Democracy and Legal Change

Since ancient Athens, democrats have taken pride in their power and inclination to change their laws, yet they have also sought to counter this capacity by creating immutable laws. In *Democracy and Legal Change*, Melissa Schwartzberg argues that modifying law is a fundamental and attractive democratic activity. Against those who would defend the use of “entrenchment clauses” to protect key constitutional provisions from revision, Schwartzberg seeks to demonstrate historically the strategic and even unjust purposes unamendable laws have typically served, and to highlight the regrettable consequences that entrenchment may have for democracies today. Drawing on historical evidence, classical political theory, and contemporary constitutional and democratic theory, *Democracy and Legal Change* reexamines the relationship between democracy and the rule of law from a new, and often surprising, set of vantage points.

Melissa Schwartzberg is Associate Professor of Political Science at Columbia University. She received an A.B. from Washington University in St. Louis in Classics and Political Science in 1996 and a Ph.D. in Politics from New York University in 2002. From 2002 through 2006, she was an Assistant Professor of Political Science at George Washington University in Washington, DC.
“This important book marks the emergence of a powerful new voice in democratic theory. In Democracy and Legal Change Melissa Schwartzberg celebrates the ‘pragmatic experimentalism’ embodied in democratic politics with its attendant virtues – a capacity for legal and political innovation, a self-conscious fallibilism, an embrace of pluralism, and a commitment to deliberative processes. She addresses the recurrent anxieties that this experimentalism generates and warns us to resist the resulting temptation to inoculate or immunize laws from democratic revision. The great political danger, Schwartzberg insists, resides not in our democratic practices and institutions, but in the predictable efforts of relatively advantaged political individuals or groups to manipulate our anxieties to their own advantage, thereby subverting political commitments we hold dear. This is a robust defense of democratic politics for perilous times.”

– James Johnson, University of Rochester

“This book breathes some fresh air into debates about democracy’s current alliance with constitutionalism. Going beyond familiar concerns about explicit limits on majority rule, Schwartzberg shows how reliance on constitutional constraints shapes the way in which democratic legislatures exercise their legitimate power to make law. In doing so, she broadens our understanding of constitutional politics in interesting and important ways.”

– Bernard Yack, Lerman-Neubauer Professor of Democracy, Brandeis University
CAMBRIDGE STUDIES IN THE THEORY OF DEMOCRACY

General Editor

ADAM PRZEWORSKI New York University

OTHER BOOKS IN THE SERIES

Jon Elster, ed., Deliberative Democracy
Adam Przeworski, Susan Stokes, and Bernard Manin, eds., Democracy, Accountability, and Representation
Robert Barros, Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution
José María Maravall and Adam Przeworski, eds., Democracy and the Rule of Law
For my family
Democracy and Legal Change

Melissa Schwartzberg

Columbia University
## Contents

_Acknowledgments_  

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ix</td>
</tr>
</tbody>
</table>

1. Introduction: Explaining Legal Change and Entrenchment 1

2. Innovation and Democracy: Legal Change in Ancient Athens 31

3. Legislation and Law Reform in Seventeenth-Century England 71

4. Fallibility and Foundations in the U.S. Constitution 115

5. Protecting Democracy and Dignity in Postwar Germany 153

6. Conclusion: Defending Democracy Against Entrenchment 193

_References_  

211

_Index_  

225
Acknowledgments

I began writing this book in New York City, where (much to my surprise) I finished it. Many of my debts are thus to New York institutions – to NYU, where I wrote the initial dissertation; to Columbia University, where I finished the book; and to the New York office of Cambridge University Press.

Virtually every idea in this work has been improved through conversations with Bernard Manin, a model of intellectual generosity and personal graciousness. I am profoundly indebted to him both as a student and as a friend. Adam Przeworski’s support for this project from its inception gave me the confidence to pursue it, and I am honored to have it in his Theory of Democracy series. John Ferejohn’s energy and insightful criticisms spurred me along, and Pasquale Pasquino and Jeremy Waldron helped shape the scope of the project in fundamental ways. Jon Elster offered detailed comments on the original dissertation for which I am especially grateful, for they served as a critical guide to my subsequent revisions.

