of power, this *interpretation* of the separation of powers as delineated by the Constitution that harms future legislatures.

Specifically, Wright will discuss the procedural nature of NEPA, and how the Supreme Court has declined to require that an agency preparing an Environmental Impact Statement (EIS) also include a ‘worst case analysis’. Specifically seen in *Robertson v. Methow Valley Citizens Council*, the Supreme Court found that NEPA only required that agencies give a hard look at environmental impacts of significant federal actions, but imposed no substantive demand to mitigate negative environmental impacts.¹⁸ NEPA, a constitutionally authorized law, fails to require analysis that would extrapolate environmental harms into the future.

Wright will explain how this is biased against future generations. This lack of a mandatory worst-case analysis implies a practical bias against the future because worst-case environmental outcomes “may be disproportionately likely to cumulate in the relatively long-term, as opposed to the short term future.”¹⁹ This potential for cumulating worst-case environmental effects would bog down future generations legislatures and demand they deal with problems arising from the environmental effects of actions taken by prior generations. In this way then, Wright argues that problems arising from the delegation doctrine, especially as they manifest in agencies dealing with the environment, would violate the reserved powers doctrine.

¹⁸ *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989)

¹⁹ R. George Wright, “The Interests of Posterity in the Constitutional Scheme,” *University of Cincinnati Law Review* 59, (1990): 9

ELISABETH ELLIS

The second witness that will testify is political theorist Elisabeth Ellis. Ellis will present her vision of provisional politics and provisional theory. Importantly, Ellis will not identify specific parts of the Constitution as violating the reserved powers doctrine. Rather, Ellis will argue in the theoretical, and the hypothetical. Ellis will provide a crucial understanding not of *how* but of *why*. Ellis will answer why we should be concerned with the reserved powers doctrine, and why, in theory, provisionality, not permanence, must rule the day.

Ellis is an advocate of provisional theory. Provisional theory advocates for a system in which “citizens’ capacities for self-rule are determined by the citizens’ stake in the policy itself, rather than in morally arbitrary...membership groups.”²⁰ One such morally arbitrary membership group, we will argue, is a temporal membership group, or a generation. In this case, Ellis will critique the modern state of democratic legitimacy, arguing simply that democracies built on entrenched constitutions are not legitimate. To make her point, Ellis will draw on the principle of affected interest and the need to defend political possibility.

Principle of Affected Interest

This principle is central to our case. The principle of affected interest is “perhaps the most basic of democratic institutions.”²¹ Simply put, this principle mandates that individuals should be able to influence decisions and government actions that affect

²⁰ Elisabeth Ellis, *Provisional Politics: Kantian Arguments in Policy Context* (New Haven: Yale University Press, 2008) 85

²¹ Archon Fung, “The Principle of Affected Interests: An Interpretation and Defense” in ed. Jack Nagel and Rogers Smith *Representation: Elections and Beyond* (Philadelphia: University of Pennsylvania Press, 2013): 237

them. In an intergenerational sense, the applications of this principle are clear; each generation should be able to influence decisions that affect them. This is known as generational sovereignty. In regards to environmental policy under federal agency authority, this is no longer the case.

Ellis will champion her theory of provisional politics through a lens of environmental regulation. Specifically, over time, federal environmental agencies have evolved from protecting the environment to authorizing its destruction, and Ellis will explain how this is will violate the principle of affected interest. Modern environmental law statutes do more damage then they prevent. In fact, “agencies at the local, state, and federal levels have turned [environmental law statutes] into a broad-scale permitting system that allows colossal damage.”²² Constitutionally authorized federal agencies are allowing for ocean acidification, wetlands destruction, carbon emissions, and species extinction at alarming rates.²³ The reality however, is that the current generation will not feel the affect of these actions nearly as significantly as future generations. Specifically, continued climate destruction will force future societies to adapt, but not modern society. Future societies, given the environmental constraints placed upon them by the modern industrial society, must “figure out how to survive conditions [they have] never known.”²⁴ As Ellis will explain, the principle of affected interest is the most basic of democratic ideals. However, “the seams of democracy tore out a long time ago in environmental law.”²⁵

²² Mary Christina Wood, *Nature's Trust* (New York: Cambridge University Press, 2014), 103

²³ *ibid.*, pp. 10

²⁴ *ibid.*, pp. 11

²⁵ *ibid.*, pp. 53

Given this structure of environmental policy making that flies in the face of the principle of affected interest, Ellis will highlight why this a problem of intergenerational concern. Ellis has argued against the arbitrary nature of geographic and territorial interest groups making decisions that affect others outside of their group, and here will argue similarly against temporal groups. That is, a current generation's furtherance of constitutional jurisprudence that authorizes agency ignorance of environmental degradation represents a group making decisions about things that will not primarily affect themselves. This violates the principle of affected interest.

Political Possibility

Second, Ellis will argue that current generations, under the Constitution, are limiting future political possibility. As has been established, without massive fundamental changes in our consumption of fossil fuel, future generations will face severe environmental crises. In light of this, Ellis will argue that current generations are limiting the political possibility of future generations by forcing their hand; current generations are making future generations deal with an impending ecological crisis. Future generations will be faced with limited options. The current generation faces “a planetary emergency in which only a narrow window of time remains to act before tipping points foreclose all feasible options”.²⁶ It is this foreclosure of feasible options that serves to directly limit the political and legislative possibility of future generations legislatures. Ellis is particularly concerned with the Constitution as a political institution that reduces political possibility for future generations. In this way, Ellis will argue that

²⁶ Mary Christina Wood, *Nature's Trust* (New York: Cambridge University Press, 2014), 11

the Constitution violates the reserved powers doctrine, as it limits future legislatures' ability to choose.

MICHAEL OTSUKA

The final witness that will testify on behalf of the plaintiff is Michael Otsuka. Otsuka will argue generally against the legitimacy of the Constitution as it has been interpreted, and against the legitimacy of laws that bind the living generation despite being written by the dead. In defending his position, Otsuka will implicitly argue using the reserved powers doctrine; laws, according to Otsuka, are illegitimate if they bind those who did not consent to them, and thus each generation must have the ability to govern itself. Otsuka will argue that laws that are written by a past generation and take affect on a present or future generation would violate the reserved powers doctrine. Otsuka will first refute a defense objection to his position, known as the consequentialist objection, and second highlight the method in which a constitutional amendment must be made to avoid violating the reserved powers doctrine.

Against the Consequentialist Objection

Otsuka will testify primarily to refute what he terms the 'consequentialist' argument against a proposal to periodically revise the Constitution to better reflect the will of the present generation living under it. The consequentialist argument is best summarized by Otsuka himself when he poses the question: "Might one justifiably conclude that the laws of the dead must be assumed to have authority by default over the living in the light of the disastrous consequences of the lapse of such authority?"²⁷

²⁷ Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003), 139

In other words, this objection to our position against the legitimacy of the Constitution is that there is simply no better alternative, and that without the Constitution, there would undoubtedly be political turmoil.

Otsuka will argue against this objection, which we anticipate the defense will raise. Otsuka highlights the probability of a reasonable approach to a periodic constitutional renewal; that “it is likely [with the threat of anarchy] that citizens... would act on the presumption that the Constitution and other laws warrant re-enactment unless a very strong case for their abandonment can be made.”²⁸ In short, Otsuka takes the moderate view that allowing for a periodical revision to the Constitution would not result in political turmoil, quite simply because in his view, most American citizens would find the Constitution entirely acceptable. In fact, given institutional barriers to re-writing laws (including powerful socio-economic barriers), opening the Constitution to generational revision “might differ little from the status quo.”²⁹ In this way, then, we feel that arguing for the legitimacy of the Constitution based solely on the grounds that no better alternatives exist fails to consider likely consequences of generational Constitutional revisions.

More than Amendment

Another objection from the defense counsel that has been raised in discovery can be framed in the following way: the Constitution does not violate the reserved powers doctrine by limiting the legislatures of future generations because the Constitution is not entrenched; after all, it has been amended some twenty-seven times.

