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Political Entrenchment and Public Law

ABSTRACT. Courts and legal scholars have long been concerned with the problem of “entrenchment” – the ways that incumbents insulate themselves and their favored policies from the normal processes of democratic change. But this wide swath of case law and scholarship has focused nearly exclusively on *formal* entrenchment: the legal rules governing elections, the processes for enacting and repealing legislation, and the methods of constitutional adoption and amendment. This Article demonstrates that political actors also entrench themselves and their policies through an array of *functional* alternatives. By enacting substantive policies that strengthen political allies or weaken political opponents, by shifting the composition of the political community, or by altering the structure of political decision making, political actors can achieve the same entrenching results without resorting to the kinds of formal rule changes that raise red flags. Recognizing the continuity of formal and functional entrenchment forces us to consider why public law condemns the former while ignoring or pardoning the latter. Appreciating the prevalence of functional entrenchment also raises a broader set of questions about when impediments to political change should be viewed as democratically pathological and how we should distinguish entrenchment from ordinary democratic politics.

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INTRODUCTION

In politics, winning is only the first step. The challenge is then to make victories “stay won”—to protect them from reversal when political fortunes shift. Thus we see parties, politicians, and prevailing coalitions continually strategizing to lock in their gains, battening down their offices and policies against the winds of political change.

As far as public law is concerned, such efforts at political “entrenchment” are viewed as dubious at best. In the context of election law, attempts by temporarily prevailing political parties, incumbent politicians, and electoral majorities to solidify their hold on office by gerrymandering electoral districts, selectively restricting the franchise, or using campaign finance regulation to suppress the political speech of opponents have been the target of sustained criticism by scholars and some skeptical attention on the part of courts.¹ Manipulating the ground rules of electoral politics in these ways is regarded as an obvious pathology of democratic politics.² A separate body of scholarly commentary and judicial decision making condemns “legislative entrenchment” in the form of explicitly unrepeatable statutes and elevated procedural requirements for statutory revision. Here again, the entrenchment of political outcomes is viewed as self-evidently illegitimate: it is said to be a fundamental principle of democracy that “governments are not allowed to bind future governments”³ and that a present majority cannot “bind the hands of future decision makers.”⁴

Yet political actors intent on entrenching their preferred parties or policies need not resort to manipulating the formal rules of the Constitution, elections, or legislation. Consider recent changes to public-sector labor law. Labor unions generally provide support to Democratic candidates, mobilizing pro-Democratic voters and funding the logistical and organizational infrastructure of Democratic campaigns. Seeking to defend their hold on power against Democratic challengers, Republican officeholders have enacted restrictive labor

1. See *infra* Section I.B.1.

2. See, e.g., Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 305 (1991) (citing Martin Shapiro, *Gerrymandering, Fairness, and the Supreme Court*, 33 UCLA L. REV. 227, 239 (1985)).

3. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 (2011).

4. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 (1997).

legislation for the purpose of weakening unions.⁵ In 2011, for instance, the Republican-dominated Wisconsin legislature overhauled the state's collective bargaining laws to profoundly curtail unions' ability to participate effectively in politics. In case the purpose of these measures was not apparent, the new restrictions exempted all the unions that had endorsed the Republican Governor in the previous election.⁶ The goal, it seems, was to selectively incapacitate the Republicans' political opponents,⁷ and not just at the state level: as Wisconsin's Republican senate majority leader put it at the time, "[I]f we win this battle, and the money is not there under the auspices of the unions . . . President Obama is going to have a . . . much more difficult time getting elected . . ." ⁸ Wisconsin Republicans intent on undermining their political opposition and entrenching their party in office did not need to resort to disfranchisement or gerrymandered electoral districts. They used labor law instead.

Or consider Social Security, a program that is notorious for its resistance to reform or retrenchment. The program is not protected by any legal barrier to repeal or special election rules favoring its supporters. Rather, the program mobilized and empowered its defenders to stave off subsequent political attacks. Put differently, Social Security is entrenched not *formally*, but *functionally*. This was no accident. In developing the program, President Franklin D. Roosevelt "had one overriding aim. He wanted to entrench [S]ocial [S]ecurity so deeply in our institutional life that it would be politically

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5. See Steven Greenhouse, *G.O.P. Platform Seeks To Weaken Powers of Unions*, N.Y. TIMES: CAUCUS (Aug. 30, 2012, 10:58 AM), <http://thecaucus.blogs.nytimes.com/2012/08/30/g-o-p-platform-seeks-to-weaken-powers-of-unions> [<http://perma.cc/6ZBM-NFAJ>] (describing the 2012 Republican platform's call for elected officials to reform labor laws in restrictive ways and "salut[ing] Republican governors and state legislators" who had already taken such steps).
 6. See *Governor Walker Introduces Budget Repair*, OFF. GOVERNOR SCOTT WALKER (Feb. 11, 2011), <http://walker.wi.gov/newsroom/press-release/governor-walker-introduces-budget-repair> [<http://perma.cc/QC64-LP8T>] ("Local law enforcement and fire employees, and state troopers and inspectors would be exempt from these changes."); Todd Richmond, *Exemptions for Police, Fire Fighters in Walker Budget Bill Sparks Questions of Political Payback*, NW. (Feb. 14, 2011), <http://archive.thenorthwestern.com/article/20110214/OSH0101/110214045/Exemptions-police-fire-fighters-Walker-budget-bill-sparks-questions-political-payback> [<http://perma.cc/M8KE-95Y9>].
 7. See *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 665 (7th Cir. 2013) (Hamilton, J., concurring in the judgment in part and dissenting in part).
 8. *Id.* at 652 (majority opinion) (second alteration in original) (quoting *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 876 n.17 (W.D. Wis. 2012)), *aff'd in part, rev'd in part*, *Walker*, 705 F.3d 640.

impossible for his opponents to repeal it.”⁹ Or, as President Roosevelt himself put it, “[N]o damn politician can ever scrap my [S]ocial [S]ecurity program.”¹⁰

Labor law and Social Security are hardly unique. A vast literature in the social sciences explores the multifarious means by which political actors insulate themselves and their policies from political change. Examples range widely. In economics, Daron Acemoglu and James Robinson have argued that the single greatest impediment to economic growth throughout world history has been the conservatism of entrenched elites who fear that “creative destruction” in the economic sphere could unsettle their dominance in the political sphere.¹¹ Less dramatically, in legislative contexts ranging from tax reform and emissions trading to the Affordable Care Act and Dodd-Frank, political scientists have described how progressive reformers seek to “refashion the political context” in order to “entrench and deepen” their major policy initiatives.¹² Another influential body of work describes how, following the lead of New Deal Democrats who sought to build their policy gains into the structure of the administrative state, temporarily prevailing political coalitions seek to manipulate administrative structure and process in order to “stack the deck” in favor of their preferred outcomes.¹³

Legal scholars not infrequently draw upon, and even contribute to, these lines of interdisciplinary work. Yet there has been almost no recognition that the functional entrenchment strategies being described serve the same purposes as the formal entrenchment techniques that public law regulates. Nor is there recognition that the democratic concerns invoked against formal entrenchment are equally applicable when identical outcomes are achieved functionally.

Public law’s normative perspective on political entrenchment is puzzling in another respect as well. If locking in political arrangements and binding the hands of future decision makers is a democratically dubious enterprise, then

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9. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 15 (1999).
 10. Paul Starr, *Three Degrees of Entrenchment: Power, Policy, Structure* 31-32 (Sept. 2013) (unpublished manuscript) (on file with authors).
 11. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 84 (2012).
 12. Eric M. Patashnik & Julian E. Zelizer, *The Struggle To Remake Politics: Liberal Reform and the Limits of Policy Feedback in the Contemporary American State*, 11 *AM. POL. SCI. REV.* 1071, 1072 (2013). See generally ERIC M. PATASHNIK, *REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED* (2008).
 13. See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 433-44 (1989) (examining how legislators assure “agency compliance with the desires of the political coalition enacting and overseeing legislation”).

what are we to make of constitutionalism? One of the primary purposes of the Constitution and constitutional law, after all, is to entrench rights, rules, and structures of government against ordinary political change. To be sure, the entrenched authority of the Constitution has provoked generations of handwringing about the antidemocratic implications of constitutional constraints on present majority rule. On the whole, however, constitutional entrenchment is widely accepted. Indeed, it is celebrated, for its contributions to democratic stability, rights protection, and the historical continuity of the American political community. What is it, then, that leads courts and scholars to treat constitutional entrenchment as a qualitatively different phenomenon than entrenchment at the electoral and legislative levels?

In sum, the existing picture of political entrenchment in public law is both partial and internally inconsistent. Courts and scholars have maintained an oddly myopic focus on entrenchment strategies that operate through explicit legal rules aimed at processes of political change, while turning a blind, or at least uncritical, eye to the vastly more expansive domain of political entrenchment. And even within that limited field of vision, public law has regarded legislative, electoral, and constitutional entrenchment as distinct and self-contained phenomena, ignoring both their functional and normative similarities.

To illustrate, imagine a political coalition committed to stringent and sustained environmental regulation to prevent climate change.¹⁴ Imagine further that the coalition has attained sufficient power at the federal level to take various kinds of political action. Finally, imagine that the coalition fears that its hold on power will be fleeting, and that antiregulatory political forces will eventually regain dominance in federal politics and seek to reverse the environmental policies enacted by their predecessors. Here are four strategies the coalition might contemplate to entrench their program against repeal. Least likely, it could attempt to enact a constitutional amendment that guarantees certain measures of environmental protection. Operating at the sub-constitutional level, it could attempt to enact an unrepealable environmental statute. Taking a less direct approach, it might instead manipulate the rules of election law to favor its own candidates and voters over the opposition's and therefore retain political control and the power to continue its regulatory agenda. Finally, it might pursue a range of functional entrenchment strategies. It could create a tradeable emissions program that would facilitate the formation of interest groups with a stake in preserving and expanding the

14. See *infra* notes 221–228 and accompanying text; cf. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present To Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).

prevailing regulatory regime. It might try to drive polluting industries offshore and out of the American political process. Or it could delegate expansive regulatory authority to a politically sympathetic agency like the Environmental Protection Agency, which might be more insulated from change than the political branches. All of these different strategies might be viewed by the coalition as functional substitutes—more or less interchangeable mechanisms for accomplishing the same basic purpose. But public law would view them as quite distinct, as a matter of both legal rules and normative democratic theory.

This Article questions what, if anything, justifies this differential treatment. At a descriptive level, it catalogues and compares the range of legal and political techniques through which parties, politicians, and policies are insulated against contestation and change. At a normative level, it raises questions about whether and when political entrenchment of various kinds should be regarded as a matter of concern in public law and what exactly the concern should be.

More specifically, the Article proceeds as follows. Part I surveys how the phenomenon of political entrenchment has been defined and regulated as a matter of public law. Entrenchment comes into view when political actors intentionally create legal impediments to political change. Beyond the special case of constitutionalism, public law has recognized and regulated this behavior primarily in two contexts.

One is election law, where scholars have increasingly viewed the entrenchment of incumbent officeholders, political parties, and majority coalitions as the central problem that legal regulation of the political process should be designed to solve. Although courts have not yet fashioned doctrinal tools aimed explicitly at preventing or remedying entrenchment, judges and Justices have joined in the scholarly skepticism and in some cases have found ways of striking down election rules that seemed to have the purpose and effect of suppressing democratic competition and protecting power holders against political challenge. The doctrinal prohibition on entrenchment is more explicit in the second context of legislative entrenchment. It has long been understood that legislatures are not permitted to enact unrepealable statutes or to insulate statutes against repeal or revision by way of supermajority rules or other special procedural requirements. The blurry boundaries of this prohibition have been interpreted inconsistently by judges and scholars, who have invoked it to cast doubt on a whole range of laws, from government contracts to framework statutes and the Senate filibuster.

Courts and scholars have understood electoral and legislative entrenchment as separate and independent phenomena, but it may be more illuminating to view them as pieces of a larger puzzle. Political actors use electoral entrenchment to accomplish indirectly what legislative entrenchment accomplishes directly, namely, insulating substantive policy outcomes against shifting political preferences.

Electoral and legislative entrenchment (as well as constitutional entrenchment) are created by means of formal legal rules governing processes of political change—the rules governing voting and elections, the enactment or repeal of legislation, and constitutional adoption and amendment. Yet, as Part II describes, politicians, parties, and policies can be entrenched through functional, political mechanisms just as readily as through formal, legal ones. Developing and drawing upon a wide range of examples, this Part synthesizes three general mechanisms of functional entrenchment. First, politicians, parties, and temporarily prevailing coalitions can enact substantive policies that strengthen political allies or weaken political opponents. Second, they can enact policies or programs that change the composition of the political community, selecting in allies or selecting out opponents. Third, they can shift the locus of political decision making to an actor or institution that is responsive to allies or unresponsive to opponents. These functional strategies appear to be close substitutes for formal electoral, legislative, and constitutional entrenchment, and there is every reason to believe they are widely used by political actors to accomplish the same ends.

Why does public law view formal entrenchment as a form of democratic failure and an attractive target for legal regulation while treating functional entrenchment largely as a matter of normative and legal indifference? Part III takes up this question, considering whether the apparent inconsistency can be explained or rationalized. Perhaps formal entrenchment is more harmful to democratic values, less susceptible to benign or beneficial uses, or simply easier to identify and police? Section III.A considers these possibilities but finds them less than fully persuasive. The remainder of Part III goes further in a skeptical direction. Section III.B.1 asks whether there is any good reason for viewing constitutional entrenchment more favorably than legislative or electoral entrenchment, or even for treating it as a different category. Section III.B.2 raises the question of whether, once we recognize that political entrenchment is not limited to formal entrenchment, the concept has any clear outer boundaries or coherent core. A unifying theme of the discussion in Part III—amplified in the Conclusion—is the need for a broader perspective on impediments to political change and assessments of their costs and benefits or democratic legitimacy.

The progression of the argument along these lines leads to a shift in perspective that it may be helpful to foreshadow. Our main thrust is to show that the formal arrangements commonly described by the term “entrenchment” have functional analogues that are driven by the same motivations and have similar effects. For this purpose, we proceed on the assumption that “political entrenchment” is an adequately—even if not always clearly or consistently—defined phenomenon. Our argument is that on any plausible understanding of entrenchment, there will be innumerable political phenomena that fit the bill,

beyond the narrow band of formal entrenchment. Once we push past the formal markers of electoral and legislative entrenchment to focus on the functional goals and mechanisms that might be viewed as entrenching, however, the boundaries of the category of “political entrenchment” and the features that are supposed to distinguish it from ordinary or desirable democratic politics begin to fade. By appreciating the potential breadth of the category of entrenchment, this Article not only expands our understanding of that phenomenon but also ultimately calls into question its meaning and utility.

I. POLITICAL ENTRENCHMENT THROUGH THE LENS OF PUBLIC LAW

A. *What Is Political Entrenchment?*

Political “entrenchment” is discussed more often than it is defined, and it is not clear that any single definition captures all uses of the term. At the most general level, “entrenchment” means that political change has been made more difficult than it otherwise would (or should) be.¹⁵ “Political change” is obviously a broad category. At the level of constitutionalism, the relevant objects of stasis and change include the structure of government, the boundaries and allocation of governmental powers, and the set of rules and rights prohibiting specific governmental actions. At the subconstitutional level, political change can mean change in which politicians or parties are elected to office or change in the substantive policy outcomes generated by these power holders and their supporters.

Impediments to political change can take a number of different forms. Public lawyers tend to focus on formal, procedural barriers to change, such as the Article V requirements of dual supermajorities for constitutional amendment or a hypothetical statute that deems itself unrepeatable. The legal rules governing political change through the democratic process are also a common target of entrenchment concerns. Parties that disfranchise or suppress the political speech of opponents, incumbent legislators who gerrymander electoral districts to ensure their own reelection, and dictators who outlaw opposition parties or cancel elections altogether are all engaged in projects of political entrenchment, manipulating the ground rules of the democratic process in order to retain their hold on power.

15. Cf. Starr, *supra* note 10, at 2 (defining entrenchment as “the creation of mechanisms to impede or constrain ordinary or expected processes of change” (emphasis omitted)).

