Chapter One

Introduction: Explaining Legal Change and Entrenchment

Since ancient Athens, democrats have taken pride in both their power and their proclivity to change their laws. For centuries, political theorists have recognized the distinctively democratic tendency to modify laws, yet this very capacity has given pause to democrats, and they have sought to restrict radically their ability to exercise this authority. As a consequence, democrats have resorted to "entrenchment" – the use of irrevocable laws – as a means of countering their tendency to engage in legal change.

Although today inflexible law is considered a hallmark of democracy, the process of modifying law has a distinguished democratic pedigree of its own. At critical moments for the development of democracy, debates about the appropriate scope and locus of legal change have come to the fore. Political theorists have shaped the ways in which we have conceptualized the nature and the limits of the power to modify law during these disputes. Through retrieving a set of arguments on behalf of the democratic ability to change law, and through analyzing the circumstances in which democracies have restricted this power through the use of entrenchment, we can revisit the question of the relationship between the rule of law and democracy from a variety of fresh vantage points.

The form that legal change has taken, and the logic underlying the modification of law, has of course varied over the centuries. The Athenian embrace of legal change derived from an ideological

commitment to pragmatic innovation more broadly. This may be distinguished from seventeenth-century English republicans, who saw the possibility of legal change as a means of affirming popular consent to legislation by wresting the power away from the artificial reason of judges and, in turn, from the American framers, who situated the power of amendment on the grounds of human fallibility. Nor have defenses of immutability remained consistent across the centuries: Whereas the Athenians sought to make their commitments credible to allies, Cromwell used entrenchment to protect religious freedom for Christians (not those engaged in "Popery," however) and to regulate the sale of the crown lands, and the Americans sought to make equal suffrage of states in the Senate and – for a limited time – the slave trade substantively immutable.

Today, the best-known example of entrenchment is the protection granted to human dignity in the post–World War II German Basic Law. This usage has given it remarkable moral standing among contemporary constitutional framers and political theorists. However, entrenchment serves as a means by which legislators can seek to protect not only those rules that they regard as most important or those that serve a "constitutive" purpose – securing the conditions of democratic decision making, or preventing democracy from revising itself into tyranny – but as a means of preserving privileges and power asymmetries. Thus, entrenchment betrays one of democracy's most attractive legacies: the ability to modify law.

My aim in this work is twofold. First, I seek to retrieve and defend the ability to modify law as a quintessential and attractive democratic trait. Second, I explain the use of entrenchment as a response to this fundamental activity: I argue that democrats have long had recourse to entrenchment – both in response to their own anxiety about the consequences of legal change and because of particular interests in protecting certain laws against revision – but that these efforts are futile at best and pernicious at worst.

Defining Legal Change and Entrenchment

In this work, I seek to analyze the choice of mechanisms to alter and to entrench law at key turning points for democracy, and to retrieve the arguments surrounding these decisions about legal flexibility. Through examining the means by which democracies have chosen to enable and to restrict their power to amend laws – and through highlighting the ways in which political theorists have conceptualized these decisions – I hope to defend legal change as a distinctive and appealing democratic activity, and to provide reasons for resisting the historically salient decision to entrench. Although my aim is not to offer a comprehensive overview of the methods by which laws may be modified or protected, to sharpen some of the distinctions I draw here and to identify idiosyncratic uses of terminology (e.g., "entrenchment," which typically refers to any norm that is procedurally difficult to amend) – a brief overview of the relevant concepts may be helpful. In this section, I highlight and define the major mechanisms of legal change and the approaches to entrenchment that will occupy the rest of the book.