²⁸ Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003), 140

²⁹ *ibid.*, pp. 140

We anticipate that defense counsel will argue that the Constitution, and constitutional case law and interpretations are not entrenched because they can be overturned or ignored. However, this argument minimizes the change we are seeking. Otsuka will consider the role of amendment in general in constitutional theory, and will conclude that the current violation of the reserved powers doctrine is so extreme as to demand “a change of such fundamental dimension, sufficiently alien from any conception of the imminent preexisting order.”³⁰ The magnitude of the harm, demands that redress be taken out of the language of amendment, and legitimized by some extra-constitutional set of events. Otsuka will address the way in which the magnitude of the harm mandates that more than the usual course of action (amendment) must be considered.

CONCLUSION

We argue that the Constitution, and the system of laws and structures that have developed over its existence and under its authority violate the reserved powers doctrine. The reserved powers doctrine is the bedrock of democracy in the most universal sense; a legislature must be able to legislate itself. The Constitution, in our view, has allowed for the slow development of constraints against future legislatures, primarily from the ways in which environmental policies allowed under the EPA’s jurisdiction will come to limit the political possibility of future legislators. We have given future generations no choice but to deal with the problems we have created, problems whose affects will not be felt by the current generation, but by future

³⁰ Sanford Levinson, “How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change,” in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995), 21

generations. Future generations are being harmed, their rights are being violated, and they need a voice.

Defense Brief in Support of Motion for Summary Judgment

SUMMARY OF ARGUMENT

We write this brief in response to the claims brought forth by Mr. Jefferson and the plaintiff in this case. The plaintiff is charging that the United States Constitution violates the reserved powers doctrine, in limiting the possibilities of future legislatures to legislate for themselves. The plaintiffs argue that the Constitution does not *inherently* violate this doctrine; rather, they argue that the interpretation and development of constitutional jurisprudence throughout its existence has turned the Constitution into a tool of intergenerational harm. We have elected to draft this brief and present our case in response, arguing that the Constitution, both inherently and through its interpretation, actually acts as a tool to *prevent* intergenerational harm.

In this brief, we will outline the positions that our three witnesses will take throughout the duration of the upcoming trial. This brief will provide an overview of each of our witnesses and their anticipated testimony. Importantly, in this brief we will outline the broader points each of our witnesses will make, though we fully anticipate that each will detail their arguments further throughout the course of the trial. Section II of this brief will outline our response to the plaintiff's framing of the Constitution in this case. Section III will begin the outline of our anticipated witness testimony starting with Victor Muñoz-Fraticelli. Section IV will outline the testimony of Edmund Burke, and Section V will outline the anticipated testimony of Kelsey Juliana. Finally, Section VI will provide a conclusion.

CONSTITUTIONAL THEORY

First, it is important to note that we agree with many of the concerns brought forth by Mr. Jefferson in his brief. We understand the importance of intergenerational justice, and are especially concerned about preserving the rights of future generations of legislatures to govern for themselves; we acknowledge and agree upon the importance of the reserved powers doctrine. However, the plaintiff's approach to solving this perceived problem is in our view entirely incorrect. The Constitution is not a tool of intergenerational harm, as Mr. Jefferson claims, but rather a tool to *prevent* intergenerational harm. First, we must begin to understand the intergenerational nature of the Constitution.

A 'Perpetual' Constitution

The plaintiff and Mr. Jefferson would have the Court believe that the Constitution is perpetual: that it is designed to last forever and rule future generations exactly as it ruled past generations. We take the opposing view, and argue that the Constitution is perpetual not in substance but in structure. The governmental structure the Constitution allows for and in fact created may be designed as perpetual, but the Constitution itself can be amended by future generations (as has been done twenty-seven times).

Article V of the Constitution itself expressly allows for constitutional revision and amendment. Article V states that Congress, "whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution."³¹ Clearly

³¹ U.S. Const. Art V

written within the constitutional text itself, then, is a prerogative to amend the Constitution.

Quite simply, the way in which the plaintiff frames and defines the role of the Constitution, specifically as a ‘coordination device’ hammers home our very point on the constitution theory. We will argue, especially through the testimony of Victor Muñiz-Fraticelli and Edmund Burke, that this type of coordination is critical. Acting as this coordination device, a constitution “provides the ground rules that facilitate and enable cooperative political and social action on the part of those who live under them.”³² This quote, used by Mr. Jefferson in the plaintiff’s own brief, encapsulates our argument concerning the Constitution. The Constitution, because it acts primarily as a coordination device (which the plaintiff states) does just that: it *coordinates* in order to better govern. The Constitution provides the ground rules, and without these ground rules in place, governance of any sort is much more difficult. Because of this, that the plaintiff views the Constitution itself as a coordination device is evidence enough of its intergenerational utility. However, because the plaintiff is pursuing further claims against the Constitution and the intergenerational harm it causes, we will present three witnesses to defend our case.

VICTOR MUÑIZ-FRATICELLI

We will first elicit testimony from political philosopher Victor Muñiz-Fraticelli. Muñiz-Fraticelli will respond directly to the fundamental claims brought forth by Thomas Jefferson. Muñiz-Fraticelli will outline his response to two claims arising from

³² Keith E. Whittington, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 291

Jefferson’s democratic critique of the American Constitution, which we anticipate will be the theoretical underpinning of the plaintiff’s case throughout the course of the trial. The claims Muñiz-Fraticelli will focus on arise from Thomas Jefferson himself. This section will outline his response.

Given that Mr. Jefferson is the plaintiff’s lawyer and will represent them at trial, we anticipate that many of his ideas and arguments will be present throughout the plaintiff’s case in chief. Based on the documents presented to the defense during the discovery period in this case, we understand that Mr. Jefferson will be presenting an argument in favor of the periodic re-enactment of the Constitution, in order to capture the true democratic ideals to which it claims to enshrine. Muñiz-Fraticelli will object to Mr. Jefferson’s argument on instrumental grounds.

Specifically, Muñiz-Fraticelli will identify two ways in which a periodically expiring constitution is in fact a harm on its own to future generations. First, Muñiz-Fraticelli will explain that “a self-expiring constitution raises an overwhelming hurdle to the establishment of a prosperous and stable social system.”³³ Muñiz-Fraticelli will outline a few reasons for this claim, namely that in a politically developed and advanced society, social and political projects of any magnitude require more than one generation of development and work. In the case of important social endeavors, Muñiz-Fraticelli will explain that such projects “give greater returns to the generations that follow than to those who presently labour in them.”³⁴ Because of this inherent longevity, Muñiz-Fraticelli will argue that because these social endeavors take so long, political stability

³³ Victor Muñiz-Fraticelli, “The Problem of a Perpetual Constitution,” in Axel Gosseries and Lukas Meyer, eds., *Intergenerational Justice* (Oxford: Oxford University Press, 2009): 388

³⁴ *ibid.*, pp. 389

is required for their completion, and a perpetual constitution provides the stability needed for success.

Second, Muñiz-Fraticelli will explain that the institution of a perpetual constitution is not a political *limit* on future generations legislatures. Rather, he will assert that the prospect of a perpetual constitution is “the enabling condition that allows both present and future generations to fruitfully engage in self-government.”³⁵ This is one of the more important critiques of the plaintiff’s argument. We share the plaintiff’s desire to ensure the reserved powers doctrine is fully enforced and allows for future generations to govern themselves, however, Muñiz-Fraticelli will explain that the way to achieve this goal is only through the implementation of a perpetual constitution. Only through a perpetual constitution can a future generation be liberated “from the unwieldy burden of renegotiating the conditions of civil association at every generational turn.”³⁶ We will argue that this burden is quite simply too much for each generation to bear, and only results in increasing the probability that a future generation’s rights to self-governance are being violated.

EDMUND BURKE

The second witness who will testify on behalf of the defense is Edmund Burke. Burke will further develop the critiques of Jefferson issued by Muñiz-Fraticelli, especially in expanding the idea that a defacto perpetual constitution is in fact the best way to ensure that a future generation does not lose its right to govern itself, which is guaranteed by the reserved powers doctrine.