As we shall emphasize, however, manipulating formal rules is not the only way to prevent change. After all, dictators can imprison or shoot their opponents rather than disfranchise them. Less dramatically, parties, politicians, and policies can create political, rather than legal, impediments to change. Recall the introductory example of labor law reform: incumbents can entrench themselves in office not only through gerrymandering or franchise restrictions but also by incapacitating the electoral organization of the political opposition. Or recall the example of Social Security: the program is difficult to retrench not because of any legal barrier to repeal, but because the enactment of the program mobilized and empowered defenders to stave off subsequent political attacks.¹⁶

Whatever form impediments to political change might take, to qualify as “impediments” they must be distinguishable from the expected workings of the political process. Political entrenchment implies not just the absence of political change but some kind of special *constraint* on the usual processes of political change. Thus, the persistence of politicians or parties in office, or the preservation of particular policies over long periods of time, is not necessarily proof of entrenchment. If politicians, parties, or policies are retained simply because they continue to be popular among the electorate, this would not be viewed as entrenchment. Entrenchment implies that the political system is not responsive to changes in voters’ preferences; a system that is perfectly responsive to unchanging preferences would be viewed as a well-functioning democracy.¹⁷

Thus, notwithstanding conventional claims to the contrary, it is possible that Social Security has proven politically durable simply because political support for the goal of providing financial security for people in old age has not diminished over the past eighty years. If this were the complete explanation for the program’s survival, we should not think of Social Security as entrenched any more than we think of criminal laws against homicide as entrenched.¹⁸ Both might endure simply because they remain consistent with the first-order political preferences of a (super)majority of citizens. The perception that Social Security is entrenched stems from the view that, in contrast to prohibitions on murder, a present majority might *not* vote to reenact the program in anything like its current form. The program persists, in this view, because it is now defended by a powerful interest group, brought into being by the program

16. See *supra* notes 9-10 and accompanying text.

17. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 702 (2011); see also Starr, *supra* note 10, at 1 (“Entrenchment is not the same as persistence, though it can be one of its causes . . .”).

18. Levinson, *supra* note 17, at 702.

itself, which has proven capable of preventing present majority preferences from prevailing.

Other kinds of impediments to political change blur the boundary between entrenchment and ordinary politics. Suppose that Social Security persists not (just) because of interest group mobilization but because of its increasing popularity over time, as Americans have learned from their experience under the program that mandatory savings for retirement is more beneficial than they initially imagined. One could view this dynamic of endogenous preference change as a mechanism of entrenchment on the theory that this kind of path-dependent increase in political support should count as a special impediment to ordinary political change. Or suppose that critical support for preserving Social Security stems from the expectation among workers that the earmarked taxes they have paid into the program are now owed to them by the government upon retirement, or by the reliance of many Americans on the existence of Social Security payments to support their retirement, leading them not to save through other vehicles.¹⁹ One could also view these kinds of adaptive preference shifts as mechanisms of entrenchment.

For the purposes of this Article, however, we will work with a more limited definition of entrenchment. Rather than regarding some kinds of shifts in preferences as creating entrenchment barriers, we shall take individual political preferences, regardless of how they have been shaped or transformed, as given. Furthermore, we shall accept the satisfaction of present majority will—again, “black boxed” with respect to the process of its formation—as a benchmark for well-functioning democracy. Only impediments to giving effect to present majority will, such as supermajority rules for revising statutes or political dynamics like the mobilization of a powerful interest group, will be taken as examples of entrenchment.²⁰

Identifying this kind of entrenchment requires some baseline conception of ordinary, unconstrained processes of political change. In the public law literature on entrenchment, two kinds of “ordinary politics” baselines are commonly in play.²¹

One is the process for, or political difficulty of, effecting change through some alternative channel, usually one that is more responsive to majority will.²²

19. On these alternative explanations for the political entrenchment of Social Security, see Starr, *supra* note 10, at 31-33.

20. See *infra* Section III.B.2 for a discussion of this limited definition of entrenchment.

21. See *infra* Section III.B.2, which revisits these definitional baselines and questions their utility in demarcating a limited category of entrenchment. For now, we are attempting a working definition.

22. See Klarman, *supra* note 4, at 498 (conceptualizing entrenchment as antimajoritarian).

For example, when constitutional law in the United States is described as entrenched, reference is typically made to the “supermajorities” needed to effect constitutional change, in contrast to the “majorities” needed to enact a statute. This is obviously a highly stylized, even formalistic, vision of how actual lawmaking processes operate. With respect to statutes, we might push past the caricature of “majority rule” to notice, for example, the different majorities implicated by electing senators, representatives, and the President, and the likely supermajorities necessary to assemble a prevailing legislative coalition. Moreover, the procedural barriers to statutory enactment would be only part of a functional assessment of political difficulty, which would depend on many other variables – the formation and alignment of coalitions, the ability of interest groups to block action, internal legislative procedures and agenda-setting power, and much else.²³ For present purposes, however, the important thing to see is that the baseline being used to define entrenchment is the (more or less hypothetical) alternative of effecting political change through some process that (better) tracks the preferences of democratic majorities or the median voter.

A different “ordinary politics” baseline is set by the degree of difficulty of *creating the status quo*. Under this standard, entrenchment means that a political arrangement is now more difficult to change than it was to create in the first place.²⁴ On this definition, it is no longer clear that the U.S. Constitution should count as entrenched, because it is not obvious that the supermajoritarian procedures required for amendment are a higher hurdle than the supermajoritarian procedures the Constitution had to overcome in the course of its initial enactment.²⁵ Likewise, an unpopular incumbent who cannot be dislodged from office is not entrenched if she originally had to defeat a similarly advantaged predecessor to win her post.

In many cases the two criteria for identifying entrenchment converge. In the paradigmatic case of legislative entrenchment, for example, a statute

23. For a discussion of these complexities and their consequences for the way we might think about entrenchment, see *infra* Section III.B.2.

24. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002) (defining legislative entrenchment as “the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action *in the same form*” (emphasis added)); see also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 388-89 (2003) (distinguishing between “symmetric” and “asymmetric” entrenchment).

25. The unamendable requirement that no state be denied equal suffrage in the Senate is an exception. See U.S. CONST. art. V. That provision is procedurally more difficult to repeal than it was to enact. See McGinnis & Rappaport, *supra* note 24, at 411-15; Posner & Vermeule, *supra* note 24, at 1681-82.

enacted by majority vote specifies that a supermajority is required for revision or repeal, combining an upward departure from the absolute standard of majority rule with an upward departure from the relative standard for initial enactment. Likewise, in the paradigmatic case of electoral entrenchment, a party or coalition manipulates the rules of election law upon gaining office—for instance, by disfranchising opponents or reducing their voting power—such that a subsequent majority of voters who would prefer to replace the incumbents will be thwarted. If that same majority would have been sufficient to prevent the incumbents from being elected in the first place, then both criteria of entrenchment are satisfied. Most of the examples this Article discusses qualify as entrenched according to both baselines. Social Security, for instance, might be classified as entrenched both by reference to present majority will and by reference to the initial difficulty of the program's enactment, prior to the formation of a mobilized group of vested beneficiaries and supporters.

Public law has primarily focused on entrenchment as an *intentional* strategy,²⁶ and most of the examples we discuss are of this sort.²⁷ The intentionality of entrenchment is often associated with bad motives, as when parties and politicians engage in self-serving efforts to suppress competition and maintain their hold on power. But intentional entrenchment need not be self-serving. As the literature on constitutionalism emphasizes, there are perfectly respectable, public-regarding reasons for entrenchment. Constitutions, in common with other mechanisms of entrenchment, facilitate enduring political commitments (or “precommitments”), protecting normatively preferred policies from being undermined by shortsighted or otherwise pathological decision making.²⁸ Constitutional and other forms of entrenchment also promote political coordination and stability, reducing the costs of both conflict and transition.

Criticisms of entrenchment are also familiar from the literature on constitutionalism. Entrenched policies and political arrangements arguably substitute rule by the “dead hand” of the past for rule by present majorities,

26. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998) (exploring “ways in which dominant parties manage to lock up political institutions to forestall competition”); Klarman, *supra* note 4, at 502 (starting from the assumption that “legislators strongly prefer to remain in office”).

27. Section III.B.2 revisits intentionality as a criterion of entrenchment.

28. See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 88-174 (2000); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 134-77 (1995).

threatening democratic ideals of popular sovereignty and self-government.²⁹ The dubious democratic legitimacy of entrenchment goes hand in hand with practical concerns about preventing the current political community from responding to changed circumstances or shifting values by locking in bad or anachronistic policy decisions. We return to the costs and benefits of political entrenchment below.³⁰

B. Two Forms of Political Entrenchment

Bracketing the special case of constitutionalism,³¹ public law has grappled most extensively with political entrenchment in two contexts. Electoral entrenchment involves efforts by parties and politicians to entrench themselves in office by manipulating the rules of democratic politics. Such efforts have been generally frowned upon by courts and commentators, and scholars have called for broad swathes of election law jurisprudence to be reoriented toward preventing political entrenchment of this kind. Moving from elections to governance, it has long been assumed that “legislative” entrenchment—including, at a minimum, the enactment of statutes that cannot be revised or repealed by a majority of a subsequent legislature—is constitutionally impermissible and democratically illegitimate.

1. Electoral Entrenchment

In democratic politics, power holders—whether incumbents, political parties, or electoral coalitions—will often possess the means and motivation to preserve their privileged positions by rigging the rules of the electoral system. In some cases, the desire of elected officials to entrench themselves in office may lead them to act contrary to the preferences of their constituents. Thus, term limits have found little support among incumbent state legislators, who predictably lack enthusiasm for voting themselves out of a job.³² In other cases, officeholders and their constituents will share a common interest in perpetuating their hold on power and in fending off political challenges from

29. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 99–102 (2010).

30. See *infra* Part III.

31. We return to constitutionalism *infra* Section III.B.1.

32. See Klarman, *supra* note 4, at 509–13. Even where clear majorities or supermajorities of voters support term limits, in most jurisdictions the only route to their enactment has been through initiative and referendum processes that bypass legislatures. See *id.* at 510.

opposing parties or coalitions.³³ Both types of electoral entrenchment are viewed as predictable pathologies of the democratic political process and problems that law might help to solve.

Electoral entrenchment strategies take many different forms. The most straightforward is simply to prevent one's opponents or their supporters from casting ballots, while enfranchising as many of one's own supporters as possible. Thus, after the Civil War, Republicans in Congress sought to enfranchise black voters in the South, partly for moral and ideological reasons, but also to ensure the electoral dominance of their party.³⁴ The end of Reconstruction allowed Southern Democrats to turn the tables, using force, fraud, poll taxes, literacy tests, and other tactics to disfranchise virtually all black voters and many poor whites, thereby restoring and entrenching their own political supremacy.³⁵ Through the 1960s (and perhaps beyond), black disfranchisement was used as a tool of entrenchment for the Democratic party in the South; factions within the party; elected officials who might be vulnerable to defeat by black voters (or biracial coalitions); and, of course, white majorities, which were able to maintain political and social dominance by monopolizing control over government.³⁶ In recent elections, voter ID laws, more stringent registration requirements, the curtailment of early voting, and other procedural regulations have been supported or opposed based in large part on their predictable effects on the racial and partisan composition of the electorate: Democrats accuse Republicans of supporting voter ID and similar procedural requirements in order to disproportionately exclude Democratic voters, while Republicans accuse Democrats of opposing voter ID laws so that more illegal ballots will be cast in favor of Democrats.³⁷

33. See *id.* at 498 (distinguishing the former kind of "agency" problem from the problem of "cross-temporal majorities," while portraying both as problematic forms of electoral entrenchment).

34. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 87-104 (2000); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 28-29 (2004).

35. See KEYSSAR, *supra* note 34, at 105-16. See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

36. See Issacharoff & Pildes, *supra* note 26, at 660-66 (describing how white conservative elites in Texas and elsewhere in the South used black disfranchisement to entrench their control over the Democratic Party and the Party's control over the state).

37. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 324-30 (2014) (describing the new array of franchise restrictions and their partisan consequences); see also Maggie Haberman & Amy Chozick, *Democrats Wage a National Fight over Voter Rules*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/us/politics/democrats-voter-rights-lawsuit-hillary-clinton.html> [<http://perma.cc/55HQ-BMCL>] (describing the burgeoning legal battles over voter access restrictions and

Another time-honored technique for tilting the electoral playing field is manipulating the number, size, and boundaries of electoral districts—the infamous gerrymander. Before the Supreme Court required equipopulosity of legislative districts, legislators elected from malapportioned districts resisted any change in district boundaries, just as constituents in overrepresented districts resisted reapportionment schemes that would reduce their representation.³⁸ Along with at-large and multimember districting schemes, gerrymandering was a key line-drawing tool used by white majorities, incumbent legislators, and the Democratic Party in the South to suppress black voting power and preserve political hegemony.³⁹ Partisan gerrymanders remain a staple of contemporary politics, permitting parties to leverage temporary or slight legislative majorities into enduring or decisive control without the trouble of attracting more votes.⁴⁰ Alternatively, legislators who manage to overcome their partisan differences and cooperate across party lines have the opportunity to agree on districting schemes designed to preserve the safety of their seats—so-called “bipartisan” or “incumbent” gerrymanders.⁴¹

Many other levers of electoral entrenchment are available to strategic political actors. Political parties that gain effective control of government can regulate the party structure of elections and have done so with predictable attention to the prospects for their own electoral success—for example, by requiring closed primaries when their competitor party would benefit from an open primary structure.⁴² Or, the two major parties can collaborate to protect their “duopoly” by using cumbersome ballot access requirements,⁴³ bans on

their partisan stakes in the 2016 presidential election cycle); Richard L. Hasen, *The Voting Wars Heat Up*, SLATE (Sept. 29, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/voting_restrictions_may_reach_the_supreme_court_from_ohio_wisconsin_north.html [<http://perma.cc/6F2F-9FXM>] (surveying litigation over restrictive voting legislation and stressing the partisan stakes).

38. See Klarman, *supra* note 4, at 513-15.
39. See Issacharoff & Pildes, *supra* note 26, at 700-03.
40. See Stephanopoulos, *supra* note 37, at 348-49 (presenting evidence that, in recent decades, parties with full control over state governments have enacted districting plans that award themselves six percent more seats on average than the plan that would have resulted if the opposing party had been in charge of redistricting); see also *id.* at 286 (suggesting that gerrymandering helped Republicans keep their majority in the House in 2012 despite receiving 1.4 million fewer votes nationwide than Democrats).
41. See Klarman, *supra* note 4, at 515-16.
42. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 102 n.298 (2004).
43. See Klarman, *supra* note 4, at 521-23.

fusion candidacies,⁴⁴ or “sore loser” laws to prevent entry by third parties or independent candidates.⁴⁵ Campaign finance regulation offers yet another tempting instrument for suppressing competition and securing political power, allowing incumbents or temporarily dominant parties to channel money to themselves and away from challengers, while also helping corporations and wealthy donors protect their preferred policies against challenges from less wealthy constituencies.⁴⁶

Courts have intervened in all of these areas, developing an elaborate jurisprudence governing many facets of the electoral process. Poll taxes, literacy tests, and other instruments of minority disfranchisement have been invalidated.⁴⁷ The constitutional rule of “one person, one vote” now governs the drawing of electoral districts.⁴⁸ Race-conscious gerrymandering is mandated by the Voting Rights Act to ensure a measure of minority representation, but also constrained by the Equal Protection Clause to avoid overly or too overtly race-based decision making.⁴⁹ The Supreme Court has deemed political gerrymandering a constitutionally cognizable problem, albeit one for which the Justices have not been able to agree upon a judicially manageable solution.⁵⁰ Most limitations on campaign spending, beyond the regulation of direct contributions to candidates, have been invalidated as

44. See Issacharoff & Pildes, *supra* note 26, at 683-86; Pildes, *supra* note 42, at 117-26.

45. See Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1042-58 (2011).

46. See Klarman, *supra* note 4, at 522-23; Pildes, *supra* note 42, at 130-53.

47. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (invalidating a multimember districting scheme for its discriminatory effect on black voters); *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) (reaffirming Congress's ban on literacy tests as a valid antidiscrimination measure); *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) (upholding sections of the Voting Rights Act that restricted literacy tests for certain non-English speaking citizens); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that Virginia's poll tax violated the equal protection clause of the fourteenth amendment).

48. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 558-71 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

49. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that redistricting based on race is evaluated under strict scrutiny, yet requiring redistricting to be race-conscious to ensure compliance with the Voting Rights Act).

50. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (deciding, in a split decision with no majority opinion, not to intervene in a congressional redistricting plan); *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that political gerrymandering claims are justiciable, but without a majority agreement upon a standard to govern such claims).

violations of free speech.⁵¹ Some types of regulations of political parties and ballot access limitations have also been rejected as unconstitutional.⁵²

While many of these judicial interventions have had the effect of limiting opportunities for political entrenchment, entrenchment has not typically been the doctrinal focus. Instead, courts have tended to frame their role as enforcing individual rights, leaving systemic concerns like preserving political competition and preventing entrenchment mostly offstage.⁵³ Nonetheless, recognition and disapproval of electoral entrenchment not infrequently bubble to the surface of judicial opinions. Motivating the Court's initial decision to enter the "political thicket" was the recognition that malapportionment threatened "systematic frustration of the will of a majority of the electorate,"⁵⁴ and that "entrenched political regimes" prevented a legislative solution.⁵⁵ Courts have been especially skeptical of ballot access restrictions imposed upon third parties and independent candidates when these restrictions "operate to freeze the political status quo."⁵⁶ In a Seventh Circuit decision ultimately affirmed by the Supreme Court, an Indiana voter ID law was upheld over a dissent that described the law as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folk believed to skew Democratic."⁵⁷ Expressing

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51. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Am. Tradition P'ship, Inc., v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam); *Citizens United v. FEC*, 558 U.S. 310 (2010).
52. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (declaring Ohio's filing deadline for independent candidates unconstitutional); *Williams v. Rhodes*, 393 U.S. 23 (1968) (holding that Ohio's restrictive ballot access laws violated the equal protection clause by effectively limiting access to the two major parties).
53. See *Issacharoff & Pildes*, *supra* note 26, at 644-46, 717; *Pildes*, *supra* note 42, at 40-41.
54. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting); see also *Klarman*, *supra* note 4, at 531-32.
55. *Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring); see also *Reynolds v. Sims*, 377 U.S. 533, 553-54, 570 (1964) (noting that the entrenchment of the Alabama legislature prevented the development of a solution to alleged malapportionment); *Klarman*, *supra* note 4, at 531.
56. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971); see also *Klarman*, *supra* note 4, at 535-36. The Supreme Court has invalidated a closed primary requirement imposed on the minority Republican Party by the Democratic-controlled legislature, i.e., "the one political party transiently enjoying majority power." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986).
57. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008). Judge Posner, who authored the majority opinion for the Seventh Circuit panel, subsequently came to share the dissenting view. Referencing the "ferocity" of party competition, Judge Posner admitted in an interview that he "wasn't alert to this kind of trickery, even though it's age old in the democratic process." John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013),

skepticism of campaign finance regulation, Justice Scalia has warned that “[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”⁵⁸ And Justice Breyer has explained the constitutional problem with partisan gerrymanders in terms of “[t]he democratic harm of unjustified entrenchment,” evidenced by a redistricting plan that awards a party receiving a minority of statewide votes a majority of legislative seats.⁵⁹

Prominent election law scholars have been more overtly and consistently focused on entrenchment as a central concern for legal regulation of the political process. For example, Michael Klarman argues that courts should commit themselves to policing the dual entrenchment problems of representatives perpetuating their hold on office by acting contrary to the wishes of their constituents and temporary political majorities seeking to extend their hold on power into the future.⁶⁰ To this end, Klarman develops a framework for “anti-entrenchment review” of districting, disfranchisement, ballot access restrictions, campaign finance reform, and other areas of election law.⁶¹ Klarman’s approach is motivated by an overarching commitment to the democratic value of majority rule, which he sees as threatened whenever officials contradict the preferences of a majority of citizens or when the will of a present majority is thwarted by entrenched arrangements.⁶² Similarly focused on the problem of entrenchment, Samuel Issacharoff and Richard Pildes emphasize the need to maintain political competition and to guard against “political lockups” perpetrated by “existing holders of political power [who] seek to perpetuate their control . . . by capturing the basic structures and ground rules of politics itself.”⁶³ As Pildes elaborates, judicial intervention is justified “whenever self-interested political actors employ political power to insulate themselves from the political competition required to make electoral accountability meaningful.”⁶⁴

<http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html> [<http://perma.cc/G3T9-AWMK>].

58. *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

59. *Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting).

60. See Klarman, *supra* note 4, at 498.

61. See *id.* at 528-39.

62. See *id.* at 502-09.

63. Issacharoff & Pildes, *supra* note 26, at 648, 650.

64. Pildes, *supra* note 42, at 46.

2. *Legislative Entrenchment*

It has long been conventional wisdom among constitutional lawyers that “one legislature may not bind the legislative authority of its successors.”⁶⁵ More specifically, a legislature may not “entrench” a law by forbidding subsequent repeal or amendment, or by imposing heightened procedural hurdles, such as supermajority voting rules that were not necessary to enact the law in the first place.⁶⁶ For example, Congress would not be permitted to enact a statute requiring a balanced federal budget “in perpetuity,” or with an attached prohibition on repeal, or a prohibition on repeal by less than a two-thirds majority. If Congress did enact such a statute, the purported entrenchment would presumably be invalidated by courts (to the extent they would find the issue justiciable). And it could be legally ignored by subsequent Congresses: notwithstanding the statutory language, a congressional majority in pursuit of an unbalanced budget would be free to repeal or override the preexisting statute pursuant to the standard second-in-time rule. This, at least, is the consensus view among constitutional theorists.⁶⁷

The precise source of the anti-entrenchment principle in U.S. constitutional law has never been entirely clear. Aversion to legislative entrenchment has a long history in British constitutional thought, where—at least in theory, if not always in practice⁶⁸ — “[t]here is no law which Parliament cannot change”⁶⁹ and “[a]cts of parliament derogatory from the power of subsequent parliaments bind not.”⁷⁰ But the British version of the anti-entrenchment principle developed as a corollary of parliamentary supremacy, and so it does not obviously translate to the American legal system, in which

65. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion) (referencing 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

66. Thus, Eric Posner and Adrian Vermeule define legislative entrenchment as “the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form.” Posner & Vermeule, *supra* note 24, at 1667.

67. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 124-25 n.1 (3d ed. 2000); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 526-36 (1999); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379; Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress To Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986). But see Posner & Vermeule, *supra* note 24 (arguing that there is no basis for a rule against legislative entrenchment).

68. See Posner & Vermeule, *supra* note 24, at 1678.

69. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 84 (8th ed. 1915).

70. 1 WILLIAM BLACKSTONE, COMMENTARIES *90.

the legislature is subordinate to the Constitution.⁷¹ In its American incarnation, the prohibition on legislative entrenchment seems to have been recast as a means of marking the contrast between entrenched constitutional law and ordinary law lacking this definitive constitutional characteristic. As Laurence Tribe once testified to Congress, “Only by a constitutional amendment can one truly bind the future: unless we keep clearly in mind that distinction between a constitutional amendment and a bill or resolution, we have really lost our way.”⁷²

As a textual matter, the anti-entrenchment principle has been variously grounded in some combination of the Article I grant of limited legislative powers, the provisions of Article I specifying limited terms of office for congressional representatives, and Article V, which has been understood as creating an exclusive pathway for supra-statutory entrenchment.⁷³ The Supreme Court has enforced the rule in a handful of cases, though without much explication of its constitutional source, justification, or scope. For instance, in holding that the Ohio State Legislature was free to change the location of a county seat notwithstanding a preexisting statute that had “permanently established” the existing seat,⁷⁴ the Court explained:

Every succeeding legislature possesses the same jurisdiction and power with respect to [the public interest] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.⁷⁵

Although the prohibition on statutory entrenchment has gone largely untested—neither Congress nor state and local legislatures appear to have

71. See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion); Eule, *supra* note 67, at 393.

72. *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 51 (1977) [hereinafter *Hearings*] (statement of Laurence H. Tribe, Professor of Law, Harvard Law School).

73. See Posner & Vermeule, *supra* note 24, at 1680-95 (critically surveying these and other textually grounded arguments).

74. *Newton v. Comm'rs*, 100 U.S. 548, 561 (1879).

75. *Id.* at 559.

attempted anything like this very often⁷⁶ – the anti-entrenchment principle has been extended to analogous legislative acts that are more prevalent in the real world. For example, the principle has been invoked to criticize the entrenchment of the Senate’s cloture rule requiring sixty votes to end a filibuster, and to argue that, as a constitutional matter, a simple majority must be empowered to end filibusters.⁷⁷ The principle has also been cited in objections to “framework” statutes like the Gramm–Rudman Act, the Administrative Procedure Act, and the War Powers Resolution, which seek to impose constraints upon, or take presumptive priority over, downstream legislative decision making.⁷⁸ Scholars have also raised anti-entrenchment objections to the creation of property rights protected against subsequent confiscation by compensation requirements⁷⁹ and to consent decrees that lock in government policies against subsequent revision.⁸⁰

As far as courts have been concerned, the anti-entrenchment principle has had the most purchase in the constitutional law of government contracting. Judicial enforcement of contracts entered into by earlier legislatures against their successors pursuant to the Contracts and Takings Clauses looks suspiciously similar to legislative entrenchment.⁸¹ Since the early Republic, the

76. See Posner & Vermeule, *supra* note 24, at 1678–79.

77. See Eule, *supra* note 67, at 407–15; Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 250 (1997); Posner & Vermeule, *supra* note 24, at 1694–95; John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1780–81 (2003).

78. Cf. Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011 (2010) (discussing the Administrative Procedure Act and the War Powers Resolution); Kahn, *supra* note 67 (discussing the Gramm–Rudman Act); Posner & Vermeule, *supra* note 24, at 1695–97 (discussing the Gramm–Rudman Act). Statutes that purport to create rules of statutory interpretation or construction for downstream statutes, such as the Religious Freedom Restoration Act or the Defense of Marriage Act, might also count as examples of legislative entrenchment. See TRIBE, *supra* note 67, at 125–26 n.1; Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 98–99, 108 (2004); Posner & Vermeule, *supra* note 24, at 1697–99; see also *Lockhart v. United States*, 546 U.S. 142, 147–49 (2005) (Scalia, J., concurring) (expressing the view that a statutory requirement of express reference for override should be treated as nonbinding). For a conflicting view, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2117–20 (2002), which finds no entrenchment problem with congressional enactment of prospective rules of statutory interpretation.

79. For a useful description, see Serkin, *supra* note 3, at 898–99.

80. See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295.

81. See, e.g., Dana & Koniak, *supra* note 67, at 478–79 (discussing the permissibility of government contracts with private industry to raise revenue by “selling law-making

Supreme Court has been of two minds about the enforceability of such contracts. In some cases, the Court has taken the view that contracts between governments and private parties should be fully enforceable, emphasizing the public-regarding benefits of contractual commitment, the risk of political opportunism, and the reliance interests of private actors.⁸² Even while enforcing contracts, however, the Court has struggled to distinguish the anti-entrenchment principle that “one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.”⁸³ This principle attains primacy in cases where the Court has refused to enforce government contracts, taking the view that the government cannot contract away sovereign authority. In those cases, the Court emphasizes the possibility of corrupt or imprudent contractual obligations, the need for responding to changed circumstances, and, above all, the democratic imperative of contemporaneous self-governance.⁸⁴

Scholars have embraced and amplified these normative concerns as applied to legislative entrenchment more broadly. Critics of entrenchment argue that current legislatures will possess more information than past ones and that disallowing them from adapting to changed circumstances would lock in erroneous and anachronistic decisions.⁸⁵ They also argue that legislative

authority”); Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 313-17, 326-32 (1999) (discussing differences between private parties and the government with regard to available contract remedies); Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 467 (1999) (describing tension “between the power of government to bind itself and future governments in contract and the freedom of a democratically elected legislature to override the acts of a prior legislature in response to evolutions in judgment, information, or politics”).

82. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).
83. *Fletcher*, 10 U.S. (6 Cranch) at 135; see also *United States v. Winstar Corp.*, 518 U.S. 839, 873 & n.19 (1996) (plurality opinion) (recognizing the principle “that ‘a general law . . . may be repealed, amended or disregarded by the legislature which enacted it,’ and ‘is not binding upon any subsequent legislature,’” even while enforcing a government contract (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905))).
84. See, e.g., *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 33 (1977) (Brennan, J., dissenting); *Stone v. Mississippi*, 101 U.S. 814, 817 (1880) (holding that a state legislature cannot bargain away its police power); *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 507 (1848) (holding that a state cannot contract away its eminent domain power); see also Fischel & Sykes, *supra* note 81, at 319 (explaining the “vexing and recurring problem concern[ing] the government’s ability to enter into long-term contracts” as conflicting with the constitutional anti-entrenchment principle).
85. See Eule, *supra* note 67, at 387; Roberts & Chemerinsky, *supra* note 77, at 1811-12.

entrenchment would exacerbate the damage that a badly motivated majority or one with extreme or aberrational preferences could inflict on the country.⁸⁶ More generally, they argue that, like electoral entrenchment, legislative entrenchment illegitimately undermines democratic accountability and majority rule by disempowering legislatures from acting on the preferences of current majorities. As Julian Eule put it in his foundational argument against legislative entrenchment, “The fundamental . . . assumption of American political life—that legislative action reflects current majoritarian preferences—could be finally laid to rest if shifting majorities were unable to alter prior majoritarian choices.”⁸⁷

3. *Common Denominators*

Courts and scholars have treated electoral and legislative entrenchment as two separate and distinct phenomena.⁸⁸ The conspicuous difference between entrenching parties and politicians in office, on the one hand, and entrenching enacted statutes and the policy decisions they embed, on the other, has struck most observers as sufficient reason to place electoral and legislative entrenchment in separate categories.

Upon closer inspection, however, the basis for this categorical distinction begins to blur. After all, elections matter in large part because they decide who controls the government and, consequently, the kinds of laws and policies likely to be generated. Correspondingly, at least one important reason electoral entrenchment strikes many as problematic is that it permits politicians who have lost popular political support to enact laws and policies that the median voter disprefers. If, for example, the Democratic Party can manipulate election law to retain a majority of seats in a state legislature even after losing majoritarian support, it might use its power to raise taxes on the rich or legalize marijuana, despite the fact that most voters and citizens might prefer lower taxes or oppose legalization. But legislative entrenchment can accomplish the very same ends, and it raises the very same concerns. Suppose, in our example, that electoral entrenchment is impossible. In its fleeting moment of majoritarian ascendance, the Democratic Party, anticipating defeat at the polls in the next election, might enact unrepealable laws raising taxes and legalizing

86. See Eule, *supra* note 67, at 388; Roberts & Chemerinsky, *supra* note 77, at 1809-11, 1813.

87. Eule, *supra* note 67, at 405; see also Dana & Koniak, *supra* note 67, at 526-36 (“If majority rule means anything, it means rule by the current majority and not by a majority of the past.”).

88. But see Klarman, *supra* note 4, at 504-07 & nn.63-69 (making the connection between legislative and electoral entrenchment).

marijuana. Even after Republicans commanded a legislative and electoral majority, they would be powerless to reverse these policy decisions. Thus, to the extent that countermajoritarian policymaking is the driving concern, electoral and legislative entrenchment seem functionally and normatively equivalent.⁸⁹

The same point holds in the reverse: when legislative entrenchment or its equivalent is impossible, electoral entrenchment can serve as a substitute. Critics of legislative entrenchment worry that a narrow legislative majority might, for instance, enact a ban on capital punishment and, “knowing that the voters will be angry and will want to elect pro-death penalty replacements,” entrench the statute against repeal.⁹⁰ But these commentators might equally well worry that the same precarious majority would use the tools of election law—gerrymandering districts, disfranchising or defunding opponents, and the like—to defeat their pro-death-penalty opponents and retain office. Either form of entrenchment would prevent capital punishment from being restored by an opposed majority.

The simple point is that electoral entrenchment and legislative entrenchment are substitutable strategies for accomplishing the same basic result: locking in substantive policy outcomes. Entrenched policy outcomes can be generated either indirectly through electoral entrenchment or directly through legislative entrenchment. From the perspective of both political actors scheming to protect policy outcomes and citizens concerned with what these policy outcomes will turn out to be, the bottom line is largely the same.⁹¹

89. Commentators have recognized that government contracts can be used to lock in both specific policies and broader party platforms or coalitional agendas:

[A] political party in power might undertake to ensure the survival of its policies against the contingency of future political defeat by entering contracts that could make changes in policy extremely expensive. Proregulatory forces might enter long-term contracts with private entities for expensive regulatory services; antiregulatory forces might contract with the private sector to reimburse it for the costs of any future changes in regulation; small-government proponents might enter contracts promising compensation for any increase in taxes; big-government proponents might enter long-term employment contracts with government workers. By making it difficult or impossible to change policies once put in place, incumbent officials could thwart the possibility of democratic changes to public policy.

Fischel & Sykes, *supra* note 81, at 338.

