

ENTRENCHMENT

Wealth, Power, and the Constitution of
Democratic Societies

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UNIVERSITY PRESS

New Haven and London

Contents

Preface and Acknowledgments ix

Introduction: The Stakes of Entrenchment xi

1. UNDERSTANDING ENTRENCHMENT 1

Strategic entrenchment 5

Lock-in and the costs of change 11

Social structure and cultural entrenchment 20

Enabling constraints, traps, and contradictions 26

2. ARISTOCRACY AND INHERITED WEALTH 32

Wealth, power, and rules of inheritance 34

The political origins of primogeniture 38

Patrimonial inheritance and oligarchic entrenchment 43

Entrenching a republic: The eighteenth-century solution and its limits 46

3. RACIAL SLAVERY AS AN ENTRENCHED CONTRADICTION 56

The colonial divergence 59

Constitutional entrenchment and the costs of change 66

Slaveholders and national power	78
Overcoming slavery's entrenchment	86
Entrenching abolition—but not equality	92
4. THE CONSERVATIVE DESIGN OF LIBERAL DEMOCRACY	105
Entrenchment of electoral rules	108
Counter-majoritarian entrenchment: Supreme courts and central banks	118
Entrenchment through international treaties	126
5. ENTRENCHING PROGRESSIVE CHANGE	134
Varieties of social protection	140
The great conjuncture	146
The curious case of progressive taxation	157
Lock-in and lock-out	168
6. DEMOCRACY AND THE POLITICS OF ENTRENCHMENT	186
Oligarchy as populism	189
Constitutional capture	196
Democracy's stress tests	205
<i>Notes</i>	209
<i>Index</i>	245



Introduction

The Stakes of Entrenchment

TRYING TO CEMENT CHANGE—to entrench it—can be a dangerous game. The deeper and more lasting the change we seek, the higher we raise the stakes and the more fraught we make the contest. There is nothing so much to be feared in politics as the other side permanently getting its way, and no temptation greater than the opportunity to get one's own way decisively and for good.

Yet it is impossible to keep everything open to choice, so even without anyone's intending it, many things become relatively fixed. As social and political institutions develop, their constitutive features—the basic elements that make them what they are—often become increasingly difficult or seemingly impossible to change. The process may be sudden or slow, the result of deliberate decisions or an unintended byproduct of actions taken for other reasons. As people come to regard the fundamentals as settled and perhaps as natural facts of life, they are likely to give ~~long~~ odds to changing them, if they think about those opportunities at all.

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We can describe the same process in a more positive way, however, from the standpoint of innovation. Unlike passing fads, the most significant innovations in both institutions and technologies are generally long-lasting. Innovators have an interest not only in having their ideas adopted but also in making them stick. They may want to ensure that once their innovations go into effect, those who opposed the ideas beforehand do not have the opportunity to undo



them. They are interested, in short, in entrenchment—durable innovation, they might call it.

Entrenchment per se is not a bad thing. We could hardly organize our lives, make plans, or have any confidence about the future if not for some more or less fixed aspects of law and society. This confidence is partly what political constitutions are intended to provide, and constitutional entrenchment—adopting a legal rule in a form that makes it hard to change—is one of the principal forms entrenchment takes. As the example of political constitutions indicates, entrenchment may be a means of protecting values of high importance, such as freedom, rule of law, and democracy. Constancy in fundamentals may be the condition for innovation in other dimensions.

As the constitutional example also indicates, entrenchment may be a carefully thought-out choice, the result of a publicly deliberated decision to make an arrangement difficult to undo. In such cases, entrenchment is often traceable to specific historical moments and known historical figures whose reasoning we may be able to reconstruct. In the many contrasting cases where entrenchment emerges without any conscious plan, it often results from the unanticipated effects of chains of decisions, or from the choices of countless anonymous people accumulating slowly over long periods.

We usually notice entrenched institutions, interests, and beliefs only when they obstruct change. But we also need to see entrenchment from its beginnings, not only as a condition but as a process—as a type of change structured, intentionally or not, so as to be difficult to reverse. Entrenchment is not the opposite of change. It is the making of changes that then become hard to undo and that increase the resistance to stress at the foundations of society.

These considerations make the phenomenon of entrenchment more complicated than it may seem. A society's entrenched features—the foundational features that are hardest to change—shape what kind of society it is. They establish its moral and political character and influence its economic performance. They have often arisen through great struggles and may again become the subject of high-stakes conflict. Whether we want to preserve or reform those entrenched realities, or to entrench new ones, we need to understand entrenchment itself. That is the general motivation of this book. But

there is a more particular one as well: to understand the foundations of power in the troubled democracies of our time.

Much of our politics today is a struggle over entrenchment—over efforts to bring about change in a form that the other side will find hard to undo. The three decades after World War II were a period of liberal democratic entrenchment in the West: all the relevant parties accepted the terms of democratic institutions. The arrangements adopted as part of that settlement initially kept the power of concentrated wealth in check and created the basis for a widely shared prosperity. That order, while not entirely undone, has been shaken. The last quarter of the twentieth century saw a surge in economic inequality, and after an era when democratic forms of government were expanding worldwide, liberal democracy itself has come under attack. Even the nations with the longest and deepest democratic traditions are haunted by the twin specters of oligarchy and populist nationalism. The conflicts today are testing just how well-entrenched—or how fragile—the institutions are that underlie constitutionalism, democracy, and the economics of shared prosperity.