³⁵ Victor Muñiz-Fraticelli, “The Problem of a Perpetual Constitution,” in Axel Gosseries and Lukas Meyer, eds., *Intergenerational Justice* (Oxford: Oxford University Press, 2009): 389

³⁶ *ibid.*, pp. 389

In writing his piece “Reflections on the Revolution in France” Edmund Burke explained the importance of political and constitutional longevity in the development of a just society. In critiquing the status of the French revolution, Burke draws on the example of the British crown. The crown, as an example of governmental stability is an entailed inheritance. This intergenerational inheritance, that of stable and steady government itself, is passed down from generation to generation. Burke will argue that to ask for constitutional revisions, or to claim that an intergenerational method of governance violates the rights of future generations legislatures is to shirk the responsibilities of the entailed inheritance.

Burke argues that this inheritance is a gift, rather than a curse. Burke will testify that “it has been the uniform policy of our constitution to claim and assert out liberties, as an *entailed inheritance* derived to us from our forefathers.”³⁷ Burke defends the intergenerational transfer of this inheritance as a preservation of political structure “in so great a diversity of its parts” as to lead to an entire people “inheriting privileges, franchises, and liberties, from a long line of ancestors.”³⁸ These privileges, franchises, and liberties provide the cornerstone for Burke’s argument. Importantly, these are the same future privileges, franchises, and liberties that the plaintiff and their counsel, Mr. Jefferson, wish to defend. Included in the inheritance is the very right to self-governance, and Burke will explain that the idea of an inheritable government is the best way to preserve the rights of future generations. In fact, as Burke will testify, if the

³⁷ Edmund Burke, “Reflections on the Revolution in France,” in *Burke, Paine, Goodwin, and the Revolution Controversy*, ed. Marilyn Butler (Great Britain: Cambridge University Press, 1984): 39

³⁸ *ibid.*, pp. 39

plaintiff in this case were to succeed, and institute a method for periodic constitutional revision, they would find only punishment for future generations in their success.

KELSEY JULIANA

Our third and final witness is Kelsey Juliana. Ms. Juliana is a youth plaintiff in an atmospheric trust litigation case against the United States Federal Government. Named defendants are Barack Obama and Gina McCarthy, for failing to properly protect the atmosphere and preserve a healthy climate for future generations. This lawsuit, filed on August 12, 2015, will provide the basis for the testimony of Ms. Juliana.

Importantly, in an intergenerational context the testimony of Ms. Juliana might seem counterintuitive at first. After all, much of the plaintiff brief focused specifically on the issue of climate change, suggesting that a failing governmental bureaucracy, enabled by constitutional interpretation is directly limiting the political possibility of future generations' legislatures. Surely then, additional testimony from Ms. Juliana concerning the failures of the governmental bureaucracy to limit atmospheric damage would seem to fit naturally with the plaintiff in this case?

On the contrary, Juliana will outline her concerns with the federal government. We will argue that these environmental concerns are the exact reason we *need* a perpetual constitution. In a similar vein as Burke, Juliana's testimony will outline the strong need for a continuing political arena, with long-lasting structure and reliable governance. We will argue, using the testimony of Juliana, that the damage being done by the federal government to the rights of future generations is exactly why those

generations need a perpetual constitution in order to protect their right to govern themselves.

Ms. Juliana will outline the basic claims of her suit against the government. Specifically, Juliana will claim that the defendants, including the United States federal government, has “long standing knowledge of the cumulative dangers that their aggregate actions are causing the plaintiffs”³⁹ and future generations of legislatures. These actions include failing to implement the EPA’s 1990 Plan “Policy Options for Stabilizing Global Climate” and the Congressional Office of Technology (OTA) 1991 plan titled “Changing By Degrees: Steps to Reduce Greenhouse Gases.” Both plans were requested by congressional action, and despite the government’s full understanding of the dangers of rising CO_2 levels, the government failed to implement either plan. Juliana will testify about the drastic effects of this failure, and the punishment this imposes on future generations.

In short, we agree with many of the environmental concerns brought forth in the plaintiffs brief by Mr. Jefferson. We concede entirely the massive environmental and ecological damage to wetlands, oceans, and forests across the globe and within the boundaries of the United States. We join Mr. Jefferson and the plaintiff in condemning agency action (or inaction) that leads directly to the direct permit schemes, authorization, and subsidization of the dangerous fuel extraction methods used throughout the United States. Ms. Juliana will explain that because of the actions that allow these environmental dangerous practices to continue, and thus endanger both her

³⁹ Complaint for Declaratory and Injunctive Relief at 3, Kelsey Cascadia Rose Juliana, Xiuhtezcatl Tonatiuh M. *et al.* v. United States, Barack Obama *et al.*, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015)

own life, health, and enjoyment of the natural resources where she lives, but also those of her children and grandchildren, which makes this an intergenerational issue.

Ms. Juliana's testimony will connect with the testimony of Mr. Muñiz-Fraticelli. The environmental protection that is needed and outlined by Ms. Juliana can only be achieved through long-term and consistent policy. As Muñiz-Fraticelli explains, this policy can only be implemented by utilizing a perpetual constitution to establish the 'ground rules' necessary for intergenerational progress. The progress needed to stem the tide of impending climate disaster can only be achieved with purposeful and consistent long-term policy, which demonstrates clearly the need for a perpetual constitution.

CONCLUSION

We take a firm position in defense of the Constitution, and the system of laws and interpretations that the plaintiff alleges have come to violate the reserved powers doctrine. Even if one concedes that the Constitution is violating the rights of future generations to govern themselves (a fact which we will contest) the Constitution is not perpetual, and can be amended to fit each generation's needs. This brief outlined this fact in section [], and outlined the testimony of each of the witnesses we will call in this case, including the testimony of Victor Muñiz-Fraticelli, Edmund Burke, and Kelsey Juliana. We will demonstrate that the Constitution is not a tool of intergenerational harm during trial, but rather the Constitution is the tool we must use to *prevent* intergenerational harm.

Trial

Opening Statements

Plaintiff Opening Statement

MR. JEFFERSON: May it please the court. Your Honor, Opposing Counsel, Members of the Jury.

Take yourself out of this courtroom. Remove yourself from what surrounds you and I right now: the bar, the box you are sitting in, the judge in his robes. Take it all away. Imagine your children. Imagine your grandchildren. What type of world do you want to leave for them? What legacy do you want to leave behind? What kind of world will we leave?

Now lets return to this courtroom. Today we the plaintiff will show you that the kind of world we are leaving behind for our children is a world where we are setting them up for failure. A world where we impose the consequences of our actions upon the generations to follow. A world where today's greed punishes our children and grandchildren.

One of the fundamental bedrocks of American democracy is the reserved powers doctrine. This doctrine mandates that each successive legislature can legislate for itself. It sounds simple, because it is. It means that no outside influences can encroach upon the legislative function of a given legislature. It allows the 110th Congress to govern without worry of what the 109th Congress or 111th Congress might think of the way it governs. The reserved powers doctrine is what allows us to govern the way we choose to be governed, and this doctrine is what it at stake here today. The

reserved powers doctrine is a law of democracy more fundamental than the Constitution itself.

Today, we will show you that the Constitution of the United States itself, specifically its interpretation over time, violates the reserved powers doctrine. This causes intergenerational harm, that is, harm from one generation of Americans to the next. Today, we will show you that the Constitution has become a *tool* of intergenerational harm, and violates the reserved powers doctrine and the rights of future generations of American legislatures to legislate for themselves. In short, today we will show you that the Constitution acts from its grave.

We will prove our case by calling three witnesses to the stand. First, you will hear from R. George Wright. Mr. Wright is a law professor at the Indiana University Robert H. McKinney School of Law. Mr. Wright will testify about a bias against future generations in constitutional interpretation. Specifically, Mr. Wright will outline the progression of the delegation doctrine through judicial decisions including *J.W. Hampton, Jr. & Co. v. United States*, and how this delegation doctrine ultimately harms future generations in an environmental way through the National Environmental Policy Act (NEPA).

Next, you will hear from Elisabeth Ellis, a political philosopher. Miss Ellis will testify about the way in which the Constitution limits the political possibility of future legislatures, which is a violation of the reserved powers doctrine. The reserved powers doctrine is simple; it means that each generation can govern itself, and one generation may not impose or bind another generation. Specifically, Miss Ellis will testify in favor of a system of provisional politics, where authority is not allocated by random and

arbitrary membership within one particular generation, but rather is allocated for each successive generation.