90. Roberts & Chemerinsky, *supra* note 77, at 1798.

91. A corollary observation is that theories of electoral entrenchment that emphasize the importance of preserving robust partisan competition and preventing partisan lock ups do not really get to the heart of what is problematic about entrenchment. See Issacharoff & Pildes, *supra* note 26. Imagine that a temporarily ascendant Republican majority in Ohio

This is not to deny that voters care about the identity or party label of the representatives they elect to office for reasons independent of the policy outcomes those representatives are likely to produce. Voters may want to replace incumbent officeholders who are incompetent, corrupt, or personally dislikeable, regardless of the consequences for policymaking. To the extent that voters have policy-independent electoral preferences along these lines, then some forms of electoral entrenchment will be viewed as problematic on grounds that have no equivalent when it comes to legislative entrenchment. Consider, for example, a bipartisan gerrymandering scheme that generates safe, noncompetitive districts for all incumbents but results in perfectly proportional representation for the two major parties. Governance outcomes under such a scheme would continue to reflect the policy preferences of the electorate, and indeed more voters would find themselves in districts represented by someone who shared their policy preferences and party affiliation than if districting were random. Yet incumbent officeholders who might otherwise have been unseated would be safely entrenched in office. Many people might prefer a “fair” election, even if the only change would be to replace those incumbents with co-partisans who would generate similar policy outcomes.⁹²

enacts a law imposing a wealth requirement for voting, effectively disfranchising all poor people in the state. The immediate electoral impact of such a law might be to deprive Democratic candidates of any chance of winning state and federal offices that would otherwise have been competitive—the Republican Party would be entrenched in power. The immediate policy impact would be a correspondingly sharp turn to the right as the interests of poorer voters were discounted, perhaps resulting in reduced spending on welfare programs, inner-city public schools, and the like.

But the Republican ascendancy would not last forever. Democrats would quickly realize that their only hope of securing or retaining office would be appealing to the median voter of this new, wealthier electorate. The Democratic Party in Ohio and individual Democratic officeholders and candidates would presumably shift their platforms accordingly, moving them close to the platforms of prevailing Republicans. Eventually, competition and some sort of rough parity between the parties would be restored, and the entrenchment of Republicans would come to an end. But—and here is the important point—this would be cold comfort to supporters of the *old* Democratic platform and the predisfranchisement median voter. Whatever the party label of prevailing politicians in the new regime, governance outcomes would reflect the preferences of the new, wealthy electorate—more closely resembling the initial Republican coalition, resulting in policies more closely resembling the initial Republican platform. So long as that group of citizens and that set of policies remained entrenched, the end of partisan entrenchment seems relatively unimportant. Cf. Stephanopoulos, *supra* note 37, at 299–300 (observing that the existence of competition is no guarantee that electoral outcomes will align with voters’ preferences).

92. Compare Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 612–30 (2002) (arguing that bipartisan gerrymanders represent a fundamental failure of competitive democracy), with Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The*

Still, at least a large part of the reason citizens will object when a party, officeholder, or electoral faction retains power by means of electoral entrenchment is that the resulting governance outcomes are likely to deviate from their preferences. And at least as a first approximation, these outcomes can be generated equally well by entrenching them directly or by entrenching them indirectly, such as by entrenching their proponents in office. This linkage between electoral and legislative entrenchment reflects the simple fact that political power is primarily valuable because of what it can be used to accomplish.

The linkage operates at a normative level as well. As we have seen, the perceived pathologies of entrenchment in both categories are nearly identical. Locking in parties, politicians, and policies alike threatens the democratic value of rule by present majorities—replacing democratic responsiveness to popular preferences with dead-hand control of the past and anachronistic or maladapted governance outcomes. This should come as no surprise. If electoral and legislative entrenchment create similar functional outcomes, then to the extent these outcomes are viewed as democratically pathological, the diagnosis will be the same for both.

II. FROM FORMAL TO FUNCTIONAL ENTRENCHMENT

As the previous Part surveyed, concerns about entrenchment in public law have been focused on formal legal rules that create impediments to political change—rules of election law that increase the difficulty of replacing incumbents or prevailing political parties in office or rules about legislation that increase the difficulty of revising enacted policies. But political entrenchment can also be accomplished without any shift in the legal rules directly governing permissible processes of political change. As this Part describes, what electoral and legislative entrenchment accomplish formally and legally can also be accomplished functionally and politically.

A. *The Idea of Functional Entrenchment*

Constitutional theory provides a useful point of entry to the distinction between formal and functional entrenchment. Constitutional theorists have long understood that formal, legal entrenchment is “neither necessary nor

Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 654-73 (2002) (emphasizing that noncompetitive electoral districts can both satisfy voter preferences and generate proportional representation at the legislative level).

sufficient to create functional political entrenchment.”⁹³ Formal entrenchment of the text does not prevent constitutional change, because constitutional change need not be channeled through the Article V amendment process. Indeed, as a practical matter, the most important mechanism of constitutional change has been through shifting interpretations or constructions of the meaning of the (formally unchanged) constitutional text by courts, political actors, and the public.⁹⁴ Formal entrenchment in the constitutional text is therefore no guarantee of functional stability.

Conversely, constitutional theorists have emphasized that functional stability need not depend on formal constitutional status. Thus, theorists have pointed to a number of norms *outside* the constitutional text that are treated in practice as impervious to ordinary political contestation or change—and thus that might be understood as functionally, even if not formally, constitutional.⁹⁵ In Bruce Ackerman’s view, for example, constitutional norms may be created or rewritten when the American public is roused to transcend ordinary politics and engage in a higher-order form of deliberation about the public good.⁹⁶ These norms may float free of any particular legal text, or they may be codified in formally nonconstitutional statutes like the 1964 Civil Rights Act and the 1965 Voting Rights Act.⁹⁷ For Ackerman, what makes these norms constitutional is not just their special democratic pedigree but also their invulnerability to ordinary political revision. Thus, Ackerman emphasizes that “an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place.”⁹⁸ Similarly seeking to define constitutional law functionally rather than formally, Ernest Young concludes that the only interesting and distinctive sense in which some legal norms should be considered constitutional is that they are “entrenched” against change.⁹⁹ Among other examples, Young points to the Social Security Act’s promise of

93. Levinson, *supra* note 17, at 697–98.

94. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011); STRAUSS, *supra* note 29.

95. Karl Llewellyn, writing in the 1930s, defined our “working [c]onstitution” as the set of norms and institutional arrangements that political actors treat as “not subject to abrogation or material alteration.” Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 28–29 (1934).

96. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

97. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1757–93 (2007).

98. *Id.* at 1788.

99. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 426 (2007).

government financial support in old age, which he plausibly predicts is less likely to be “fundamentally altered or abolished over the next ten years” than canonical constitutional norms like the rights to burn an American flag or get an abortion.¹⁰⁰

Whatever protects Social Security, the Civil Rights Act, and perhaps other “superstatutes”¹⁰¹ from revision or repeal, it is not any kind of formal barrier to change. These statutes and the arguably “constitutional” norms they embody are formally susceptible to repeal or revision through the ordinary Article I, Section 7 procedures. Nonetheless, as these theorists recognize, laws and policies can be protected by political barriers that may be every bit as difficult to overcome as constitutional barriers or other formal impediments to change.¹⁰² These laws and policies are *functionally*, even if not formally, entrenched.

But functional entrenchment is hardly limited to a small set of landmark, quasi-constitutional statutes. For example, critically assessing the prohibition on legislative entrenchment, Posner and Vermeule observe that other types of government actions, beyond formal entrenchment, might share the purpose and effect of altering the downstream political environment in such a way as to increase the costs of changing course, even to the point of practical impossibility. They offer the example of a legislature intent on entrenching a policy against riding bicycles in a park: if barred from enacting an unrepeatable statute, the legislature might instead replace the existing concrete paths in the park with bicycle-unfriendly gravel, effectively raising the downstream

100. *Id.* at 427.

101. Taking a similar approach to Ackerman’s and Young’s, William Eskridge and John Ferejohn identify as “America’s Working Constitution” a set of “superstatutes,” including the 1964 Civil Rights Act, the Voting Rights Act, and the Endangered Species Act of 1973, which created “entrenched governance structures and normative commitments.” WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7 (2010).

102. In fact, as Young suggests, formal barriers may be much less effective in preventing political and constitutional change than functional ones. More strongly: legal constraints may be meaningless in the absence of underlying political support. Recall the fear expressed by James Madison and other designers of the U.S. Constitution that constitutional rights and rules would create mere “parchment barriers.” THE FEDERALIST NO. 48, at 276 (James Madison) (Clinton Rossiter ed., 1999). Madison recognized that legal prohibitions would only be meaningful if they could be made politically self-enforcing, by way of political decision-making processes and institutions that would selectively empower decision makers with the right interests and incentives. Generalizing the point, constitutional and other forms of legal entrenchment always depend on the political entrenchment of the relevant legal rules or their substance. See generally Levinson, *supra* note 17; *infra* notes 282-286 and accompanying text.

financial and political costs of bringing back the cyclists.¹⁰³ Here, a functional mechanism of entrenchment substitutes straightforwardly for a formal one.¹⁰⁴

What theorists of subconstitutional entrenchment seem not to appreciate, however, is that examples like this are the rule, not the exception. Statutes and policies, as well as politicians and parties, can be entrenched just as readily by functional, political mechanisms as by formal, legal ones.

Indeed, political scientists, economists, and sociologists have generated a vast and varied literature exploring the many different means by which political actors seek to insulate power holders and policies against downstream political change without recourse to formal entrenchment devices. These functional entrenchment strategies take a number of different forms. For illustrative purposes, we focus on three of the most general.¹⁰⁵ One is the

103. Posner & Vermeule, *supra* note 24, at 1687.

104. In fact, upon closer inspection, a number of examples of legislative entrenchment featured in the scholarly literature seem to involve functional without formal entrenchment. Theorists who characterize the Gramm-Rudman Act and other framework statutes as impermissible legislative entrenchment recognize that there is no legal impediment that prevents a subsequent congressional majority from revising or repealing the original statute. To the extent framework statutes entrench policies or procedures against change, they do so by raising the political salience—and therefore, in some cases, the political cost—of reversal. Gramm-Rudman, for example, was designed to impose “substantial political risks” on subsequent congressional majorities that chose not to comply by forcing them to overcome the burden of “legislative inertia” and “to act in the full glare of the balanced budget debate.” Kahn, *supra* note 67, at 205; see also Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES, 717, 748–53 (2005). The entrenchment of the Senate filibuster may be similar, if the Senate rules are interpreted to permit a current majority to lower the voting threshold for cloture. For that matter, if the remedy for breach of government contracts is limited to damages—as the Court has strongly implied it must be—then the only barrier to legal change is whatever political consequences flow from paying that amount of money. See *United States v. Winstar Corp.*, 518 U.S. 839, 885–87 (1996) (plurality opinion). At the extreme, one could argue that the costs of entrenchment can always be boiled down to political costs, inasmuch as even a clear legal prohibition or a judicial command could be ignored or overridden by political actors willing to suffer the political consequences.

105. This is not meant to be an exhaustive list. Other methods and mechanisms of functional political entrenchment might be identified, and the various methods might be taxonomized in various ways. For example, Paul Pierson develops a set of mechanisms of political stabilization and path dependence by analogy with the economic phenomenon of increasing returns. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 17–53 (2004). Patterns of technology adoption, industrial location, and international trade have been explained as emerging from a path-dependent process through which slight initial advantages snowball into irreversible market dominance. Increasing returns are commonly created by several features of the economic context: (1) large set-up or fixed costs, which lead to lower marginal costs of producing additional units and create an incentive to stick with the initial design; (2) learning effects, which increase the value of the product over

enactment of substantive policies that have the effect of strengthening political allies or weakening political opponents. A second, related strategy is to enact policies or programs that have the effect of changing the composition of the political community—selecting in allies or selecting out opponents. A third strategy is to shift the locus of political decision making, empowering a different governmental institution and consequently a different set of political actors and groups.

In the Sections that follow, we illustrate these common mechanisms of functional political entrenchment with a number of examples, some drawn from existing work in the social sciences and others that we develop on our own. Each of these examples involves a political strategy designed to accomplish functionally what equivalent electoral or legislative entrenchment strategies might have accomplished formally.

B. Money and Mobilization

The most straightforward strategy of political entrenchment is to selectively empower one's allies or to selectively *disempower* one's enemies. One way of accomplishing this, of course, is by manipulating the legal frameworks governing elections and legislation. But another, and perhaps more pervasive, way of achieving the same results is to engineer policy initiatives that organize, mobilize, and enrich interest groups and other constituencies with a stake in defending one's preferred policies and the officials who enacted them, or that demobilize or drain the resources of interest groups and constituencies on the other side. In E.E. Schattschneider's well-known summation, "New policies create a new politics."¹⁰⁶ And new politics

time; and (3) coordination effects, including network externalities, which increase the value of a product as more people use it and expect others to use it in the future. *See generally* W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994). The classic example is the QWERTY typewriter keyboard. *See generally* Paul A. David, *Clio and the Economics of QWERTY*, 75 *AM. ECON. REV.* 332 (1985). Pierson shows how each of these features has political analogues. The design of political institutions and policy regimes often entails high initial set-up costs. These institutions and regimes often inspire specific, nontransferable investments by various political actors and increase the power of these actors to block change. The benefits of coordinating around an existing set of institutions and policies lends further stability to these arrangements by creating equilibria in which no group can do better by withdrawing or contesting the status quo. *See* PIERSON, *supra*, at 22-53, 142-57; *see also* Levinson, *supra* note 17, at 681-91 (elaborating on these and other mechanisms of political stability and entrenchment).

106. E.E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* 288 (1935); *see also* THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY*

can be engineered in ways that entrench enacted policies or the parties or politicians that created them, through political feedback effects.¹⁰⁷

The classic example to which we have been referring throughout is Social Security, which created a vested interest group that was induced to rely on the benefits of the program and strongly motivated to resist retrenchment. Prior to the enactment of the Social Security Act, senior citizens in the United States were neither a politically active nor particularly powerful constituency. But Social Security galvanized seniors, providing them with a focused motivation for defending their benefits and the material and organizational resources to transform themselves into a formidable interest group. As a result, Social Security became increasingly untouchable—the notorious “third rail” of American politics.¹⁰⁸

Other examples of political feedback effects focus on entrenchment by way of disempowering enemies. For example, scholars have documented how airline deregulation reduced the economic and political cohesion of the industry and therefore the political pressure that could be applied in favor of recartelization.¹⁰⁹ Similarly, international trade agreements and free-trade policies tend to channel wealth and (consequently) political power away from import-competing interests and toward export interests and therefore to erode their own opposition while building their own support.¹¹⁰

Political actors may not always intend or anticipate these self-entrenching political feedback effects. But it would be remarkable if political actors were not attuned to the self-serving possibilities, and in at least some cases there is clear evidence that entrenchment was not just an unintended byproduct but part of the self-conscious design of particular programs and policies.

IN THE UNITED STATES 57-60 (1992) (describing how “[p]olicies [t]ransform [p]olitics”). Schattschneider was generalizing from the example of the tariff:

By means of the protective system governments stimulate the growth of industries dependent on this legislation for their existence, and these industries form the fighting legions behind the policy. The tariff likewise destroys interests. The losers adapt themselves to the new conditions imposed upon them, find themselves without the means to continue the struggle, or become discouraged and go out of business. Is this not true, in varying degrees, of nearly all other policies also? New policies create a new politics.

SCHATTSCHNEIDER, *supra*, at 288.

107. See PIERSON, *supra* note 105, at 30.

108. See ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE (2003); Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POL.* 143, 144-47 (1996).

109. See, e.g., PATASHNIK, *supra* note 12, at 179-80.

110. See ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 53-54 (2009).

1. *From Poll Taxes and White Primaries to Labor Law*

The struggle for political power in the American South during the early and middle decades of the twentieth century is oft-invoked as a seminal example of electoral entrenchment. The Democratic Party during this period had a monopoly on Southern politics, and the Party itself was ruled by a faction of white conservatives. This ruling faction was able to maintain its grip on the Party—and thus on Southern politics—only by disfranchising blacks and poor whites.¹¹¹ To this end, Party leaders engineered the enactment of poll taxes and prohibitions on black participation in primary elections.¹¹²

But poll taxes and the white primary were not the only tools of electoral entrenchment. Labor law was another device used by conservative Democrats to fend off threats to their dominance. Those threats came from unions. Beginning in the late 1930s, the Congress of Industrial Organizations (CIO)—the labor movement’s progressive wing—sent teams of organizers to the South in an attempt to realign the Democratic Party.¹¹³ Union efforts began with political education and so-called “citizenship classes” that covered the procedures for voting, the importance of voting, and tools for organizing communities to vote.¹¹⁴ The unions’ political work also included voter

111. Because blacks and poor whites almost always outnumbered white elites in any election district, the Democrats’ strategy was a tenuous one: if even a small proportion of blacks or poor whites could be registered and enabled to vote, power within an individual district, or across the Party as a whole, could be shifted. As Patricia Sullivan concludes, “The inordinate power enjoyed by southern members of Congress was dependent on a small electorate restricted by race and class.” PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* 105 (1996).