Jack Knight set me on this path when I was an undergraduate at Washington University in St. Louis, and he continues to ensure that I do not wander off into the brambles. I will resist the impulse to shift all blame for the deficiencies of this work to him and instead just thank him for those dimensions of my career and scholarship for which he will acknowledge responsibility. Conversations with Christopher Eisgruber, James Johnson, John McCormick, Andrew
Acknowledgments

Rehfeld, and Bernard Yack, among many others, shaped my thinking about these questions in fundamental ways.

At NYU, a McCracken and a Bradley Fellowship supported my research. My colleagues Suzanne Fry, Jennifer Gandhi, Sona Golder, Wonik Kim, Dimitri Landa, Jeffrey Lax (now a colleague at Columbia), Carmela Lutmar, Patricio Navia, Sebastian Saiegh, Loretta Sorensen, Christian Stracke, and James Vreeland – among others – helped to develop this work in various ways through their insights and their friendship. My new colleagues at Columbia – including Jean Cohen, Tanisha Fazal, John Huber, David Johnston, Ira Katznelson, Samuel Moyn, Annie Stilz, and Nadia Urbinati – asked important questions that helped me to think through the final revision of the manuscript. I am grateful to Lewis Bateman and Ciara McLaughlin at Cambridge University Press for their help and their support for the project, as well as to Stephen Calvert for his careful work as copy editor and to Navdeep Singh at TechBooks for his attention to the manuscript.

Most of the book was written at The George Washington University, where I spent four years as an assistant professor. Ingrid Creppell was a marvelous interlocutor and friend, and Nathan Brown provided detailed comments on the manuscript and shaped my thinking about constitutional scholarship in countless ways. Sarah Binder, Chris Deering, Henry Farrell, Steven Kelts, Forrest Maltzman, Kimberly Morgan, Elliot Posner, Chad Rector, Lee Sigelman, Erik Voeten, and Bill Winstead offered advice and friendship throughout my time in Washington. I also received a University Facilitating Fund Award, enabling me to hire a GW undergraduate, Laura Blessing, who collected pamphlets and other primary sources for the seventeenth-century chapter.

Along with talks at NYU and GW, I presented elements of this work at the American Political Science Association (APSA) Annual Meeting, the Midwest Political Science Association Annual National
Acknowledgments

Meeting, the Northeast Political Science Association, and the Institute for Constitutional Studies Summer Seminar on Slavery and the Constitution (as well as a special Institute session cosponsored by the APSA, for which I am grateful to Maeva Marcus). I thank the chairs, discussants, and participants at all these sessions for their advice. Nathan Brown’s graduate seminar in constitutionalism at GW read an early version of the manuscript, and Mark Tushnet’s constitutional law seminar at Georgetown Law read a very condensed version of the work. Students in these seminars wrote response questions and essays on this work, which guided my final revisions; the condensed paper was widely circulated, and I appreciate the many comments I received (particularly those of Benito Aláez Corral).

Jennifer Gandhi has been the first and last reader of my work since graduate school; her patience is, almost, unbounded. For that, for her capacity to recall details of our shared history and of my own historical arguments, and for her friendship, I thank her. I also wish to express my appreciation to my non–political scientist friends (from my youth in Albany, from Washington University, and from our years in the District of Columbia and Baltimore) who occasionally expressed polite interest in the progress of the book but who usually goaded me into forgetting about it for a while.

I dedicate this book to my family. My parents, Rosalyn and Barry Schwartzberg, have encouraged my intellectual interests since childhood, and my sister Debbi has kept me from taking them too seriously. My wonderful in-laws, Nina and Howard Jones, and the entire Jones clan tolerated with very good cheer my work on this project during our “Jonesfests.” Most of all, I thank my husband, David, for his support for my academic career and for his efforts to bring balance and relative calm to my life. This undertaking should have induced everyone I love – including our cats, Sully and Otto – to flee. I am very fortunate that they did not.
Acknowledgments