Finally, you will hear testimony from Michael Otsuka, a political scientist. Mr. Otsuka will testify against two objections to our case; you will hear about what he calls the consequentialist objection to a periodic evaluation of the Constitution. Mr. Otsuka will testify that the Constitution itself is in need of more than amendment if it is to transition from an intergenerational tool for harm to an intergenerational tool for ensuring the rights of future generations.

We bear the burden of proof in today's case, to prove to you, by a preponderance of the evidence, that the Constitution directly harms later generations by violating the reserved powers doctrine. This means we must prove our case to be more likely true than not. We will shoulder this burden. At the end of today's trial, I will stand before you once again and remind you that you are now faced with a choice. So I will ask, what kind of world do you want to leave behind? Thank you.

Defense Opening Statement

MR. MADISON: May it please the court. Your Honor, Opposing Counsel, Members of the Jury.

Mr. Jefferson and I agree on something. You see we both agree that we need to leave the best world behind that we can for our posterity. We agree that our children, and our grandchildren deserve to inhabit a world well taken care of, where our greed now doesn't harm them later. We agree that to do so, we must protect the reserved powers doctrine, which allows our posterity to govern themselves. In short, Mr. Jefferson and I agree about the *why*. But we disagree about the *how*.

Today, the plaintiff is alleging that the Constitution itself has led to a violation of future generations' right to govern themselves, by violating the reserved powers doctrine. However, the Constitution works in the exact opposite way; the Constitution, and the judicial rulings that stem from its interpretations, are what *protect* future generations, rather than harm them. Therefore, the plaintiff will be unable to prove to you that the Constitution truly infringes the rights of future generations.

In order to show that the Constitution actually protects future legislatures' rights to govern themselves, today you will hear from three witnesses. First, you will hear from Victor Muñiz-Fraticelli, a political scientist. Mr. Muñiz-Fraticelli will respond directly to the fundamental claims that the plaintiff will bring forth today, especially the arguments of my opposing counsel, Mr. Jefferson. Specifically, Mr. Muñiz-Fraticelli will identify two key ways in which a periodically renewed constitution, which the plaintiff is in favor of, in fact *harms* future generations. You will hear that a long-lasting constitution does not harm future generations, but acts as the fundamental enabling condition for future civil and social development.

Second, you will hear testimony from Edmund Burke, a political theorist. Mr. Burke will explain that a long-lasting constitution does not violate the rights of future generations, but rather protects them. Mr. Burke will explain that proper governance is an entailed inheritance that must be shared with posterity, and that transmission of this inheritance gives future generations a stable political structure in which to protect their own rights and govern for themselves.

Finally, you will hear testimony from Kelsey Juliana, a youth plaintiff in a suit against the United States Federal Government and a climate activist. Ms. Juliana will

echo many of the environmental concerns brought forth today by the plaintiff. In fact, much environmental damage being done today is harming future generations, and Ms. Juliana's testimony will make this clear. Paired with our other witnesses, however, you will see that this is exactly why we need to maintain a long-lasting constitution between generations; to protect them from future harms.

The plaintiff has the burden of proof in this case. They have to prove this case to you by a preponderance of the evidence, which means more likely than not. They will fail to shoulder this burden.

So I will answer Mr. Jefferson's question. What kind of world do *we* want? A world defined by stability, progress, and continuity. A world where we leave a better existence for our posterity by ensuring their rights to govern are protected. At the end of today's trial I will stand before you again, and remind you not just to think about the *why*. But to think about the *how*. Thank you.

Direct Examination of R. George Wright

R. GEORGE WRIGHT

having been previously duly sworn by the Court, testified on his oath as follows:

BY MR. JEFFERSON:

Q. Please state your name and spell your last for the record.

A. My name is R. George Wright. W-R-I-G-H-T.

Q. What do you do for a living Mr. Wright?

A. I am a law professor at the Indiana University Robert H. McKinney School of Law.

Q. Where did you receive your education?

A. I graduated with my B.A. from the University of Virginia, and my Ph.D. and J.D. from Indiana University.

Q. Do you have any areas of expertise within the field of law?

A. Yes. I primarily focus on constitutional and administrative law.

Q. Mr. Wright, are you published in these areas?

A. Yes of course. I have written six books, including *Does the Law Morally Bind the Poor*, and *Freedom of the Press: A Reference Guide to the United States Constitution*. I have also written at least one hundred full-length publications, including “The Interests of Posterity in the Constitutional Scheme, published in the University of Cincinnati Law Review. I have made a copy available to both parties in this case.

Q. Mr. Wright, I would like to move on and discuss the Constitution. In your opinion, what is the function of a constitution?

A. Its simple. The American Constitution is designed and should function to protect the rights of everyone. The Constitution creates a system of government that is designed to protect and maintain equal rights.

Q. When you say everyone, who do you include in that group?

A. Every United States citizen, current and future.

Q. I’d like to spend some time discussing those future citizens. Why do they need Constitutional protection?

A. The thing is, it is safe to assume they will come to exist. There is no reason to doubt that, say 50 or 100 years from now, there will be citizens in the United States. The Constitution, as the tool that binds us to them, should protect both of our rights.

Q. Are there any other ways we are to protect future generations?

A. Absolutely. Morally, we are obliged to understand the needs of future generations as well. Some people think that, because they don't exist currently we don't owe them anything from a moral standpoint. But this view is too greedy and simple.

Q. Why do we owe future generations moral obligations, Mr. Wright?

A. There are a few different arguments as to how we can defend that position, unfortunately none truly eliminate all objections. The reality however, is that the way time separates one person from another, or one generation from another, is just as arbitrary as the way physical space separates one person from another. This means that any moral obligation we owe to current citizens removed in space, is owed to future citizens as well.

Q. Alright Mr. Wright, I'd like to talk about those obligations. What are some of the things the current generation owes to its posterity?

A. First and foremost is an inhabitable Earth. Protecting future generations against environmental disaster is one of the most important moral problems facing the current generation, and little is being done to actually protect future generations.

Q. Let's discuss what has been done, and the current environmental regulations. Are there any environmental regulations that acknowledge the importance of protecting future generations?

A. Yes, one of the most important is the National Environmental Policy Act, or NEPA.

Q. What is NEPA?

A. NEPA is a particularly inclusive environmental law that is designed to provide for the betterment of the environment. NEPA mandates that all federal agencies

prepare what is known as an Environmental Assessment (EA) and possibly an Environmental Impact Statement (EIS) which are investigations into the potentially harmful environmental effects of the agencies' proposed actions.

Q. What is NEPA's relation to the Constitution?

A. Well, it has passed constitutional muster with the courts. For example, in *Robertson v. Methow Valley Citizens Council*, the Supreme Court held that an agency not need prepare a "worst case analysis" when considering unknown environmental conditions regarding a federal agency's action.

Q. What could this mean for future generations?

A. It could mean that NEPA, a law which is deemed constitutionally valid, directs the risks and costs of environmental damage onto future generations. Of course, the members of those generations have no timely ability to challenge this.

Q. How does this direct risks to future generations?

A. Simply because of the bias that is time. It is far more likely that an environmental "worst case scenario" occurs in the future than the present. Because of this, the likelihood that a future generation must deal with this scenario is higher than the likelihood for a current generation.

Q. Mr. Wright, what is your conclusion regarding the NEPA regulations and future generations?

A. Quite simply that NEPA is a constitutionally authorized method of endangering our posterity from an environmental standpoint.

MR. JEFFERSON: Thank you Mr. Wright. No further questions.

Cross Examination of R. George Wright

BY MR. MADISON:

Q. Good afternoon Mr. Wright, I'd first like to begin by asking you about the Constitution itself.

A. Of course.

Q. You are familiar with the preamble of the Constitution, are you not?

A. Yes I am.

Q. You are aware that the preamble is important in defining the goal of the Constitution?

A. Yes, I would say so.

Q. You are aware that the preamble mentions future generations specifically?

A. Yes, I believe it does.

Q. In fact it states that it aims to secure "the blessings of liberty to ourselves"?

A. Yes it does say that.

Q. And "our posterity" right?

A. Yes the Constitution says that as well.

Q. So would it be fair of me to say that the Constitution was written with our posterity in mind?

A. Well I don't know if I feel comfortable speculating about what the founders had "in mind" when they wrote the Constitution, but that is in the preamble yes.