112. See Issacharoff & Pildes, *supra* note 26, at 652–68. After *Smith v. Allwright*, 321 U.S. 649 (1944), and the constitutional invalidation of the white primary, the poll tax became a primary tool of black disfranchisement. As Steven Lawson writes, “Along with literacy tests and registration requirements, the tax . . . dramatically sliced voter turnout and discouraged the organization of political-party opposition.” STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 55 (1976).

113. Between 1937 and 1939, for example, the CIO’s Textile Workers Organizing Committee spent two million dollars and had six hundred organizers in the field working on this Southern strategy to “recast the Democratic Party.” STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 387 (1991). When, in 1943, the CIO established its Political Action Committee (the CIO-PAC), it too focused on Southern political organizing. CIO-PAC established regional offices in Virginia, North Carolina, South Carolina, Georgia, Alabama, Tennessee, Mississippi, Florida, Louisiana, Texas, Missouri, Kansas, Oklahoma, and Arkansas. JOSEPH GAER, *THE FIRST ROUND: THE STORY OF THE CIO POLITICAL ACTION COMMITTEE* 230 (1944).

114. See, e.g., Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 792–93 (1988).

registration drives, conducted by both black and white fieldworkers and aimed at both poor white and eligible black voters.¹¹⁵ Perhaps most importantly, unions developed campaigns to pay poll taxes on behalf of voters who could not afford them.¹¹⁶

The goal of these efforts was straightforward: to organize black and working-class white voters and get them to the polls to “rid the Democratic Party of conservatives.”¹¹⁷ The union efforts produced significant results. After one successful poll tax campaign among oil workers in a Texas congressional district—a campaign that led to registration rates “higher than ever known before in the region”—the incumbent Democrat withdrew from his reelection campaign.¹¹⁸ In Huntsville, Alabama, where the CIO paid poll taxes for four thousand workers in a population of approximately 13,500, the fiercely conservative incumbent Joe Starnes was defeated.¹¹⁹

Conservative incumbents understood the political threat the union posed, and “[t]hroughout the World War II era, Southern congressmen, newspapers, and business leaders [railed against CIO] efforts to mobilize black voters and poor whites.”¹²⁰ Incumbents also understood that, just as poll taxes could neutralize political opposition from blacks and poor whites, so too could restrictive labor legislation. Thus, nearly as soon as CIO organizers arrived in the South, Southern state legislatures became “hotbeds of antilabor

115. See SULLIVAN, *supra* note 111, at 173.

116. In 1943, for example, the CIO led a poll tax drive in Martin Dies’s Texas congressional district that resulted in a twenty-five to thirty percent increase in voter registration rates. In 1944, the director of the CIO-PAC’s Southern region reported that seventy-five thousand previously unregistered workers had registered and paid poll taxes in eight Southern states. ROBERT A. GARSON, *THE DEMOCRATIC PARTY AND THE POLITICS OF SECTIONALISM, 1941-1948*, at 76 (1974).

117. GILBERT J. GALL, *THE POLITICS OF RIGHT TO WORK: THE LABOR FEDERATIONS AS SPECIAL INTERESTS, 1943-1979*, at 30 (1988).

118. MATTHEW JOSEPHSON, *SIDNEY HILLMAN: STATESMAN OF AMERICAN LABOR 610-11* (1952).

119. GARSON, *supra* note 116, at 76; see also William H. Riker, *The CIO in Politics 1936-1946*, at 310-11 (1948) (unpublished Ph.D. dissertation, Harvard University) (on file with authors). During those same 1944 primaries, incumbents in South Carolina, Missouri, Arkansas, Alabama, and Texas “all lost to PAC-endorsed candidates.” FRASER, *supra* note 113, at 514.

120. ROBERT H. ZIEGER, *THE CIO: 1935-1955*, at 230-31 (1995). “The CIO-PAC, complained North Carolina senator Josiah Bailey in 1944, ‘will seek to purge us and every other self respecting and honest man who runs for office.’” *Id.* at 230. The CIO’s organizing efforts “scared the daylight” out of South Carolina Senator Ellison Durant “Cotton Ed” Smith, BRYANT SIMON, *A FABRIC OF DEFEAT: THE POLITICS OF SOUTH CAROLINA MILLHANDS, 1910-1948*, at 197 (1998), and, during the 1948 Texas Democratic primary, a segregationist congressman received a report that “‘Negroes outnumbering whites almost 3-1 were led by CIO and AF of L leaders,’ and this mutual cooperation forced the retreat of the Dixiecrats,” LAWSON, *supra* note 112, at 127.

legislation.”¹²¹ After the CIO fiercely but unsuccessfully opposed the reelection of Texas Governor Wilbert Lee O’Daniel, O’Daniel pushed for legislation that outlawed much core union activity.¹²² Two years later, Texas passed the Manford Act which prohibited unions from charging dues that would “create a fund in excess of the reasonable requirements of such union” – in other words, a fund that could be used for political activity.¹²³ For good measure, the Texas Act also flatly forbade unions from making political contributions.¹²⁴ These laws were replicated in states across the South.¹²⁵

The Democratic push for restrictive labor laws was not confined to state legislatures; Southern Democrats who were CIO targets also took their efforts to Congress.¹²⁶ Thus, in 1943, Howard Smith of Virginia co-sponsored the War Labor Disputes Act, a law that banned political contributions by unions.¹²⁷ Several Southern Democrats who had been targeted by CIO organizing efforts also used their positions on the House Un-American Activities Committee to initiate investigations into the CIO’s political activities.¹²⁸

Of course, restrictive labor laws served purposes beyond political entrenchment. Union activity in the South threatened entrenched economic interests as directly as it threatened entrenched political leaders. But the dual purpose of the Southern Democratic approach to labor policy does not diminish its self-interested political dynamic. As George Norris Green described Texas Democratic politics during this era, the Party establishment “not only feared the economic disadvantages of unionism for Dixie’s corporations, but also opposed Northern labor’s encroachments in the high councils of the Democratic Party.”¹²⁹

The strategic use of labor law as a political entrenchment mechanism became well established in American politics, with lasting effects on both labor law and political power. Perhaps the broadest and most powerful legislative

121. SULLIVAN, *supra* note 111, at 188.

122. Murray Emanuel Polakoff, *The Development of the Texas State CIO Council* 47 (1955) (unpublished manuscript) (on file with authors).

123. 1943 Tex. Gen. Laws 180.

124. See *Labor Laws and Court Decisions*, 56 MONTHLY LAB. REV. 941, 942 (1943).

125. HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 323 (1950).

126. See TRACY ROOF, *AMERICAN LABOR, CONGRESS, AND THE WELFARE STATE 1935-2010*, at 28-30 (2011); SULLIVAN, *supra* note 111, at 174.

127. MILLIS & BROWN, *supra* note 125, at 346.

128. See JOSEPHSON, *supra* note 118, at 608-10.

129. GEORGE NORRIS GREEN, *THE ESTABLISHMENT IN TEXAS POLITICS: THE PRIMITIVE YEARS, 1938-1957*, at 61 (1979).

attack on union political activity came in 1947 when a coalition of Southern Democrats and Northern Republicans, led by Senator Robert Taft of Ohio, passed the Taft-Hartley Act. That statute imposed a wide range of new restrictions on unions, including major restrictions on union political activity and a complete federal ban on closed-shop agreements—thereby invalidating what had been the unions’ primary funding mechanism.¹³⁰ Southern Democrats in Congress were nearly unanimous in their support for Taft-Hartley.¹³¹ O’Daniel, the Texas Governor who had fought the CIO in state politics, was now a U.S. Senator and was particularly open about the political importance of the Act. As he stated on the Senate floor:

When Senators are talking about the closed shop, they are talking about the very heart and soul of the control of our American form of government, because it is the closed shop which siphons off from the taxpayers and the honest laboring people of the country, hundreds of millions of dollars. This is done for the specific purpose of defeating the reelection of any Member of Congress who opposes the labor-leader racketeers, and for the political purposes of using this money that is gained by virtue of the closed shop to elect to the Senate and to the House of Representatives men who will do the bidding of the labor leader racketeers. . . . The situation is a political one.¹³²

130. See generally Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUD. AM. POL. DEV.* 1, 16-17 (2005).

131. The political entrenchment function of the Taft-Hartley Act was also an important motivation for Senator Taft. Going into his 1944 reelection campaign, Taft believed that his position was secure, but the campaign became bitterly contested—and closely fought—when the CIO-PAC entered the race and gave its support to Taft’s opponent. See JAMES T. PATTERSON, *MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* 278 (1972). After the election, Taft placed the blame for his near loss on the CIO, and in particular on its effort to mobilize “labor and the Negroes.” Letter from Robert A. Taft to David S. Ingalls (Nov. 10, 1944), in 2 *THE PAPERS OF ROBERT A. TAFT, 1939-44*, at 609, 609 (Clarence E. Wunderlin, Jr. ed., 2001). As Taft’s biographer tells it, the 1944 campaign “left [Taft] grimly resolved to curb the power of organized labor in the future.” PATTERSON, *supra*, at 278. Returning to the Senate, Taft thus agreed to chair the Labor Committee—instead of the more prestigious Finance Committee, which he had originally favored—in order to pass the antilabor legislation that ultimately became the Taft-Hartley Act. *Id.* at 337-39.

132. 93 *CONG. REC.* 4,888-89 (1947) (statement of Sen. O’Daniel). Another example comes from Wisconsin in the 1950s. After labor unions mounted a substantial political challenge to the incumbent Republican governor—providing fifty-five percent of the Democratic challenger’s campaign contributions—Wisconsin Republicans took notice and introduced a bill to “ban . . . any political activity whatsoever by unions or their officers.” *Catlin Bill Is Signed; Kohler Praises Law*, *MILWAUKEE J.*, May 21, 1955, at 1. As enacted, the Catlin Act “severely reduced labor’s contribution to candidates of its choice and deprived the

Labor law continues to serve this electoral entrenchment function in contemporary politics. As we noted at the outset, because unions are critical institutional supporters of the contemporary Democratic Party, undermining the efficacy of labor unions is a well-understood means by which incumbent Republican leaders can increase their reelection prospects.¹³³ Recall the recent effort by Wisconsin Republicans to suppress opposition by amending the state's labor laws to restrict the collective bargaining rights of public employees and to prohibit public unions from collecting dues through payroll deductions.¹³⁴ Acting on the same motivation, Republican-dominated states

-
- struggling Democrats of a major source of revenue." ROBERT W. OZANNE, *THE LABOR MOVEMENT IN WISCONSIN: A HISTORY* 147 (2011). Democrats at the time recognized the intent and potential effect of the law, arguing that it was "intended to cripple the Democratic Party and fasten one party rule on the state." *Catlin Bill Is Signed, supra*, at 7. The bill's sponsor did not disagree, "hail[ing] the passage of his act as a high water mark for the Republican Party: [t]he power of labor unions to influence elections with money from their treasuries was over." William R. Bechtel & Kenneth Fry, *Catlin Act Vote Shows Big State Politics Shift*, MILWAUKEE J., May 4, 1959, at 5.
133. As J. David Greenstone famously observed, unions have been the "nationwide electoral organization of the national Democratic Party." J. DAVID GREENSTONE, *LABOR IN AMERICAN POLITICS* xiii (1969). While the relative strength of unions has declined in recent years, their position as a central force in Democratic politics remains stable. In the 2012 election cycle, for example, unions contributed one hundred forty-three million dollars to parties and candidates; ninety-one percent went to Democrats. In the 2010 cycle, of the top five highest-spending nonparty organizations, the only organization that supported Democratic candidates was a labor union. See *2010 Outside Spending, By Groups*, CTR. FOR RESPONSIVE POLITICS, at xiii, <http://www.opensecrets.org/outsidespending/summ.php> [<http://perma.cc/9VY3-N6LW>]; see also Hendrik Hertzberg, *Union Blues*, NEW YORKER (Mar. 7, 2011), http://www.newyorker.com/talk/comment/2011/03/07/110307taco_talk_hertzberg [<http://perma.cc/9CJ7-9EGL>]. And union efforts continue to impact election results: in the 2008 presidential elections, union membership increased by twelve percentage points the likelihood that a voter would vote for Barack Obama, and unions boosted Obama's overall national vote share by more than a full point. Nate Silver, *The Effects of Union Membership on Democratic Voting*, N.Y. TIMES: FIVETHIRTYEIGHT (Feb. 26, 2011, 7:00 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/02/26/the-effects-of-union-membership-on-democratic-voting> [<http://perma.cc/7NGF-C3XC>]. In state and local races, the union effect can be even more pronounced.
134. The effect of these restrictions on public sector unions' ability to operate either as economic or political actors has been profound: union representation among Wisconsin's public employees dropped from 53.4% to 37.6% in the two years following the legislation's enactment. See Amanda Becker, *U.S. Union Membership Steady at 11.3 Percent in 2013: Labor Department*, REUTERS (Jan. 24, 2014), <http://www.reuters.com/article/2014/01/24/us-usa-labor-membership-idUSBREA0N1MQ20140124> [<http://perma.cc/H9MG-CJAD>].

Following Wisconsin's lead, the Republican-controlled Ohio Legislature enacted a similar law in 2011. See S. 5, 129th Gen. Assemb., Reg. Sess. (Ohio 2011). Indiana and

across the country have begun to enact so-called paycheck protection bills that prohibit traditional methods of union dues collection.¹³⁵ Commenting on these developments, Steve Fraser and Joshua Freeman have observed: “[W]hat we are seeing is a partisan strategy to defund the Democratic Party, which has received massive amounts of money from the union movement in recent years, especially from public sector unions.”¹³⁶

The discussion so far highlights the ways that incumbents can use substantive policy to neutralize political opposition, in much the same way that poll taxes and primary rules were used to neutralize opposition. But policy can just as easily be used to selectively mobilize political *support*. From an electoral entrenchment perspective, these are interchangeable tactics: both are ways of using the power of incumbency to shift the rules of the political game in incumbents’ favor.

Thus, while in recent decades Republicans have sought to use their offices to undermine union strength in order to neutralize Democratic opposition, Democratic officeholders have just as aggressively sought to bolster unions in order to shore up their own electoral prospects. At the federal level, for example, Congress recently debated the Employee Free Choice Act (EFCA), a bill that would have made private-sector unionization substantially easier.¹³⁷ Nearly the entire Democratic caucus in both the House and Senate supported the bill.¹³⁸ While there were legitimate labor-policy reasons to support EFCA, Democrats could not have missed the possibility that increasing unionization rates and the political power of organized labor would improve their electoral prospects. Critics certainly highlighted this feature of the proposed legislation. Writing in *Labor Watch*, W. James Antle put it this way:

[T]he Democrats and the labor unions have a symbiotic relationship The unions help the Democrats gain power, through

Michigan passed right-to-work statutes in 2012. See IND. CODE. § 22-6-6-8 (2012); 2012 Mich. Pub. Acts 348 (private sector); 2012 Mich. Pub. Acts 349 (public sector).

135. See, e.g., Gordon Lafer, *The ‘Paycheck Protection’ Racket*, ECON. POL’Y INST. (Apr. 24, 2013), <http://s4.epi.org/files/2013/paycheck-protection-racket-tilting-political.pdf> [<http://perma.cc/Q325-XQY5>].
136. Steve Fraser & Joshua B. Freeman, *In the Rearview Mirror: A Brief History of Opposition to Public Sector Unionism*, 20 NEW LAB. F. 93, 96 (2011).
137. See generally Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664-72 (2010).
138. Though not the entire caucus. For example, at least two Democratic senators from states with very low union density—Blanche Lincoln of Arkansas and Ben Nelson of Nebraska—did not support EFCA. See, e.g., Steven Greenhouse, *Fierce Lobbying Greets Bill To Help Workers Unionize*, N.Y. TIMES (Mar. 10, 2009), <http://www.nytimes.com/2009/03/11/business/11labor.html> [<http://perma.cc/F6KR-L8G9>].

their volunteers and their financial contributions. The Democrats return the favor by enhancing the unions' clout and trying to reverse their membership's decline. This in turn means more dues with which to help elect Democrats. The cycle continues¹³⁹

Likewise, at the state level, while Republicans in Ohio and Wisconsin have moved to dismantle public sector unions, Democratic governors and legislatures in states like Illinois, California, Oregon, and Iowa have moved to expand union rights to new groups of public employees.¹⁴⁰ These newly unionized workers will undoubtedly provide a valuable source of organizational and financial support for the Democratic governors and legislators who enabled their organization. Commenting critically on one such law, George Will put the point this way: "[T]he purpose of such systems is to enable unions to siphon away, in dues, a portion of [employees'] pay, some of which becomes campaign contributions for the political party that created the system."¹⁴¹ As Will and others have recognized, labor law affects political power and is a potentially powerful mechanism of political entrenchment.