Democracies have two kinds of politics. In ordinary politics, the conflicting parties take entrenched rules and institutions as given and fight over what they understand to be temporary power positions and reversible policies. Other times, they fight over the rules themselves and power positions and policies that they anticipate, or realize only too late, will be hard to reverse. This is the politics of entrenchment. Democratic politics usually lies in the realm of the ordinary: battles over budgets, tax rates, and alterable legislation subject to swings in the partisan balance of power, fluctuations in the economy, public opinion, and other variable influences. Losing a battle does not mean losing the war. But in the politics of entrenchment, the consequences may stretch far into the future.

The deeper struggles are often over rules that govern power itself. Democracy abhors entrenched power—at least in principle. The democratic idea presumes that power is temporary, conditional on continued public favor, and reversible at elections. But a democratic government cannot exist without foundational rules that determine how its institutions work, and those rules are never immaculately

conceived. The risk of entrenched rules is that they lock in a bias in favor of whatever interests were in control at the time they were adopted. The benefit of entrenched rules is that they reduce the ability of subsequent power-holders to manipulate the rules for their own advantage. If rules are entrenched, they are enforced even against the desires of the powerful. If power is entrenched, those who possess it are able to keep it, use it, and enlarge it despite public preferences and rules to the contrary. Constitutionalism is a gamble that although the rules incorporated into a constitution may be imperfect, it is better to entrench them than to let those in power make them up as they go along.

The politics of entrenchment is not just about the powers of government. It is also about the structure of power in civil society and the private economy. The stakes here are at least as fundamental: the rules of property and inheritance; family structure and the position of women; capital and labor; the forms of independent organization and association; and other relations that determine where power lies before the curtain opens on the everyday political drama. However the formal institutions of government are framed, the meaning of democracy depends on those power relations in society. If society itself is to be compatible with democracy, it cannot be constituted on the basis of personal or class domination.

It is not a new discovery, nor should it be a controversial point, that democracy is untenable when private wealth and power are overwhelmingly concentrated in a few hands. Eighteenth-century revolutionaries in America and Europe knew that systems of patrimonial inheritance concentrating landed wealth in an aristocracy kept political power concentrated too, and that changing the rules of inheritance was vital to the consolidation of a republic. Nineteenth-century opponents of slavery saw the ownership of other human beings as a form of domination and a basis of oligarchic political power that was inimical to democracy. Later opponents of industrial monopolies and trusts confronted aggregations of power that threatened not only the livelihoods of farmers, small businessmen, and workers but also the possibilities of popular self-government.

Today the problem of monopoly power has been reduced to questions of economic efficiency, but earlier generations knew better. Limiting the political power of wealth is an old concern of

republican and liberal political thought, often framed as a concern about corruption. The classical constitutional problem was how to organize politics not simply to stop bribery, or what is now called quid pro quo corruption, but also to secure leadership that would place the greater public good before its own private interests and those of its friends. Like all forms of government, democracy faces the danger, wrote John Stuart Mill, “of class legislation, of government intended for (whether really effecting it or not) the immediate benefit of the dominant class, to the lasting detriment of the whole.”¹ Yet as damaging as it is to the efficacy and legitimacy of a democratic government, corruption for purposes of enrichment is not the greatest threat. Corruption for purposes of entrenchment—the use of power to perpetuate concentrated power in both its private and public forms—is even more dangerous.

The political interest in entrenchment arises especially at historical moments of uncertainty and fragility. Some of this interest reflects a reasonable concern for stability, including an interest in consolidating what might otherwise be short-lived victories for democracy and equal rights. But as we shall see in the following pages, there is another pattern at times of uncertainty. When those who have enjoyed privilege and power face threats of political decline, they have repeatedly sought means of entrenchment. In a representative system, they have often turned to two strategies: electoral engineering to prevent the opposition from gaining power, and control of counter-majoritarian institutions like constitutional courts to provide additional backup protection. The same pattern is at work today, when oligarchy and populism have been fused and threaten to entrench illiberal and undemocratic values.

Serious and consequential matters are at stake in everyday politics. Even reversible policies may have irreversible effects. But the stakes in the politics of entrenchment are especially high.

My approach to these questions is historical and analytical, and although the developments I cover are necessarily selective, they tell a story about the struggle over democracy amid an evolving capitalist economy and the changing forms of wealth and oligarchic power. But before we get to that history—to the entrenchment of landed wealth and racial slavery and their overthrow; the varying forms of entrenchment in both domestic and international political

institutions; the entrenchment of progressive change in systems of social protection and taxation; and the politics of entrenchment today—I begin with a more general question: How does entrenchment work? What mechanisms produce hard-to-reverse change at a society's foundations?