Q. Now I would like to move on to a specific part of the Constitution.

A. Of course.

Q. You are familiar with the Equal Protection clause, are you not?

A. Yes I am

Q. The Equal Protection clause prohibits states from denying equal protection to any person within their jurisdiction?

A. Yes that is correct.

Q. The same principle has been recognized to apply to the federal government, has it not?

Y. Yes, it has.

Q. You write about applying equal protection within your article “The Interests of Posterity in the Constitutional Scheme” don’t you?

A. Yes I do, quite a bit.

Q. You write that it is crucial to sustain societal progress, don’t you?

A. Yes I do.

Q. You also explain that bringing cultural development to an end would be an act of “visionless narcissism” don’t you?

A. Yes, because it would. Cultural and societal progress must be sustained, I don’t think anyone would disagree with that.

Q. You would agree that to prevent cultural progress is to deny equal protection, wouldn’t you?

A. Yes, that’s fair to say.

Q. And you are aware that the conceptual principles of equal protection you were writing about arose directly from the Constitution?

A. Yes they did.

Q. So it would be fair to say that in that sense, the Constitution is interested in protecting cultural and social progress?

A. I suppose you *could* say that, yes.

MR. MADISON: Thank you, no further questions.

Direct Examination of Elisabeth Ellis

ELISABETH ELLIS

having been previously duly sworn by the Court, testified on her oath as follows:

BY MR. JEFFERSON:

Q. Please state your name and spell your last for the record.

A. My name is Elisabeth Ellis. E-L-L-I-S.

Q. Miss Ellis, what do you do for a living?

A. Currently I am a professor at the University of Otago in New Zealand.

Q. What do you teach?

A. I teach ethics, philosophy, environmental philosophy, and economics.

Q. What is your educational background?

A. I received my B.A. from Princeton, and my M.A. and Ph.D., both in political science, from the University of California, Berkeley.

Q. Have you published any works?

A. Yes. I have published four books, three of which concern provisional politics. I published *Provisional Politics: Kantian Arguments in Policy Context*, which I have provided to both parties in this case.

Q. I'd like to discuss your work. What is provisional politics and provisional theory?

A. The best way to answer this question is to answer what it means to theorize provisionally. The best way to do so is best encapsulated by the philosopher Kant, when he said to "always leave open the possibility of entering into a rightful condition." It means to keep your options open, in a sense.

Q. I'd like to focus on provisionality. What are some of the fundamental principles of provisional politics?

A. There are two key principles: the principle of affected interest, and the principle of political possibility.

Q. Let's focus on the first, the principle of affected interest. What does that mean?

A. It's exactly what it sounds like. It is a principle that states that individuals should be able to influence decisions and governmental actions that affect them. It means that a polity should have a voice on matters that will directly affect them, as they are persons affected by a policy.

Q. How does this principle of affected interest apply to environmental regulations?

A. Just like it would in any other policy area. If an environmental law is enacted, those who it affects, pursuant to the principle of affected interest, should have a say.

Q. Does that happen between generations?

A. Absolutely not. As you can understand, if any law, environmental or not, is enacted and would affect future generations of people, it is difficult to give them a voice.

Q. Are there any examples of an environmental law or regulation failing to consider the principle of affected interest?

A. Oh absolutely, one of the most important is NEPA. Essentially, NEPA has become one large scale permitting system, allowing for massive environmental degradation. For example, an Army Corps of Engineers permit under NEPA authorizing wetlands destruction does not take into account the voice of those who will live in the affected area in the future. This inherently violates the principle of affected interest.

Q. Alright Miss Ellis, I would like to move on to discuss the second principle you mentioned, the importance of political possibility. What do you mean by that?

A. This is fundamental in provisional politics. As the quote from Kant explains, it's critical to allow for different political possibility. The possibility to govern however a democracy chooses should not be constrained or limited in any way, except by constraining forces that democracy may choose for itself.

Q. Can you give an example of a constraining force a democracy may choose for itself?

A. Of course. The example of checks and balances within the United States federal government works best.

Q. What are examples of a constraining force a democracy cannot choose for itself?

A. These could range from physical limitations, such as environmental and ecological limitations, to governmental limitations, such as the institution of a monarchy or a dictator.

Q. Are any of those examples present in today's case?

A. Yes absolutely. Because of the environmental damage that is occurring throughout the United States, future generations will be faces with severely limited options from a political perspective to deal with the issue.

Q. Why is that?

A. The reality is that a planetary climate emergency may foreclose all feasible options for future generations to find a way to cope politically.

Q. What are some potential consequences of this?

A. There are numerous political problems that could arise from this limited possibility, ranging from a climate refugee crisis to economic development limitations.

Q. How can this be avoided?

A. By following the principle of affected interest, which ensures maximum political possibility for future generations.

MR. JEFFERSON: Thanks you Miss Ellis. No further questions.

Cross Examination of Elisabeth Ellis

BY MR. MADISON:

Q. Miss Ellis I would first like to ask you some questions about what you call political possibility.

A. Of course.

Q. You mentioned the importance of political possibility during your direct examination?

A. Yes, it is critical that a future generation be left with political options.

Q. You advocate for provisional politics, is that right?

A. Yes I do.

Q. One of the reasons you do so is because provisional politics multiplies political possibilities, rather than limits them?

A. Yes, that is one of the reasons.

Q. I would like to run you through a hypothetical for a minute here. Imagine that in twenty years, the citizens of the United States re-write the Constitution. Are you with me?

A. Yes of course.

Q. Great. And in doing so, they elect to write a new constitution that gives power to one dictator. Still following?

A. Yes I understand.

Q. Now in doing so, would you agree that this group of citizens is making a choice to limit their own political options?

A. Yes, that's one way of looking at it.

Q. So in this case, their political possibilities are now limited, is that correct?

A. With this particular group of individuals yes, but this is a very unlikely hypothetical.

Q. To be clear Miss Ellis, the Constitution in this case did not limit their political possibilities?

A. No, not in that case you made up.

Q. So political possibility can in fact be limited by means other than the Constitution?

A. Yes of course.

MR. MADISON: Thank you, no further questions.

Direct Examination of Michael Otsuka

MICHAEL OTSUKA

having been previously duly sworn by the Court, testified on his oath as follows:

BY MR. JEFFERSON:

Q. Please state your name and spell your last for the record.

A. My name is Michael Otsuka. O-T-S-U-K-A.

Q. What do you do for a living Mr. Otsuka?

A. I am a professor in the Department of Philosophy, Logic & the Scientific Method at the London School of Economics.

Q. What is your educational background?

A. I received my B.A. in Political Science from Yale University, and my D.Phil in Politics from Balliol College, Oxford.

Q. Are you published in your field?

A. Yes I am. I am the author of *Libertarianism without Inequality*, which I have made available to both parties today.

Q. I would like to discuss your consideration of the American Constitution. Is the Constitution legitimate?

A. While that is a complex question, my answer is no, it is not.

Q. Why is that?

A. I argue against the legitimacy of all laws that were enacted by those who are now dead that rule over the living, and the Constitution falls directly into this category. The laws of the dead should not legitimately bind the living in present-day societies.

Q. Are there any solutions to this problem?

A. Yes, there is one primary solution.

Q. What is it?

A. A periodical renewal or revision of the Constitution, which allows for each successive generation to have input in the Constitution.

Q. What would this periodical renewal look like?

A. After a lot of calculations concerning age and populations, the reality is that every twenty years or so, a new generation exists and a majority within the United States population exists that would seek to revise the Constitution. This could take the form of some sort of constitutional convention every twenty years or so.

Q. Are there any concerns with this approach?

A. Absolutely, one of the most important is what is known as the consequentialist objection.

Q. What is the consequentialist objection?

A. The consequentialist objection is essentially that my proposal for constitutional amendment sounds very nice in theory, but in practice would never work.