2. *From Campaign Finance Reform to Tort Reform*

In election law scholarship and Supreme Court case law, campaign finance reform is widely suspected of being another mechanism of incumbent and partisan entrenchment. But formal campaign finance rules are not the only way that incumbents and temporarily dominant parties can shore up their financial advantage. Substantive policymaking can also be used to tilt the campaign-finance playing field. A clear contemporary example is tort reform. Trial lawyers provide a significant portion of the funds relied on by Democratic

139. W. James Antle III, *A Piece of the Action: Labor Expects Much from the Next Congress*, *New Administration*, CAP. RES. CTR. 5 (Dec. 2008), <http://capitalresearch.org/wp-content/uploads/2013/07/LW1208.pdf> [<http://perma.cc/2FPM-ANHY>].

140. For Ohio and Wisconsin, see Becker, *supra* note 134. For Illinois, California, Oregon, and Iowa, see generally Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 382-87 (2007).

141. George Will, *Siphoning Compensation from Caregivers to Unions for Political Contributions*, *MISSOULIAN* (Jan. 21, 2014), http://missoulian.com/news/opinion/columnists/syndicated/george-will-siphoning-compensation-from-caregivers-to-unions-for-political/article_4a57c-a2a-82a2-11e3-b2dd-0019bb2963f4.html [<http://perma.cc/2TVC-HMUB>]. Will's critique is not precisely accurate. Union dues cannot be used for political "contributions" to candidates, but they can be used to fund independent expenditures made on behalf of candidates, so long as the dues-paying union member does not object to such use. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 809-19 (2012).

candidates in both state and federal elections.¹⁴² Trial lawyers, in turn, rely on jury awards to generate the income they channel to Democratic candidates.¹⁴³ Consequently, legal reforms that reduce jury awards are an effective mechanism for staunching the flow of funds to Democrats—and thus an attractive entrenchment device for Republicans.

This calculus contributed to the emergence of tort reform as a central plank in the Republican Party's platform starting in the 1990s.¹⁴⁴ To be sure, Republicans supported tort reform for reasons other than partisan political advantage; tort reform is a policy goal embraced on the merits by many interest groups (and voters).¹⁴⁵ But it is impossible to miss the fact that a significant part of the attraction of tort reform for Republicans was the potential for defunding their Democratic opponents.

Certainly Karl Rove did not miss it. In his early years as a Texas political consultant, Rove presciently anticipated the political potential of tort reform. Beginning in the late 1980s and continuing into the 1990s, Rove worked to elect Republican justices to the Texas Supreme Court with an eye toward reducing the size and frequency of jury awards.¹⁴⁶ When George W. Bush became Governor, Rove also pushed for significant legislative tort reform.¹⁴⁷ As one of Rove's longtime journalistic observers recounted, Rove decided to "run with tort reform" in part because he thought the issue would play well with the Texas electorate, but also because he understood tort reform's partisan potential:

142. See Sachs, *supra* note 141.

143. See, e.g., Timothy P. Carney, *Trial Lawyer Industry Tries To Buy a Democratic Majority*, WASH. EXAMINER (Oct. 22, 2014), <http://www.washingtonexaminer.com/trial-lawyer-industry-tries-to-buy-a-democratic-majority/article/2555105> [<http://perma.cc/9RK5-3WKS>]. This phenomenon is nothing new. See, e.g., Leslie Wayne, *Trial Lawyers Pour Money into Democrats' Chests*, N.Y. TIMES (Mar. 23, 2000), <http://www.nytimes.com/2000/03/23/us/trial-lawyers-pour-money-into-democrats-chests.html> [<http://perma.cc/K4NB-8CAT>].

144. See, e.g., Wayne, *supra* note 143.

145. See *The Effects of Tort Reform: Evidence from the States*, CONG. BUDGET OFF. 2-3 (June 2004), https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_2.pdf [<https://perma.cc/L3RB-PRNF>] (presenting arguments for and against tort reform on the merits).

146. See, e.g., S.C. Gwynne, *Genius*, TEX. MONTHLY (Mar. 2003), <http://www.texasmonthly.com/story/genius> [<http://perma.cc/8SVB-DRAN>]; *Frontline, Karl Rove—the Architect: Interview: Sam Gwynne*, PBS (Apr. 12, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/architect/interviews/gwynne.html> [<http://perma.cc/GSL2-88W5>] [hereinafter *Frontline, Gwynne*].

147. Mimi Swartz, *Left Behind*, TEX. MONTHLY (Nov. 2011), <http://www.texasmonthly.com/story/left-behind> [<http://perma.cc/3XGN-8RDD>].

[I]t happened in the '80s that the major financing of the Democratic Party in Texas . . . began to be done by trial lawyers. If you looked at the biggest givers to the Texas Democratic Party in the '80s and the '90s, you would see at the top of that list trial lawyers. So [tort reform] became this giant pitched battle, because it wasn't just necessarily about the kind of verdicts and the ease with which someone might get a verdict for a plaintiff, but it was also about the back end, which was the financing of the entire Democratic Party.

....

. . . It's a battle for the soul of Texas politics because it's a battle for the money, the lifeline money of Democrats . . .¹⁴⁸

Following Rove's successful use of the strategy in Texas, the Republican Party adopted tort reform as a national cause. In 1994, Newt Gingrich included in his Contract with America a proposed bill called the Common Sense Legal Reform Act,¹⁴⁹ which would have preempted much of state tort law and imposed a federal punitive damages cap of two hundred and fifty thousand dollars in products liability cases.¹⁵⁰ The next year, the Republican-controlled House of Representatives enacted major restrictions on medical malpractice awards.¹⁵¹

Although elected leaders refrained from speaking openly about the political implications of tort reform, Republican activists were less circumspect.¹⁵² In 1994, for example, Grover Norquist published a prominent essay arguing the merits of reform.¹⁵³ Emphasizing trial lawyers' importance to the Democratic Party, Norquist asserted that "[t]he political implications of de-funding the trial lawyers would be staggering."¹⁵⁴ By 1999, with the presidential election of 2000 looming, Norquist reiterated his case, arguing that even "[m]odest tort

148. *Frontline*, Gwynne, *supra* note 146.

149. Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 674 (1996).

150. *Id.* at 675.

151. *Id.* at 680.

152. See generally STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE 97 (2006) ("Republican activists began to talk openly about attacking lawyers because of their pivotal role in funding Democratic politics.").

153. Grover G. Norquist, *A Winning Drive*, AM. SPECTATOR (Va.), Mar. 1994, at 60. The essay discusses the political benefits to Republicans of defunding the trial lawyers in the context of a reform bill that would have enabled individuals to waive the right to sue for pain-and-suffering damages in order to secure reduced automobile insurance premiums.

154. *Id.* at 61.

reform . . . would break the trial lawyers, second only to the unions as a source of funds for the left.”¹⁵⁵

Here again, the same policy that neutralizes political opposition can also mobilize political support. Tort reform seems to have played this dual role for the Republicans in the 1990s and 2000s: not only did it impede the ability of trial lawyers to finance Democratic candidates, it also protected Republican business constituencies from high-dollar tort judgments and thus incentivized (and better enabled) this constituency to act as funders for the Republican Party. As John Podesta, White House Chief of Staff under Bill Clinton, told the *Washington Post*: “Why would you make [tort reform] the cause célèbre? . . . It’s important to them in both directions, both in organizing core elements of their business and doctor communities, and at least undermining a financial base of the Democratic Party.”¹⁵⁶

C. *Shaping the Political Community*

Another well-documented entrenchment technique is for incumbent leaders to use the power of their offices to shape their own polities in such a way as to ensure their lasting support. Election law scholars have been attentive to this possibility in the context of districting, which presents politicians with

155. Grover G. Norquist, *Winner Takes All: The 2000 Elections Will Decide the Democrats’ Future*, AM. SPECTATOR (Va.), Apr. 1999, at 66, 67. In addition to trial lawyers, Norquist named “labor unions” and “Big City machines” as the other two pillars of the Democratic Party. *Id.* at 66. Following the election of President Bush, the Republican leadership did indeed move to enact a series of tort reform measures. Again, neither Bush nor any administration officials spoke of the reforms as mechanisms of entrenchment. But others did: for example, *Washington Post* reporter Thomas B. Edsall wrote of the GOP’s tort reform efforts that “[t]he drive to limit court-awarded damages in civil lawsuits . . . is usually framed as a contest between accident victims’ rights and reasonable constraints on corporate behavior. Increasingly, however, the battle is deeply partisan, as conservative groups try to mobilize the political right and cripple a key Democratic constituency, trial lawyers.” Thomas B. Edsall, *Battle over Damage Awards Takes a More Partisan Turn*, WASH. POST (Aug. 10, 2003), <http://www.washingtonpost.com/archive/politics/2003/08/10/battle-over-damage-awards-takes-a-more-partisan-turn/ade8d300-940e-4e4a-86ba-dao2c437e95> [<http://perma.cc/M96P-MEX8>].

156. Thomas B. Edsall & John F. Harris, *Bush Aims To Forge a GOP Legacy: Second-Term Plans Look To Undercut Democratic Pillars*, WASH. POST (Jan. 30, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A47559-2005Jan29.html> [<http://perma.cc/W7CN-HW27>]. Similarly, Ed Lazarus, a Democratic strategist, described tort reform as a “double header” because it worked both to “defund the Democratic Party”—by choking off tort damage awards—and to provide increased support to the Republicans by motivating donations by those industries negatively impacted by tort awards, including the pharmaceutical industry. Edsall, *supra* note 155.

the valuable opportunity to choose their voters. But here again, there are functional substitutes to gerrymandered districts. Substantive programs and policies can also be used to reshape politics in self-reinforcing ways by increasing the number of proponents relative to opponents. For example, municipal gun control or antismoking ordinances will predictably gain political support over time as gun owners and smokers either give up their firearms and cigarettes or exit the jurisdiction, either way resulting in a higher percentage of unarmed and nonsmoking supporters of the relevant policy and the officials who promulgated it.¹⁵⁷ Laws permitting more immigration or providing for the better treatment of immigrants will be similarly self-reinforcing, as a greater number of immigrants exercise more political power for the benefits of their successors.¹⁵⁸

Although some selection effects along these lines will be unintentional, strategic politicians have every incentive to manipulate policy for the purpose of shaping their electorates and entrenching their hold on power. A famous example is the “Curley Effect,” described by Edward Glaeser and Andrei Shleifer.¹⁵⁹ James Michael Curley, who served four terms as the mayor of Boston during the first half of the twentieth century, was supported by a political base of lower-income Irish residents but opposed by Boston’s wealthier Anglo-Saxon voters. To increase his own electoral prospects, Curley was interested in keeping poor Irish in the city and in encouraging the wealthy Anglo-Saxons to leave. With no formal immigration law at his disposal, Curley instead used his control over public projects, patronage, zoning laws, and the like to make things as hospitable as possible in Boston for his own voters and as uncomfortable as possible for his opponents.¹⁶⁰

Selecting a supportive constituency ensured these leaders’ political survival and thus the continuation of their broader policy agendas.¹⁶¹ In the remainder

157. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1116-18 (2003). Given Tiebout sorting dynamics, these examples can be generalized to different kinds of policy decisions, especially at the municipal level where exit is less costly.

158. See *id.* at 1118-19.

159. Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1 (2005).

160. See *id.* at 10-12.

161. Less strategic politicians may be victimized by political selection effects running in the opposite direction. See, e.g., Shaila Dewan, *Gentrification Changing Face of New Atlanta*, N.Y. TIMES (Mar. 11, 2006), <http://www.nytimes.com/2006/03/11/national/11atlanta.html> [<http://perma.cc/2ZZM-63CV>] (quoting a community leader as saying that African American mayors have “cut [their] own throat[s]” by encouraging gentrification that has decreased the percentage of black voters in the city). Daron Acemoglu and James Robinson generalize this threat to many historical and political contexts to explain why power holders

of this Section we consider two additional cases in which parties and politicians have quite clearly and self-consciously pursued entrenchment through the selection of a favorable electorate. The first example is the admission of new states in a federal system. Because each such admission threatens to shift the balance of overall federal power, those decisions are made with an eye to maintaining control by the currently dominant federal party. The second example is immigration policy, through which incumbents literally define their own polities.

1. *From Gerrymandering to State Admissions*

In a federal system, the admission of new states can shift the balance of national power in the direction favored by the representatives of the newly admitted state. Consequently, current legislative majorities can cement their hold on power by selectively admitting, or not admitting, new states. As we will show, this dynamic, just like gerrymandering, can be bipartisan or partisan. In the bipartisan form, legislatures lock in a policy status quo by designing state admissions policy in a way that maintains the current balance of partisan power. In the partisan form, a dominant party advances its own policy agenda and insulates that agenda against subsequent change by manipulating the admissions policy.

The antebellum period provides a clear instance of bipartisan agreement on state admissions for the purpose of maintaining the policy status quo. In the antebellum era, the relevant policy was slavery, and disputes over state admissions were primarily proxy fights in the sectional battle over slavery.¹⁶² During much of this period, there was an equal balance of power between Northern and Southern states in the Senate, which enabled either section to block policies they opposed.¹⁶³ But the balance of power meant that each state

often oppose economic development, out of fear that the resulting shifts in economic and political power will lead to their downfall. See ACEMOGLU & ROBINSON, *supra* note 11, at 83-91.

162. See, e.g., DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 33 (1976); see also Nolan McCarty et al., *Congress and the Territorial Expansion of the United States*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 392, 398 (David W. Brady & Mathew D. McCubbins eds., 2002) (“The admission of new states during the antebellum period was tied to the conflict over slavery . . .”). See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 152-87* (1978) (describing the events leading up to the Kansas-Nebraska Act of 1954).

163. See Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in *ANALYTIC NARRATIVES* 148, 151 (Robert H. Bates et al. eds., 1998).

admission could shift political control of the Senate, and thus control over national policymaking, to one region or the other.

With the Senate evenly divided, neither North nor South could dominate admissions politics, but each side could ensure the continuation of the status quo. The result was a series of political compromises in which slave and free states were admitted in pairs. Thus, at the time of the debate over the admission of Missouri as a slave state in 1819, there were eleven northern states and eleven southern states in the Union.¹⁶⁴ Missouri's admission, therefore, created the possibility that slave states would predominate over free ones.¹⁶⁵ To prevent this political shift and the policy consequences it would threaten, Northerners in Congress insisted that Maine enter the Union as a free state as a concession for their allowing Missouri to enter as a slave state.¹⁶⁶ The Missouri Compromise established a pattern that Congress would follow for some time, with slave and free states entering together, to preserve the Senate's sectional balance.¹⁶⁷ This so-called balance rule "protected Northerners against the dominance of national policymaking by the South, and it protected Southerners against the antislavery initiatives of the North."¹⁶⁸ In other words, it enabled Congress—in a bipartisan and bisectional manner—to lock in the national status quo on the slavery question.

But sectional balance in the Senate did not survive. By the early 1860s, Republicans had control of Congress, and the party was then able to use state admissions policy to enact its national agenda and insulate that agenda against subsequent reversal by Democrats. The admission of Nevada in 1864 provides one early and stark example of this strategy. When the state was admitted in 1864, Nevada's population was approximately forty thousand, and its economy was undeveloped.¹⁶⁹ Thus, Nevada's admission was "the most egregious effort in the nation's history to disregard population and economic criteria in order to

164. See THE FREDERICK DOUGLASS ENCYCLOPEDIA 123 (Julius E. Thompson et al. eds., 2010); H. Jason Combs, *Slavery in the Platte Region*, 15 NEB. ANTHROPOLOGIST 8, 9 (1999).

165. POTTER, *supra* note 162, at 53.

166. See FEHRENBACHER, *supra* note 162, at 107.

167. Weingast, *supra* note 163, at 154 tbl.4.1. The pattern predates the Missouri Compromise, and may indeed date back to the Founding and the admission of Vermont as a counterbalance to Kentucky.