Legal Change

Legislative (Statutory) Change

Although this is the oldest and most fundamental version of legal change – characterized by a legislature's decision to alter a preexisting rule – it is also perhaps the most controversial type of modification. H. L. A. Hart recognized that legislative enactment and legal repeal were impossible in the absence of a rule of change, and this specific dimension of legal change – as deliberate and legislative, rather than interpretive and judicial – shall be taken up in our discussion of legal reform in seventeenth-century England. Recent work by Jeremy Waldron seeking to restore "dignity" to legislation and the legislative process is of great importance to this

account, though in this work I focus on mechanisms and conceptions of alteration rather than on law making (or on the nature of democratic autonomy in general, for that matter). Accounts of statutory change are intimately linked to accounts of assembly decision making more generally: to critiques, on the one hand, of legislatures as passionate or self-interested or to laudatory accounts of the epistemic quality of democratic deliberations. Yet embracing the power of legislatures to enact law may be distinguished from affirming their power to reverse themselves, displacing traditional commitments and breaking deliberately with their past ideals. Although amendment receives more scholarly attention today, the idea that an assembly can modify law in a deliberate (and a deliberative) fashion has been a critical feature of discussions of popular government for centuries.

Interpretive Change

Today, most scholars, even those who are not red-blooded positivists, accept the idea that judges may change law through the process of interpretation. Legal scholars such as Bruce Ackerman and Sanford Levinson have encouraged us to think more broadly about the concept of amendment, arguing that judges via interpretation can effect constitutional change under certain circumstances.[1] Depending on the extent to which the entrenched law is "open-textured," it may be susceptible to significant modification over time.[2] Yet the distinction between deliberate and interpretive (i.e., "unintentional") change still has currency. Friedrich Hayek famously praised the spontaneous order by which the common

[1] Levinson (1995: 13–36); Ackerman (1998: 269–274).

[2] As Hart (1994: 128–36, 272–3) noted, the "open texture of law" leaves considerable scope for judicial interpretation, to the point of requiring judicial legislation; even if we regard this legislation as limited or "interstitial" – indeed, even if we dispute Hart's claim that judges must sometimes make law – that interpretation may lead to substantive changes in the law will, I hope, be granted.

law arose and endured independently of anyone's will. Whereas human agency in creating legislation would inexorably lead to the perversion of that design for evil purposes, a law produced "unintentionally" – or, in the language of the common lawyers, fined and refined through the wisdom of generations – could serve as an effective constraint on power. I shall suggest that through interpreting immutable law, judges do indeed modify it: Entrenchment, rather than restricting the possibility of amendment, shifts the locus of this change away from legislatures and toward the judiciary.[3]

Constitutional Amendment

Amendment clauses, for my purposes here, are constitutional provisions specifying the mechanism by which textual changes to a constitution may legitimately occur. There may be multiple procedures specified, with different procedures governing different clauses or delineating alternative methods for enacting change. The focus on textual changes may appear to be a reductive and perhaps simplistic way of addressing the question. Clearly, Levinson is right that there is an important difference between "a genuine change not immanent within the preexisting materials," a change that is "congruent with the immanent values of the constitutional order," and a change so at odds with the immanent order as to be "revolutionary."[4] Given the need to contrast amendment with alternative mechanisms of change, however, I hope the uniform heading will clarify rather than obfuscate the matter at hand.

[3] As I wrote these words, Senator Arlen Specter (R–PA) invoked the idea of "super-duper precedent" as a means of seeking to restrict the power of the Supreme Court to reverse itself on *Roe v. Wade*. Concerns that judges may engage in "legislating from the bench" reflect the increasingly widespread view that judges are capable of modifying law in fundamental ways and that this power ought to be checked rather than enhanced – however, entrenchment of abstract rights will not suffice to do so.

[4] Levinson (1995: 20–1).