Q. How do you respond to this objection?

A. I respond with a probability argument. The concern of the consequentialist objection is the threat of political chaos every 20 years, once the time comes for constitutional revision. However, this is highly unlikely.

Q. Why is such chaos unlikely?

A. Quite simply, it is in the interest of each citizen who would take part in the constitutional revision to re-introduce many of the laws of the current Constitution. In fact, most other laws would warrant re-enactment, which would lead to a higher degree of stability. The reality is that the result of opening the constitution up to periodic renewal of any sort might differ very little from the status quo.

Q. Moving on, are there any other reasons for your approach to constitutional revision?

A. Yes. At this point, the Constitution needs more than just amendment allowed by Article V to change in any drastic way.

Q. Why do you say that?

A. At this point, constitutional amendments address the symptoms, not the cause, of intergenerational discord. To revise the Constitution as I advocate would require such a fundamental change to the Constitutional order as to supersede the mechanism of a traditional amendment. Traditional amendments leave in place the basic tools that govern future generations, making the Constitution illegitimate.

MR. JEFFERSON: Thank you Mr. Otsuka, no further questions.

Cross Examination of Michael Otsuka

BY MR. MADISON:

Q. Mr. Otsuka I would like to discuss the theory of intergenerational sovereignty you advocate in your chapter “The Problem of Intergenerational Sovereignty.” First, you advocate for a similar periodic constitutional revision as does Mr. Jefferson, is that correct?

A. Yes, with some minor edits but essentially similar.

Q. I would like to explore a ramification of this position, but first I want to clarify the position itself.

A. Of course.

Q. You advocate for a periodic revision of the Constitution, is that correct?

A. Yes, like I said a modified version of what Thomas Jefferson proposed.

Q. And you argue that as it stands now, “the laws of the dead do not legitimately bind the living” in your work, don’t you?

A. Yes I do.

Q. So you propose that every twenty years, the Constitution itself be voted upon for re-enactment?

A. Yes, as compared to Thomas Jefferson who advocated that happen every 19 years.

Q. Now I would like to examine one of the ramifications of this process. You would argue that the laws of society should lapse when the generation who wrote the constitution has passed?

A. Yes, that’s correct.

Q. This should be a twenty year period where the constitution is legitimate and in effect, correct?

A. Yes.

Q. But this leaves a group of citizens out of the picture, doesn't it?

A. What exactly do you mean?

Q. Would you agree with me that there must be a group of citizens who were not old enough to vote on the constitution when it came up for re-enactment.

A. Yes, I can't imagine a society would allow children to vote on such an issue.

Q. Let's run through this hypothetical to clarify for the jury. So let's say at T_0 the constitution is enacted and is voted upon only by those who are 18 or older. Do you follow?

A. Yes I understand.

Q. Now imagine the group of that population who is 10 years old. They did not vote on the constitutional re-enactment at T_0 did they?

A. No, they weren't old enough.

Q. However would you agree that at T_8 , which is eight years after the constitutional revision, this group is 18 years old?

A. Yes that's correct.

Q. And would you agree that at 18 years old they would be affected and under the 'dominion' of the constitution?

A. Yes.

Q. However, this group of individuals did not vote for the constitution did they?

A. Of course not, they were too young to do so when the constitution was up for revision.

Q. So these individuals, under your proposal, would be subject to a constitution they did not vote for?

A. Yes.

MR. MADISON: Thank you, no further questions.

Direct Examination of Victor Muñiz-Fraticelli

VICTOR MUÑIZ-FRATICELLI

having been previously duly sworn by the Court, testified on his oath as follows:

BY MR. MADISON:

Q. Please state your name and spell your last for the record.

A. My name is Victor Muñiz-Fraticelli. M-U-Ñ-I-Z-F-R-A-T-I-C-E-L-L-I

Q. Mr. Muñiz-Fraticelli, what do you do for a living?

A. Currently I am an Associate Professor of Political Science and Law at McGill University.

Q. What is your educational background?

A. I received my B.A. in Government and Philosophy from Cornell, my J.D. from the University of Puerto Rico, my M.A. in Political Science and my Ph.D. in Political Science, both from the University of Chicago.

Q. Are you published in your field?

A. Yes, I have been published 9 times in my field. My paper “The problem of a perpetual constitution” was published in *Intergenerational Justice* and I have provided both parties with a copy here today.

Q. Mr. Muñiz-Fraticelli, I’d like to turn your attention to the case here today. Are you familiar with the charges brought forth today?

A. Yes I am, I understand that the plaintiff is alleging that the Constitution is a tool of intergenerational harm, and that it limits future political possibility for the legislatures of future generations.

Q. Do you agree with this assertion?

A. Absolutely not.

Q. Why not?

A. There are two primary reasons; the required intergenerational nature of productive civil and social projects, and the understanding of the Constitution itself in this regard.

Q. I'd like to focus on the first reason you mentioned, the intergenerational nature of productive civil and social projects. What do you mean by that?

A. Well in an advanced society, progress is not immediate. Social, civic, economic, and infrastructural progress does not happen overnight, or even over the course of years. Often, these important civic projects take generations of work and multiple generations of development to come into effect.

Q. Can you provide the court any examples?

A. Absolutely, the best example of this is the civil rights movement. Of course, even a movement that began with the Emancipation Proclamation in the 19th century has still not yet resulted in the elimination of racism from American culture. These things take quite some time.

Q. What does this mean for the Constitution in this case?

A. Well, Thomas Jefferson believes that the Constitution should be re-written or revised once every 19 years. For intergenerational progress, this would be a disaster, and in fact very counter-intuitive.

Q. How is that?

A. Well, critical to these ‘projects’ for lack of a better term, is continuity. The playing field has to be the same from one generation to the next if any real progress is to be made.

Q. So what then are the consequences of constitutional revision on these projects?

A. Constitutional revision makes any real progress much harder to come by. If the rules of the game change, the way in which laws are created and interpreted for example change, how can anyone who is trying to make a difference reliably predict what will happen from one generational cycle to the next?

Q. Earlier you mentioned the understanding of the constitution itself as a tool for harm. Why is this the incorrect understanding of the Constitution?

A. The Constitution does not harm future generations by limiting their political possibility. The reason for this is that the Constitution is what allows for any political possibility in the first place.

Q. Why is that?

A. The Constitution is the enabling condition for American democracy as we know it. It allows for the most political possibility, from one generation to another, to govern as it chooses to do so through the election process.

Q. In this sense, what is a consequence of periodic constitutional revision?

A. To insist that each generation re-write or even re-consider the Constitution is to place a significant political burden on each generation. This in fact limits acts in a far more extreme fashion than the Constitution does.

MR. MADISON: Thank you Mr. Muñiz-Fraticelli, no further questions.

Cross Examination of Victor Muñiz-Fraticelli

BY MR. JEFFERSON:

Q. Mr. Muñiz-Fraticelli I would first like to begin by asking you questions about your article “The Problem of a Perpetual Constitution”.

A. Of course.

Q. First you write substantially in this article about the benefits of self-government is that correct?

A. Yes I do.

Q. Specifically, you mention that “the very project of democratic self-government is arguably a greater boon to future citizens than to the founding generation” did I get that correct?

A. Yes you did.

Q. You suggest that a binding commitment to a constitutional form of government is in fact beneficial to future generations?

A. Yes I do, it secures the conditions of freedom to legislate openly.

Q. You explain in your article that a constitution is an enabling condition for a democracy?

A. Yes I do.

Q. This is because a constitution establishes institutions, is that correct?

A. Yes, political institutions are critical for a successful democracy.

Q. Now you acknowledge that a generation may wish to change the norms of its political society, am I right?

A. Yes, that's entirely possible, probably for the best.

Q. And to do so, you believe that a generation will be better placed to do so if they already have institutions in place?

A. Yes, of course. Rules of the game, if you will.

Q. These institutions organize the deliberation of the new political society, correct?

A. Yes, that's one of their functions.

Q. These institutions are supposed to pass from one generation to the next, correct?

A. Yes, that is their entire point.

Q. However, in your article you do *not* address the possibility that a generation may very well wish to change even the institutions?