168. See *id.* at 151.

169. See generally RUSSELL R. ELLIOTT, HISTORY OF NEVADA 70-71, 99 (1973). Nearly a century before Nevada was admitted, "[w]hen the Northwest Territories were divided into states, Congress required a population of 60,000 for each territory to be admitted." Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1678 (1991) (citing Northwest Ordinance of 1787, § 14, art. VI, ch. 8, 1 Stat. 50, 51 n.(a)).

admit a state for political reasons.”¹⁷⁰ Those political reasons were clear: Nevada may well have been admitted “to bolster Republican numbers in the Senate” and to “provide votes for the ratification of the Thirteenth Amendment [and] Lincoln’s reelection in 1864.”¹⁷¹ The State did both.¹⁷²

Across the 1860s and 1870s, Republicans continued to admit Republican states to the Union, enabling the party to lock up control of the Senate and thereby enact—and entrench—its favored policies.¹⁷³ Summarizing the Republican Party’s approach to state admission policies across the period, Charles Stewart and Barry Weingast write:

Republican political hegemony in the 1860s allowed them a head start in the race to admit new states. During the secession crisis, congressional Republicans took advantage of the withdrawal of southern members to admit Kansas as a free, and Republican, state. Over the objections of the few remaining Democrats, Congress accepted the Unionist government in Wheeling as the legitimate government of Virginia, accepted its vote consenting to the partition of Virginia, and admitted West Virginia as a new state. While denying admission to the more populous (but Democratic) Utah, Congress voted to admit (Republican) Nevada when its population was only one fifth that of the next-smallest state and one seventh that of Utah. By the time the South fully returned to Congress . . . one sixth of the Republican delegation in the Senate came from states admitted during the Civil War and Reconstruction, and three of these four states . . . provided a nearly solid core of Republican voting strength in the Senate for the rest of the century.¹⁷⁴

170. Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 *STUD. AM. POL. DEV.* 223, 232 (1992).

171. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 *AM. J. LEGAL HIST.* 119, 141 & n.76 (2004); see also ELLIOTT, *supra* note 169, at 83-84; LESLIE BURNS GRAY, *THE SOURCE AND THE VISION: NEVADA’S ROLE IN THE CIVIL WAR AMENDMENTS AND THE RECONSTRUCTION LEGISLATION* 31, 45 (1990); GILMAN M. OSTRANDER, *NEVADA: THE GREAT ROTTEN BOROUGH 1859-1934*, at 35 (1966).

172. See Stewart & Weingast, *supra* note 170, at 236 (“Nevada regularly sent Republicans to Congress, in both chambers, for the next thirty years. It dutifully provided three additional electoral votes for Lincoln in 1864, ratified the Thirteenth Amendment, and continued to vote Republican until 1876.”).

173. See *id.* at 246, 270.

174. *Id.* at 227 (footnote omitted).

More contemporary state admissions debates also reflect these entrenchment dynamics. When Alaska and Hawaii's admissions were being debated in 1953, Republican congressional majorities opposed statehood for Alaska because it was a historically Democratic territory; they supported Hawaii's admission because of that territory's more conservative political constituency.¹⁷⁵ Likewise, in the ongoing debate over statehood for the District of Columbia, Republicans oppose admission and Democrats support it because of the predictable partisan impact that D.C. statehood would have on the congressional balance of power.¹⁷⁶

2. *From Suffrage Restrictions to Immigration*

Immigration policy is another obvious lever for expanding or restricting the scope of the political community. Unsurprisingly, it too has been used throughout American history as a mechanism of entrenchment.¹⁷⁷ In 1798, for example, Congress increased the number of years an immigrant had to be present in the United States before naturalization from five to fourteen and thus significantly delayed the enfranchisement of newly arrived American residents.¹⁷⁸ Although there were likely a range of motivations for these policies, Adam Cox and Eric Posner argue that this delay was orchestrated by the Federalist Party in part as a means of preventing immigrants from installing Jeffersonians in power.¹⁷⁹ Daniel Tichenor similarly describes it as "an effort by the Federalist party to forestall its imminent loss of political power."¹⁸⁰ When, in the elections of 1800, the Federalists did lose their hold on national political power, the Democratic-Republicans who took control of the federal government changed the residency requirement back to five years.¹⁸¹ The political consequences of these shifts in immigration law were not lost on

175. See Jonathan S. Ross, Note, *A New Answer for an Old Question: Should Alaska Once Again Consider a Unicameral Legislature?*, 27 ALASKA L. REV. 257, 262-63 (2010).

176. See, e.g., Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 161-62 (1991).

177. See Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1447 (2009).

178. Naturalization Act of 1798, ch. 56, 1 Stat. 566 (repealed 1802). The five-year residence period had been established by the Naturalization Act of 1795, ch. 20, 1 Stat. 414, which was repealed in 1802.

179. Cox & Posner, *supra* note 177, at 1448.

180. DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 54 (2002).

181. See Naturalization Act of 1802, ch.28, 2 Stat. 153.

contemporary observers. Tichenor recounts how “Federalist newspapers like the *Columbia Sentinel* featured naturalization policy in an extended series exploring how Jeffersonians translated proimmigrant policies into foreign-born votes.”¹⁸²

In the 1800s, Democrats continued to push for liberal immigration and naturalization policies, in part because of their predictable electoral effects. At the local level, “Democratic organizations worked hard to enfranchise white male newcomers as swiftly as possible,” and, in 1845, a congressional investigation found that “urban Democratic political machines were well practiced at naturalizing thousands of immigrants just before elections.”¹⁸³

That political dynamic continues to prevail in contemporary politics, with the Republican Party pushing to delay the naturalization of immigrants currently residing in the United States, and the Democratic Party attempting to ensure that naturalization. Thus, under President Clinton, the Immigration and Naturalization Service launched a program called Citizenship USA, which aimed to speed up naturalization.¹⁸⁴ Republicans at the time viewed Citizenship USA as an attempt to increase the number of Democratic voters, and charged that a top aide to Vice President Gore had called the program a “pro-Democratic voter mill.”¹⁸⁵

Similarly, the immigration bill passed by the Democratic-controlled Senate in June 2013 contained a path to citizenship for the eleven million undocumented immigrants currently living in the country.¹⁸⁶ This population consists primarily of low-income Hispanics, who vote by great margins for Democratic candidates.¹⁸⁷ The undocumented population, if naturalized, would also constitute a significant percentage of the electorate in several states crucial to presidential politics: by 2020, formerly undocumented immigrants are projected to make up 7.1% of the electorate in Texas, 6.7% in Arizona, 7.8%

182. TICHENOR, *supra* note 180, at 55.

183. *Id.* at 59.

184. Sara Fritz, *Gore Immigrant Program Role Draws Fire*, L.A. TIMES (Oct. 6, 1996), http://articles.latimes.com/1996-10-06/news/mn-51224_1_vice-president [<http://perma.cc/8MYP-VR62>].

185. *Id.*

186. S. 744, 113th Cong. (2013).

187. See Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW RES. CTR. (Nov. 7, 2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election> [<http://perma.cc/S9KQ-BAKY>]; Jeffrey S. Passell & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. (Apr. 14, 2009), <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states> [<http://perma.cc/Z4JX-8F82>]; *A Nation of Immigrants*, PEW RES. CTR. (Jan. 29, 2013), <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants> [<http://perma.cc/DRK2-7NUS>].

in Nevada, 4.9% in Florida and Georgia, and between 2% and 4% in Colorado, Virginia, and North Carolina.¹⁸⁸

While Democrats supported citizenship for these undocumented residents, Republicans in the Senate not only opposed the path to citizenship, but also offered amendments that would have lengthened the time to naturalization and made the requirements for naturalization more onerous than they are today.¹⁸⁹ Republican commentators are not shy about defending this decision on electoral grounds. Thus, Laura Ingraham argued in a *Washington Post* opinion piece that the GOP should continue to oppose immigration reform: “In light of . . . the experience of California—which has shifted from a Republican stronghold to one of the most liberal states in the country, in large part because of the rise of its immigrant population—it is absurd to pretend that allowing even more immigrant voters wouldn’t be a boon to the Democrats.”¹⁹⁰ Similarly, Rush Limbaugh called immigration reform “Republican suicide.”¹⁹¹

D. Switching Decision Makers

The previous two entrenchment strategies operate by shifting the relative power of groups with a say in the political decision-making process. A further strategy is to shift the *locus* of political decision making, empowering a different set of political actors and groups. For example, the delegation of authority to independent central banks is often viewed as a mechanism for resisting political demands by short-sighted politicians and popular majorities for inflationary and otherwise misguided monetary policies.¹⁹² Central banks that can be successfully insulated from these political pressures enable

188. Walter Hickey, *How a Path to Citizenship for Illegal Immigrants Would Influence the Presidential Election of 2020*, BUS. INSIDER (Mar. 20, 2013), <http://www.businessinsider.com/impact-of-a-path-to-citizenship-on-2020-election-2013-3> [<http://perma.cc/6U9Q-5HGZ>].

189. See, for example, Senator Jeff Sessions’s amendments in committee markup and on the floor. For a full summary of amendments considered during committee markup, see S. REP. NO. 113-40 *passim* (2013), <http://www.congress.gov/113/crpt/srpt40/CRPT-113srpt40.pdf> [<http://perma.cc/5RK8-RYGP>].

190. Laura Ingraham, Opinion, *Why Conservatives Should Say No to Immigration Reform*, WASH. POST (Feb. 19, 2014), http://www.washingtonpost.com/opinions/laura-ingraham-why-conservatives-should-say-no-to-immigration-reform/2014/02/19/85ae3438-98fo-11e3-b931-0204122c514b_story.html [<http://perma.cc/W2R4-2JC4>].

191. *The Amnesty Bill Is GOP Suicide*, RUSH LIMBAUGH SHOW (Apr. 26, 2013), http://www.rushlimbaugh.com/daily/2013/04/26/the_amnesty_bill_is_gop_suicide [<http://perma.cc/KQ79-VR9K>].

192. See ALLAN DRAZEN, *POLITICAL ECONOMY IN MACROECONOMICS* 144 (2000); Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. ECON. 1169 (1985).

governments to entrench sound monetary policies. Independent central banks may also enable “political leaders [to] bind the hands of their successors in the formation of monetary policy,” locking in their preferred policies even after they have been voted out of power.¹⁹³

As this example illustrates, relocating decision-making authority to institutional actors that are relatively insulated from political forces can shield policies from change. Variations on this strategy, discussed below, include delegations to courts, administrative agencies, and international governance bodies. To the extent these institutions are likely to be controlled by political allies of the delegator, and to the extent the delegation will be relatively difficult to retract,¹⁹⁴ this can be an effective mechanism of policy entrenchment.

1. *From Legislative Entrenchment to Judicial Entrenchment*

Social scientists and legal scholars alike have recognized that politicians can entrench their policies and protect their hold on power by delegating decision-making authority to a politically insulated judiciary. Thus, working within a public choice paradigm, William Landes and Richard Posner famously argued that an independent judiciary was a useful tool for legislators who wanted to deliver statutory benefits for interest groups in exchange for campaign contributions and political support. By enforcing the initial bargains against downstream legislatures with political incentives to renege, Landes and Posner argued, courts could increase the durability—and thus the value—of these interest group bargains.¹⁹⁵

In the United States, since the early days of the Republic, presidents and parties often have resorted to a similar strategy of “political entrenchment in the judiciary” to preserve their preferred policies in the face of political defeat. Having lost control of the national government to the Republicans in the election of 1800, the lame-duck Federalist Congress famously passed the 1801 Judiciary Act, the so-called “Midnight Judges Act,” expanding the size and jurisdiction of the federal judiciary and creating the opportunity for President Adams to appoint a number of loyal Federalists to life terms on the bench. Furious that the Federalists had packed the judiciary on their way out of office, newly elected President Jefferson clearly understood the political strategy in

193. John B. Goodman, *The Politics of Central Bank Independence*, 23 *COMP. POL.* 329, 334 (1991).

194. This condition is crucial, yet often overlooked. See Levinson, *supra* note 17, at 681–83.

195. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875 (1975).

play: “[The Federalists] have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased.”¹⁹⁶

This strategy was executed more effectively by Republicans in the late nineteenth century. As they perceived the electoral tide beginning to turn against them, the Republican Party sought to lock in their agenda of conservative “economic nationalism” by expanding the jurisdiction of the federal courts and staffing them with ideologically sympathetic judges and Justices.¹⁹⁷ As the political scientist Howard Gillman has described, the “increased power, jurisdiction, and conservatism of federal courts during this period was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism during a time when that agenda was vulnerable to electoral politics.”¹⁹⁸

Jack Balkin and Sanford Levinson generalize from examples like this to emphasize the importance to American political and constitutional development of what they call “partisan entrenchment”: the strategic appointment of politically and ideologically aligned judges and Justices whose tenures will outlast party control over the political branches of government.¹⁹⁹ Balkin and Levinson emphasize that presidents and parties are motivated to engage in partisan entrenchment not just to “secure a bench likely to assist the President with his current political agenda” but also “to secure future influence even when the party loses power.”²⁰⁰ From this perspective, federal judges and Justices are simply “temporally extended representatives of particular parties,” or representatives of “a temporally extended majority,” and “hence, of popular understandings about public policy and the Constitution.”²⁰¹ Thus, picking up shortly after the historical point where Gillman leaves off, Balkin and Levinson point to the early New Deal period, in which “the federal judiciary, which had been entrenched by the Republican Party, mostly resisted the Democrats’

196. Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 THE WRITINGS OF THOMAS JEFFERSON 302, 302 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

197. Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512-13, 516-17 (2002).

198. *Id.* at 511.

199. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

200. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 495 (2006).

201. Balkin & Levinson, *supra* note 199, at 1067, 1076.

proposed construction of the regulatory and welfare state.”²⁰² Examples like this could be extended through the present. For instance, one account of the politics of judicial appointments during Ronald Reagan’s presidency emphasizes that the administration “approached [judicial] appointments as a way ‘to institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.’”²⁰³

2. *From Legislative Entrenchment to Administrative and International Entrenchment*

A close analogue to judicial entrenchment is administrative entrenchment. Temporarily prevailing parties and political coalitions can extend their influence beyond the boundaries of political defeat by delegating decision-making authority to an administrative agency that is relatively insulated from political control, effectively “lock[ing] in policies so they are not reversed or undone when political power changes hands.”²⁰⁴ For example, McNollgast portrays the 1946 enactment of the Administrative Procedure Act (APA) as a strategy for entrenching the New Deal.²⁰⁵ When it became increasingly likely that the Democrats would lose the White House in 1948, the Party—while still in Congress—supported the imposition of procedural restrictions on the administrative agencies it had recently created. According to McNollgast, the Democrats supported the APA and its procedural restraints on agency action as

202. Balkin & Levinson, *supra* note 200, at 534. From a normative standpoint, Balkin and Levinson for the most part view partisan entrenchment through the judiciary as an attractive feature of American democracy, one that plays the important role of mediating the tension between constitutionalism and democratic self-government. *Id.* But they also believe it can sometimes go too far. Thus, when it comes to the Supreme Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000), Balkin and Levinson condemn what they see as “five members of the Court using their powers of judicial review to entrench their party in the Presidency, and thus, in effect, in the judiciary as well, because of the President’s appointments power.” Balkin & Levinson, *supra* note 199, at 1080. Why we should be fine with Presidents and parties entrenching their policy positions through judicial appointments, but not with Presidents entrenching themselves in office by way of favorable rulings about election law coming from their judicial appointees, is not entirely clear.

203. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 220 (2008) (quoting David M. O’Brien, Opinion, *Meese’s Agenda for Ensuring the Reagan Legacy*, L.A. TIMES (Sept. 28, 1986), http://articles.latimes.com/1986-09-28/opinion/op-9537_1_edwin-meese-iii [<http://perma.cc/K3U7-3RAF>]).

204. Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 288-89 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (surveying the relevant literature); *see also supra* note 13 and accompanying text.

205. McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180-83 (1999).

a means of “‘hard wir[ing]’ the policies of the New Deal against an expected Republican, anti-New Deal political tide.”²⁰⁶ In particular,

[t]he danger was that a Republican president could use this broad discretion to undo much of New Deal regulatory policy simply by appointing anti-New Dealers to head these agencies. Since procedural restraints make it costly and politically difficult for agencies to change existing policy, the establishment of procedural due process would blunt any Republican president’s ability to dismantle or shift the regulatory policies of the New Deal.²⁰⁷

Decisions about administrative agency design can also entrench policy by setting into motion the type of policy-mobilization cycle described earlier. As Jonathan Macey argues, the design of administrative agencies can “perpetuate the power and legitimacy of certain [interest] groups and undermine the power and legitimacy of others.”²⁰⁸ Interest groups empowered by a particular agency design will, of course, be the groups most likely to influence agency decision making in the future. So, legislatures can entrench their policy preferences by designing agencies in ways that empower the interest groups that share the preferences of the enacting legislature.²⁰⁹

The executive can use agencies as an entrenchment device too. One way is through what Nina Mendelson has called “agency burrowing,” which occurs when an outgoing, lame-duck presidential administration engages in last-minute attempts to entrench its policy preferences through various executive

206. *Id.* at 180.