It is sometimes argued that these clauses may not specify the exclusive means by which constitutional change can legitimately occur, because the alternative method of recourse to the people is always an implicit alternative. Bruce Ackerman is the best-known proponent of such a theory, arguing that Article V of the U.S. Constitution provides procedures that are "sufficient, but not necessary, for the enactment of a valid amendment"[5]: In the presence of a robust popular mandate for change, Ackerman has suggested, "revolutionary reformers" may take up the mantle of constitutional amendment through other means. Similarly, Akhil Amar has argued for the nonexclusivity of Article V, suggesting that constitutional change could occur legitimately via a mechanism reflective of popular sovereignty, such as a national referendum, because the constitution does not specify that it is the *only* means by which amendment may occur.[6] Yet the argument that constitutional provisions in general ought not to be taken to be exclusive may have disturbing implications – should we take "the executive power shall be vested in a President of the United States of America" clause to suggest that a dual kingship is a legitimate alternative? As David Dow has argued, *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") is a well-established statutory and constitutional principle.[7]

Yet even if we are reluctant to adopt the nonexclusivity argument, Ackerman and Amar touch upon a particularly important idea: The ability to engage in constitutional change is a fundamental act of popular sovereignty, and ought not to be alienated to judges nor subject to extraordinarily strenuous procedures. Indeed, as both Ackerman and Amar suggest and I shall argue as well in Chapter 4, the framers were abundantly aware of the importance of constitutional change (though here I suggest that the framers' defense was

[5] Ackerman (1991: 15).
[6] Amar (1995: 90).
[7] Dow (1995: 127).

primarily on the grounds of fallibility, an argument that also proved instrumentally valuable as a cloture device). My aim here is to avoid the standard dichotomy of constitutionalism versus popular sovereignty or majoritarianism and instead to retrieve other, frequently overlooked democratic defenses of legal change. However, the belief that amendment was inevitable, paradoxically, gave rise to efforts at entrenchment, and indeed it continues to do so today. American attempts to restrict the capacity to change ought not to be overlooked in our constitutional theory – if only as a cautionary tale.

Constitutional Revolution

Sweeping constitutional or regime change is not my focus here, although the concern that democracy, perhaps through its tolerance of antidemocratic forces, will harbor the forces of its own destruction has been a concern since Plato. We shall engage this argument most thoroughly in discussing the jurisprudential origins of the decision to entrench human dignity in the German Basic Law, particularly in the work of Carl Schmitt, as a claim on behalf of entrenchment. In the absence of entrenchment, it was argued, democracy would lack the stable core necessary to foreclose the possibility that authoritarianism could be imposed through democratic means – that is, a majority vote. Here, I refer to such arguments as relying on the "logic of democratic autophagy" – that is, that unfettered democracy will "consume itself."[8]

Comprehensive constitutional change also constitutes an implicit response to concerns about entrenchment. However, the rejoinder that a determined citizenry can always revoke entrenched provisions through recourse to constitutional revolution – while obviously correct – makes light of the costs entailed in recourse to constitutional conventions. This is the case even if we embrace

[8] Such an argument has taken many forms, most famously perhaps that of "militant democracy," as in Loewenstein (1937).

the possibilities of ongoing constitutional change. Regular recourse to constitutional conventions – to revisiting the fundamental commitments of a community, including the type of regime – would indeed crowd out the possibility of any other governmental activity. Further, although constitutional conventions should not be feared, the process of radical alteration in order to make a relatively minor adjustment to a constitution may indeed lead to instability. This instability may be desirable under certain circumstances, but, again, the loss of security of expectations could be disastrous for a society, particularly one undergoing transition. If the presence of entrenched clauses – often posited as desirable, particularly in countries undergoing transition – could induce recourse to constitutional conventions or inspire claustrophobic panic (as, we shall learn, it did in Athens), the costs of immutability could be grave.

Entrenchment

Although entrenchment as I define it here usually entails textual irrevocability, it can also take a variety of different forms. Entrenchment may be temporally limited or unlimited, formally specified, or implicitly enforced. It raises distinctive issues, as we shall see, from the typical problems associated with constitutional legitimacy, but examining entrenchment also constitutes a means of placing these questions in stark relief.