A. They wouldn't want to in the first place, it would be too great a burden.

Q. But is that a yes to my question, you do *not* address that possibility?

A. No, there is no reason to.

Q. And if a generation did wish to change the institutions that define their government, your testimony is that it would be too great a burden to do so, is that correct?

A. Yes that is correct.

MR. MADISON: Thank you, no further questions.

Direct Examination of Edmund Burke

EDMUND BURKE

having been previously duly sworn by the Court, testified on his oath as follows:

BY MR. MADISON:

Q. Please state your name and spell your last for the record.

A. My name is Edmund Burke. B-U-R-K-E.

Q. Mr. Burke, what do you do for a living?

A. I'm most known for my work as a member of the British Parliament. I served in the House of Commons, where I served for many years as a leader of the Whig party.

Q. What are your areas of expertise?

A. I am especially known for my support of the cause of the American Revolution, as well as my critique of the French Revolution.

Q. I would like to focus on your concern with the French Revolution. Are you published in that field?

A. Yes absolutely. My piece "Reflections on the Revolution in France" was widely distributed and I have made copies available to both parties in today's case.

Q. Could you outline your views on the French Revolution briefly?

A. Absolutely. In short, the revolutionaries in France, at the time of my writing, were aiming to do themselves a great injustice. A revolution would have harmed the revolutionaries more than it would benefit them.

Q. Why is that, Mr. Burke?

A. My concern with the revolution in France was that it flew in the face of the form of intergenerational government that had been established and developed by modern society. It demonstrated a serious disregard for a desire to preserve the government to better the future.

Q. When you say the form of intergenerational government, what do you mean?

A. Our civil liberties, as ensured and protected by government, should be treated as an entailed inheritance, passed down from each generation to the next. These liberties that we enjoy in civil society have been derived from our forefathers, and need to be transmitted to our posterity, to ensure they have the same liberties as we do.

Q. What do you mean when you say that liberties are an entailed inheritance?

A. A system of government that allows for civil progress is in itself a liberty. As such, it should be protected and preserved for each generation. It is an entailed inheritance because it comes from a long line of ancestors and over time, such a government must be protected for future generations.

Q. I would like to focus on this case now, Mr. Burke. Are you familiar with the charges in this case?

A. Yes. I understand that Mr. Jefferson is leveling charges that the American Constitution violates the reserved powers doctrine by allowing for actions that limit the powers of future generation's legislatures.

Q. I'd like to focus on that charge. Are future generations of legislatures being limited by the American Constitution?

A. Absolutely not.

Q. Why not?

A. While it may not always seem readily apparent, the reality is that the political system within the United States is advanced and relatively efficient. To advocate to overthrow this system and this governmental structure established by the Constitution is ungrateful to those who have so carefully crafted it. More importantly however, it would be counterintuitive to Mr. Jefferson's professed ends.

Q. Why would that be counterintuitive?

A. It is critical to maintain an intergenerational 'language' if you will. There must be norms, rules, and structures that apply across generations in order to achieve governmental and societal goals. Between generations of government actors, there simply must be a preservation of the method of government conduct. In this case, that's the Constitution.

Q. In your view then, Mr. Burke, does the Constitution violate the rights of future legislators?

A. No. In fact, it is because of the Constitution that future legislators may even come to exist.

MR. MADISON: Thank you Mr. Burke, no further questions.

Cross Examination of Edmund Burke

BY MR. JEFFERSON:

Q. Mr. Burke, I would like to ask you some questions about your views on the American Revolution, and I'll be referring to your "Speech on Conciliation with the Colonies."⁴⁰

⁴⁰ Edmund Burke, "Speech on Conciliation with the Colonies" (Speech, March 22 1775) ed. Henry G. Bohn, *The Works of the Right Honourable Edmund Burke* (Chicago: University of Chicago Press, 1987)

A. Of course.

Q. In this speech, you discuss some of the causes of the American revolutionary spirit in 1775 is that correct?

A. Yes, that's true.

Q. You suggest that the American people were in search of freedom, is that fair to say?

A. Yes that is fair.

Q. This freedom would take the form of developing their own government?

A. Yes, that was the goal of the American revolutionaries.

Q. Now in your speech you outlined some of the unique reasons that American revolutionaries desired self-governance, is that true?

A. Yes.

Q. I would like to focus on two specifically. One of them was a high level of education?

A. Yes, a very high concentration of lawyers within the colonies made for a particularly revolutionary spirit.

Q. You explained that in Boston especially, many colonists were well-trained lawyers is that true?

A. Yes, I did say that.

Q. This was relatively unique to the American colonies, was it not?

A. It definitely was.

Q. You stated definitively that "in no country perhaps in the world is the law so general a study" is that true?

A. Yes I did say that, though of course I don't have any numbers to back up that claim.

Q. Another factor that you believe contributed to the revolutionary spirit was the remoteness of the colonies to England, is that true?

A. Yes.

Q. This great distance, in your estimation, weakened the effect of proper government?

A. Yes without a doubt, it was extremely difficult to govern colonies that were such a great distance apart.

Q. This was another factor that made the colonies unique?

A. Yes, it certainly was important to the relationship between the colonies and the crown.

Q. Now because of these two factors, you believed that the revolutionaries had a reasonable claim to freedom of government?

A. To some extent yes, but not entirely no.

Q. You said in your speech that the colonists "formed a government sufficient for its purposes" am I correct?

A. Yes I did say that.

Q. They did so by breaking off from the crown?

A. Yes they did.

Q. And this still allowed for proper self-governance, did it not?

A. Yes, in that case yes it did.

Q. And finally, Mr. Burke, in your speech concerning a new government, you stated that “new institution is infinitely better obeyed than the ancient government ever was” is that correct?

A. Yes I did say that.

MR. JEFFERSON: Thank you, no further questions.

Direct Examination of Kelsey Juliana

KELSEY JULIANA

having been previously duly sworn by the Court, testified on her oath as follows:

BY MR. MADISON:

Q. Please state your name and spell your last for the record.

A. My name is Kelsey Juliana. J-U-L-I-A-N-A.

Q. Ms. Juliana, what do you do for a living?

A. I’m currently a student, studying Environmental Education at Warren Wilson College in Asheville, North Carolina.

Q. Why are you interested in Environmental Education?

A. I am currently a plaintiff in a lawsuit against the United States federal government.

Q. I would like to discuss this lawsuit. Why did you file it?

A. I believe strongly that the federal government has ignored their own plans to stop dangerous climate change. I also believe that the government, especially the EPA, has willfully ignored a mounting body of evidence demonstrating the potentially disastrous consequences of unregulated CO_2 emissions.

Q. I would like to talk about the harms of unregulated CO_2 emissions. Can you outline how you are being harmed?

A. Absolutely. One example is food. I like to eat a lot of wild salmon, and the summer of 2015 drought and record-setting heat in Oregon (my home state) killed a large number of salmon in the river. Of course, mounting scientific evidence has linked global warming to greenhouse gas emissions.

Q. Are there any other ways you specifically are harmed that you mention in your suit?

A. Yes. Ocean acidification and rising sea levels directly threaten other marine food sources as well, once again with great frequency along the Oregon coast.

Q. Do these problems extend to future generations?

A. Without a doubt. The lives, liberties, and property rights of future generations of Americans are threatened directly by climate change and CO_2 emissions. It goes without question that drinking water, sufficient and healthy food sources, and freedom from imminent climate catastrophe should be inherent to any civil society. However, future generations are at risk because of environmental causes.

Q. Moving on from the problem you discuss in your suit, what is a proposed solution?

A. In simple terms, the global atmospheric concentration of CO_2 must be reduced to below 350 ppm (which means parts per million) prior to the end of the century. This would go a long way to alleviate the climate crisis.

Q. What is the first step the federal government can take to achieve this goal?

A. The first step would be to admit the federal government's role as public trustee of natural resources. Once the federal government understands its responsibility as a public trustee, progress can begin.

Q. When you say the government must accept its role as public trustee, what do you mean?

A. That means that the government should rightly possess certain public ecological assets in trust. The ecological trust must be kept and sustained for future generations to come, and includes critical natural resources. It means ensuring the protection of future generations.

Q. Is this not the case now?

A. Absolutely not. Water, forests, minerals, and oil – all of which are critical natural resources, are being privatized, and removed from the public's hands and taken out of the public trust. All of this contributes to the fossil fuel consumption that leads to climate disaster.

Q. Now I would like to discuss the protections afforded to you by the Constitution in this case. In your view, has the federal government acted in violation of the Constitution?

A. Yes. Specifically, in allowing for the over-development of the fossil fuel industry, the federal government has violated the principles of the Equal Protection Clause.

Q. How?

A. The actions of the federal government have caused irreversible climate change damage. Because of this, current and future generations are being denied rights

to a healthy environment that had in fact been afforded to future generations. This is a violation of the principle of equal protection.

Q. Where do the principles of equal protection arise from?

A. The Constitution. The Constitution protects future generations from environmental harm through the Equal Protection clause.

MR. MADISON: Thank you Ms. Juliana, no further questions.

Cross Examination of Kelsey Juliana

BY MR. JEFFERSON: May it please the court

Q. Ms. Juliana I would like to discuss some of the details of your suit against the Federal Government.

A. Absolutely.

Q. In your suit, you allege that the Federal Government must admit its public trustee obligation to the public?

A. Yes, without a doubt.

Q. You outline multiple governmental admissions that this must be done?

A. Yes, there are actually many examples of times in which the Federal Government has, in some form, recognized this responsibility.

Q. One of these is a congressional declaration that the “Federal Government is among the trustees for natural resources” is that correct?

A. Yes, that is one.

Q. Other times, the President has designated federal agencies to act on behalf of the public, is that correct?

A. Yes, this has led to the creation of the USDA, DOE, and DOI to name a few agencies.

Q. So these agencies are, in your estimation, a step in the right direction if they are designated to act on behalf of the public as trustees for natural resources?

A. Yes, that would be the case.

Q. Let's talk about how this agency designation comes about. You are aware that this Congressional oversight to establish these agencies is the result of Congress's enumerated powers within the Constitution?

A. Yes, that is my understanding.

Q. This would suggest that the Constitution's interpretation allows for the designation of the federal government as a trustee of natural resources, is that correct?

A. Yes, that may be true.

Q. And the designation of the Federal Government as a trustee of natural resources is what you seek as part of your suit against the Federal Government, is that correct?

A. Yes, one of the parts of my suit you are correct.

Q. Thank you Ms. Juliana, no further questions.

Closing Arguments

Plaintiff Closing Statement

MR. JEFFERSON: May it please the court. Your Honor, Opposing Counsel, Members of the Jury.

At the beginning of today's trial, I asked you a question. I asked you: what type of world do you want to leave for your children? I asked you to consider our legacy as a generation; what it is now, and what you hope it will be. Throughout the course of today's trial, I have shown you what type of world we are leaving for our children if we maintain the status quo, but I hope you thought about what kind of world we could leave for our children. So what kind of world *can* we leave for future generations? The answer is simple; one where each generation can govern for themselves, free from constraints from the past. This is the type of world we are asking you to give them.

Today we are alleging that the Constitution violates the reserved powers doctrine, which mandates that each legislature be able to legislate for itself. Specifically, you heard that the way in which the constitutionally authorized environmental damage severely limits the political possibility of future generations of legislatures. In order to prove our claim to you we called three witnesses to the stand to testify, and I would like to talk about the testimony of each in turn.

First you heard from Mr. R. George Wright, a political scientist and law professor. Mr. Wright testified first about our moral obligation to future generations, and explained that we are obligated to provide a stable environment to future generations. You also heard about NEPA, an environmental regulation that is designed to ensure that federal agencies consider the environmental impacts of their actions. However, you heard that the Supreme Court found that the Constitution does not mandate that agencies prepare for the worst-case environmental analysis, which as Mr. Wright explained, is a constitutionally authorized form of bias against future generations. Thus, not only does this demonstrate a way in which future legislators are

being limited, as such action essentially forces them to deal with the fallout from environmental damage, but also that such a bias stems directly from constitutional interpretation.

Second, you heard testimony from Elisabeth Ellis, a political scientist. Miss Ellis testified about provisional politics, and explained the importance of political possibility. More importantly, Miss Ellis outlined the principle of affected interest, which mandates that for a law or regulation to be legitimate, those who it affects must have had a voice in its design. You heard Miss Ellis explain that this principle is violated by constitutionally authorized environmental regulations such as NEPA, because those permits allowing for CO_2 emissions, for example, affect future generations and future legislators greatly.

Finally, you heard from Michael Otsuka, a political scientist. Mr. Otsuka told you about the world we can have; Mr. Otsuka advocated for a world where the Constitution is revised every twenty years, to ensure that each generation has a say in the constitution that governs them. Mr. Otsuka explained that at this point, an amendment is not sufficient to stop the damage being done to future generations of legislatures. Mr. Otsuka outlined our position and our proposition; he outlined our world.

In this case, we had the burden of proof. We had the burden to prove to you, by a preponderance of the evidence, that the Constitution does in fact violate the reserved powers doctrine by limiting future generations. We have constrained them politically, which inherently violates the reserved powers doctrine. We have met our burden, and

proven our case to you beyond a reasonable doubt, and ask that you find in favor of the plaintiff. Thank you

Defense Closing Argument

MR. MADISON: May it please the court. Your Honor, Opposing Counsel, Members of the Jury.

Mr. Jefferson and I agree on something. Mr. Jefferson and I agree that we need to leave our children and our grandchildren a better world. We agree that we have to respect their right to govern themselves, we agree that we are currently damaging the environment too much to do so, and we agree that we must respect the importance and adhere to the reserved powers doctrine. We agree on the *why*. But we disagree on the *how*.

Today the plaintiff and Mr. Jefferson came before you and alleged that the United State Constitution itself is harming future generations. You heard that somehow, the Constitution is in fact the *tool* that causes intergenerational harm, and that violates the reserved powers doctrine by limiting and controlling future generations of legislators. However, today what you heard is that the Constitution is in fact the tool that *protects* future generations and ensures that the benefits of our democratic society are passed on to them. The Constitution is an inheritance and we must protect it and treat it as such, in order to guarantee that future generations do the same.

In order to show you that the Constitution is *not* a tool of intergenerational harm, today we called three witnesses to the stand. First you heard from Victor Muñiz-Fraticelli, a political scientist. Mr. Muñiz-Fraticelli told you about progress. You heard that civic, social, and political progress is not immediate and that often long-term

projects require political stability over a long period of time. This means that the Constitution, which provides the political structure necessary for this type of large-scale progress, is *needed* by future generations. Future generations depend on the stability of a constitutional system similar to their ancestors and posterity, just as the current generation does. Constitutional revisions every twenty years, as Mr. Jefferson would prefer, opens up future generation to dangerous instability.

Next you heard from Edmund Burke, a politician and political author. Mr. Burke expanded on the importance of political stability; you heard that the Constitution is what Mr. Burke calls an entailed inheritance, and should be passed from generation to generation. You heard that to avoid doing so risks instability. You heard that we must protect the Constitution, because it creates a system of government that itself is a liberty and a boon to future generations and their legislatures.

Finally, you heard from Kelsey Juliana, an environmental activist. You heard that the United States Federal Government is currently endangering future generations by allowing dangerous levels of CO_2 emissions. You heard exactly how this threatens the health and well-being not only of Ms. Juliana, but of future generations of Americans just like her. But more importantly, you heard that the mechanism to stop this harm lies *within* the Constitution itself, in the form of the Equal Protection Clause. So we must ask ourselves, without the mechanisms inherent in the Constitution that focus on protecting marginalized communities, such as future generations, how would we be able to abide by the reserved powers doctrine, as the plaintiff so desperately wants to do?

The plaintiff had the burden of proof in this case. They had to prove their case to you by a preponderance of the evidence. They have failed to shoulder this burden, as they have been unable to prove to you that the Constitution violates the reserved powers doctrine. So I urge you not to just think about the *why* but rather the *how*. Remember that the plaintiff's case doesn't fulfill their burden, and find in favor of the defense.

Thank you.

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