Formal, Time-Unlimited Entrenchment

This is, so to speak, the benchmark case of entrenchment. Although, as I shall demonstrate, it has existed in some form for over 2,500 years, over the past 50 years constitution makers have increasingly turned to entrenchment clauses as a means of securing fundamental norms, such as basic rights. Most Western European constitutions since the end of World War II – including those of

France, Germany, Greece, Italy, and Portugal – use entrenchment, if only to protect the form of regime (as in France and Italy), though Greece and Portugal protect extensive lists of rights and institutional arrangements. Many of the post-Soviet constitutions – including Armenia, Azerbaijan, Bosnia-Herzegovina, the Czech Republic, Romania, and Russia – feature entrenchment clauses, as do many African and Latin American constitutions. As we shall see, although democrats have regularly turned to the use of formal entrenchment as a means of checking their impulse toward change, entrenchment poses distinctive problems from those generated by ordinary constitutionalism. Further, the use of immutable laws has a long and distinctive history of criticism in political thought.[9]

As we shall see, a motif for critics of entrenchment in Anglo-American political thought is the denigration of the "laws of the Medes and the Persians." The likely source for these references is biblical, either from the Book of Daniel or the Book of Esther. The Book of Esther tells a tale in which Queen Vashti refuses to submit to the King's wish to display her nude body to his drinking companions, and the King creates an unalterable edict, in keeping with the laws of the Medes and the Persians, banishing her from the throne and asserting husbands' authority over their wives.[10] In Daniel 6:8 and 6:15, King Darius, urged on by his "presidents and

[9] Like most constitutional scholars, I do not insist that for a clause to be entrenched the entrenchment clause governing the law itself must also be entrenched, as formal logic might demand. Nor do I think that entrenchment clauses can obviously and legitimately be modified by "popular sovereignty"; they have binding force in constitutions and give rise to real obligations, and it is for precisely this reason that I argue against them in this work. Peter Suber (1990) offers an important and fascinating discussion of logical puzzles involving amendment and entrenchment; see also Ross (1969) and Da Silva (2004), among others, for the implications of the presence of an "immutable core" for paradoxes of amendment.

[10] This story is cited in Vile (1992: 3). Vile offers a brief (several-page) overview of the development of theories of amendment in the history of political thought.

princes," enacts a decree prohibiting petitions to God or man for 30 days, upon pain of being thrown to the lions. The presidents and princes remind him that the law of the Medes and the Persians prescribes the inalterability of his decrees or statutes. Daniel, caught praying by these men, is cast into the lion's den; the king had wished to free him, but the men again remind him of the immutability of the law. God sends an angel to shut the lion's mouth, and the king has the captors themselves (as well as their wives and children) thrown to the lions instead. The implication in this passage is that only God can create an immutable law, as the men are hoisted by their own petard: They die by the immutability of their maxims.

References to the laws of the Medes and the Persians were always critical, even when used – as by Cromwell – in a context generally defending the possibility of enacting immutable laws. As we shall see, Cromwell invoked these laws in a speech to Parliament, distinguishing the fundamental laws that ought to be unalterable from those circumstantial rules that should be changeable, and Rev. Samuel Stillman at the Massachusetts Ratifying Convention argued that the constitution ought not to be like the laws of the Medes and the Persians. Jeremy Bentham, too, referred to the Medes and the Persians in his criticism of entrenchment in the constituent assembly of the French Revolution: "The attempts made by Lycurgus, of Numa, the Medes and Persians, by the lovers of raree shows among the Athenians, and so many other pretenders to infallibility with or without inspiration, have been hitherto quoted only for the absurdity, as so many imitations of Salmoneus who, by making a noise, thought to rival Jupiter, the King of gods and men, and as so many attempts to transform finite power into infinite."[11]

[11] Bentham, *Necessity of an Omnipotent Legislature* (2002: 265–6); Schwartzberg (forthcoming).