207. *Id.* at 192. Once again, we might question why the Republicans did not just enact a statute repealing or revising the APA. The possibility of entrenchment by way of delegation to, or design of the structure and process of, administrative agencies assumes that these arrangements cannot be disentranced as easily as they were enacted. *See* Stephenson, *supra* note 204.

208. *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99 (1992).

209. As one example of this design dynamic, Macey points to the decision about whether an agency will regulate a range of industries with distinct interests (the Occupational Safety and Health Administration, for example) or whether the agency will be structured so as to regulate a single industry (the Commodities Futures Trading Commission, for example). *See id.* at 99, 104-08. Macey’s argument is that an agency with a single-industry jurisdiction is more likely to empower that industry’s interest group than is an agency that regulates a range of industries and thus competing interest groups. *See id.* at 104-08. The structure and design of an agency can ensure that the policy preferences of the regulated industry will continue to be enacted by the agency, even if the electoral majority that established the agency is no longer dominant. *See id.* at 108-09.

actions.²¹⁰ On the model of partisan entrenchment in the judiciary, the administration can engage in “personnel burrowing,” converting agency political appointees into civil service employees in order to keep them in their jobs beyond the end of the President’s term.²¹¹ The idea is that these appointees will carry the (former) President’s policy preferences forward with them.²¹²

Along similar lines, Elizabeth Magill has described how administrative agencies often impose limitations on their own discretion to act as a means of ensuring that policies implemented by the sitting agency are difficult to change by the appointees of the subsequent administration.²¹³ For example, agencies sometimes offer greater procedural protections than the APA requires.²¹⁴ Just as procedural rules imposed by the APA create hurdles to policy change, this and other forms of agency “self-regulation” can increase these hurdles and more fully insulate the policy status quo. As Magill elaborates, a “self-regulatory measure might create a process that involves so many key actors that the status quo bias would be great because it takes so many to agree to change policies or because the specific actors empowered under the regime will predictably hold particular views.”²¹⁵

The same basic strategy of entrenchment can be pursued through “upward” delegations to international organizations. Scholars of international relations have described how temporarily prevailing political coalitions can make use of international agreements to preserve policies threatened by domestic politics by placing them under the control of international organizations that are insulated by a democracy deficit.²¹⁶ Thus, looking at the human rights context in the late 1940s, Andrew Moravcsik observed that reciprocally binding human rights obligations tended to be supported only by newly established – and therefore tenuous – democratic governments, and that

210. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 560-61 (2003).

211. *Id.* at 606.

212. *Id.* at 608.

213. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861-62 (2009).

214. *Id.* at 868.

215. *Id.* at 888. Such self-regulatory agency behavior is particularly effective given the judicial doctrine that requires agencies to adhere to their own procedural rules. *See id.* at 873-76.

216. *See, e.g.*, Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT’L ORG. 519 (2000); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 511-24 (2004); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT’L L. & POL. 707, 727-34 (2006); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 231-36 (2010).

they tended to be rejected by both established democracies and dictatorships.²¹⁷ Moravcsik explains this phenomenon with an entrenchment analysis: the current political leadership of new democracies signed on to binding human rights agreements in order to “lock[] in’ the domestic political status quo against their nondemocratic opponents.”²¹⁸

Even better, both types of delegation—to domestic agencies and to international decision-making processes—can be combined to create a kind of double entrenchment. This is the story told by Rachel Brewster about the entrenchment of banking regulation.²¹⁹ A group of central banks, including the U.S. Federal Reserve, agreed through the Basel Accords to establish minimum capital requirements for banks.²²⁰ From the perspective of the U.S. political process, the requirements contained in the Accords might be viewed as doubly entrenched: set as an initial matter by the Federal Reserve, an insulated political actor, and then entrenched against change by the Federal Reserve itself by the greater political costs of violating international agreements.

E. Summary

Political entrenchment can occur formally, but it can also occur functionally. Incumbent power holders can preserve their hold on office by manipulating the formal rules of election law; but they can also manipulate substantive policy in order to neutralize their political opposition, mobilize their own supporters, and define the polity that will decide their next election. Likewise, if formal legislative entrenchment is off the table, power holders can lock in their policies and programs by organizing and empowering a constituency that will resist retrenchment or by delegating decision-making authority to an institution that will remain politically committed to preservation.

A recent article by Richard Lazarus, tellingly entitled *Super Wicked Problems and Climate Change: Restraining the Present To Liberate the Future*, offers a useful illustration of the discussion so far.²²¹ In a moment of hope that Congress and the President would enact climate change legislation, Lazarus takes as his project to design this potential statute in such a way as to entrench

217. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 219-20 (2000).

218. *Id.* at 244.

219. Brewster, *supra* note 216, at 517-18.

220. *Id.* at 517.

221. Lazarus, *supra* note 14.

it against political opposition in the future. He recommends, and sketches, “precommitment strategies” that would “insulate programmatic implementation to a significant extent from [the] powerful political and economic interests” that will predictably be opposed to, and intent upon eroding, an aggressive environmental regulatory regime.²²² “[N]otwithstanding th[e] undemocratic effects” of such strategies, Lazarus believes that current lawmakers would be justified in “making it more difficult for future legislators and agency officials to substitute their views of sound policy for the judgment of past lawmakers” for the purpose of saving the planet from the catastrophic effects of climate change.²²³

Of course, one way of entrenching a climate change statute would be to make it formally unrepeatable. Lazarus considers this option, but ultimately rejects it, in part because legislative entrenchment is of dubious constitutionality and would become a source of controversy, and in part because an absolute ban on amendment would be too extreme.²²⁴

Instead, Lazarus recommends a series of functional entrenchment strategies. One possibility would be to “design federal climate legislation in a manner that would create a powerful political constituency with a strong economic incentive favoring the legislation’s preservation”—for example, by including a tradable emissions program that would attract large investments in emissions rights.²²⁵ Another would be “to couple domestic climate change legislation with the United States’ agreement to international treaty obligations,” which would “significantly raise the political cost of any retreat.”²²⁶ Other measures would be designed to protect and promote climate change regulation in the executive branch, pursuant to statutory delegation. On the model of the Federal Reserve, Lazarus suggests ways of insulating agency officials in charge of implementation from “pressures likely to derive from short-term economic concerns, which [might] undermine the law’s effectiveness.”²²⁷ He also suggests ways to structure the regulatory process in order “to enhance the influence of interest groups that are concerned about protecting future generations but which otherwise lack the necessary economic or political clout.”²²⁸ As Lazarus clearly appreciates, these strategies of

222. *Id.* at 1158.

223. *Id.* at 1157.

224. *Id.* at 1207-09.

225. *Id.* at 1210.

226. *Id.* at 1209.

227. *Id.* at 1212; *see also id.* at 1212-16 (describing strategies for insulating agency officials).

228. *Id.* at 1212; *see also id.* at 1216-25 (describing strategies for enhancing interest-group clout).

functional entrenchment serve as close substitutes for formal entrenchment of either the legislative or electoral varieties.

The Bush tax cuts of 2001 and 2003 provide another vivid illustration of the substitutability of formal and functional entrenchment. The tax cuts were enacted with sunset provisions, so that they would automatically expire in 2010.²²⁹ This raised no flags from a legal perspective; quite the contrary, sunset provisions are precisely the opposite of the kind of formal legislative entrenchment of which public law disapproves. Yet political observers noticed that the tax cuts, even while couched as temporary for purposes of facilitating enactment and disguising their likely budgetary implications, were in fact engineered to be self-entrenching.²³⁰ The reforms were “tailored to shape the politics of tax cuts down the line in ways that favored tax-cutters’ long term goals,”²³¹ creating a political dynamic that would lead to their extension—essentially duplicating the effect of an unrepealable statute. Furthermore, linking legislative to electoral entrenchment, Republicans might well have expected that political support for the tax cuts would “provide a powerful motivation for the wealthy to bankroll Republican reelection efforts in the future.”²³² Once again, the moral is that, even if the pathways of formal entrenchment are closed, there will often be a functional pathway that leads to the same destination.

III. RATIONALIZING ENTRENCHMENT?

We have seen that courts and public law scholars view formal electoral and legislative entrenchment as matters of grave normative concern and as appropriate targets for legal regulation. We have also seen that in many contexts functional entrenchment strategies appear to be close substitutes for these formal ones. Yet the seemingly ubiquitous phenomenon of functional entrenchment has never been perceived as problematic in public law.²³³ And to

229. For a description of the tax cuts and their sunset provisions, see Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 338, 370-83 (2006).

230. JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 60-62 (2005) (describing this feature and quoting one commentator’s observation that “[t]he lesson of the Bush tax-cutting record is that what matters is structural change and political leverage down the line”).

231. *Id.* at 58.

232. *Id.* at 61.

233. This descriptive claim is mostly an inference from omission. However, in response to Posner and Vermeule’s example of bicycles in the park, see *supra* note 103 and accompanying text,

make matters more confusing, in at least one major area—constitutional law—entrenchment is widely embraced.

In this Part, we explore whether there is any way of rationalizing public law's seemingly inconsistent treatment of the various forms of political entrenchment. Section III.A asks whether there is any good reason for viewing formal entrenchment as a bigger problem or a more sensible target of legal regulation than functional entrenchment. Section III.B then expands the frame of analysis, first, to ask whether there is any good reason for regarding subconstitutional entrenchment as any more problematic than constitutional entrenchment; and second, to question whether a meaningful category of entrenchment—or the reasons for worrying about it—can be coherently bounded at all.

A. *The Uneasy Case for Policing Formal but Not Functional Entrenchment*

Is there any good reason for believing that formal entrenchment should be prohibited and policed, while functional entrenchment should be tolerated or ignored? One possibility is that formal entrenchment is more harmful than functional entrenchment. Another is that, even if the two forms are equally harmful, formal entrenchment is easier to identify and therefore a more workable target for legal regulation. We discuss each of these possibilities in turn.

1. *Harmfulness*

The near-consensus view in the public law literature is that formal electoral and legislative entrenchment are socially harmful and legally undesirable, if not outright prohibited.²³⁴ As we have seen, commentators emphasize the unfair aggrandizement of political power by upstream decision makers at the expense of their successors, the frustration of present majority will, and the costs of locking in bad or anachronistic policies.²³⁵ Nightmare scenarios are front and

critics of legislative entrenchment have been explicit in insisting that formal entrenchment is a different and more problematic phenomenon. See Dana & Koniak, *supra* note 67, at 530-31; Roberts & Chemerinsky, *supra* note 77, at 1813-19; Stewart E. Sterk, *Retrenchment of Entrenchment*, 71 GEO. WASH. L. REV. 231, 238-39 (2003).

²³⁴ Posner and Vermeule are a major exception with respect to legislative entrenchment, and much of what they say in defense of that practice applies to entrenchment more broadly. See Posner & Vermeule, *supra* note 24. Eule goes out of his way to recognize some of the functional benefits of entrenchment before proceeding to conclude that legislative entrenchment is nonetheless unconstitutional. See Eule, *supra* note 67, at 390-91.

²³⁵ See *supra* Section I.B.

center. A lame-duck Democratic Congress, facing a newly elected Republican Congress and President, enacts a statute entrenching its entire legislative program against modification or repeal.²³⁶ After the enactment of an entrenched statute defunding all nuclear weapons for ten years, an unforeseen threat to U.S. national security arises that only nuclear weapons could deter.²³⁷ When a temporarily dominant political party or coalition takes measures to cement itself in power or block the channels of political change, the specter of oligarchy or dictatorship menacingly looms.

The social science literature on functional entrenchment takes a more balanced normative perspective. While social scientists certainly have not missed the fact that self-serving political actors can use various entrenchment techniques to lock in their political gains at the expense of opponents and the public at large, the literature on functional entrenchment recognizes that, in at least some contexts, “entrenchment is a legitimate goal in a democratic polity.”²³⁸ After all, the risk of locking in ill-motivated or mistaken policies must be weighed against the possibility of insulating good policies against ill-motivated or mistaken reversals. If, for instance, preventing global warming will improve social welfare in the long run, then society might well benefit by insulating these policies against short-term or partial interests as Lazarus contends.²³⁹ Delegation to central banks, international organizations, and independent judiciaries can be a vehicle for entrenching sound monetary policies, free trade, and human rights.²⁴⁰

Even if there is no reason to expect prior political decisions to be substantively better than later ones, social scientists emphasize that stability and predictability can be valuable in their own right.²⁴¹ Thus, many of the foundational contributions to the political science and economics literature on entrenchment emphasize the benefits of credible commitment.²⁴² A government that can credibly and successfully commit itself to repaying debts or to preserving economic entitlements will be able to borrow money on more favorable terms or encourage private sector investment; a government that can credibly commit not to bail out banks that make risky investments may be able

236. See Sterk, *supra* note 233, at 237.

237. See Eule, *supra* note 67, at 386-87.

238. Patashnik & Zelizer, *supra* note 12, at 1083.

239. See Lazarus, *supra* note 14.

240. See *supra* Section II.D.

241. See Levinson, *supra* note 17, at 673-75 (surveying beneficial forms of commitment drawn from the social science literature).

242. See, e.g., *id.* at 673-74.

to avert a future financial crisis; and so on. Entrenchment-induced stability can also serve to “tak[e] particularly contentious issues or subjects off the table” and to allow controversies to be settled in a lasting way, economizing on conflict, reducing rent-seeking, and freeing up political resources for other uses.²⁴³

In short, entrenchment can be used for good as well as for ill. But—and here is the crucial point—this goes for formal as well as functional entrenchment. An unamendable statutory formula could replace the delegated authority of the Federal Reserve as a means of locking in sound monetary policy. If stringent environmental regulation will provide long-term benefits in preventing climate change, those benefits could also be achieved through legislative entrenchment, or perhaps alternatively by tilting the electoral playing field in favor of liberal Democrats.

In sum, there is nothing about the distinction between formal and functional entrenchment that would appear to correlate with social harms or benefits. Both can be motivated by the narrow political self-interest of parties, politicians, and interest groups; or, alternatively, by broader, public-regarding motivations. And both can be used to accomplish the same outcomes, insulating officeholders and policies against downstream majorities with different preferences. Given the broad substitutability of formal and functional entrenchment mechanisms, there is no reason to believe that one would be categorically more harmful (or beneficial) than the other.

2. *Identifiability*

Despite their general substitutability, formal entrenchment does appear to differ from functional entrenchment in one important way: it will almost always be easier to identify. On the (questionable) assumption that entrenchment is generally a bad thing, this could explain why formal

243. *Id.* at 675. While these benefits follow most naturally from the stability of policy decisions, the advantages of stabilizing electoral outcomes should be broadly similar in kind. The entrenchment of incumbents may contribute to more effective governance, on the theory that more experienced legislators with accumulated knowledge of their constituents and their needs will outperform a rotating cast of novices. The entrenchment of parties or coalitions might also lengthen political time-horizons, facilitating the implementation of policies with longer-term social benefits as opposed to focusing politicians on short-term political gains. Electoral entrenchment should also reduce the frequency of dramatic, destabilizing shifts in policies that can come with changes in party control of government. And, of course, if the entrenchment of parties and political coalitions leads to the entrenchment of a platform or set of policy outcomes, then all of the potential advantages of legislative entrenchment with respect to stability, predictability, and commitment should carry over.

entrenchment alone is singled out by public law. If strategies of formal entrenchment can be more readily identified and distinguished from benign political behavior, that could make them more sensible targets for judicial scrutiny or other forms of legal regulation than their functional brethren.²⁴⁴

Whatever else might be said for the prohibition on formal legislative entrenchment, it is simple enough to administer. Statutes that explicitly announce their own entrenchment through prohibitions or special procedural obstacles to repeal are easy to identify and to distinguish from ordinary statutes. To be sure, there is considerable ambiguity about how far beyond this core case the prohibition on legislative entrenchment might be extended—to framework statutes, internal legislative rules like the Senate filibuster, (some types of) government contracts, and so on.²⁴⁵ But at least in the core case, the definitional boundaries of entrenchment are clear, and the statutes that fit the definition announce themselves unambiguously.

When we move beyond the simple case of legislative entrenchment, however, the task of defining and identifying a forbidden category of even formal entrenchment becomes more difficult. Electoral entrenchment is illustrative. Despite the calls of election law scholars for a more aggressive judicial role in policing entrenchment in this domain,²⁴⁶ courts have been daunted by the difficulty of demarcating a judicially administrable category of forbidden conduct.²⁴⁷

One source of difficulty lies in determining the relevant baseline for identifying impermissible entrenchment. As we have seen, diagnoses of entrenchment typically rely upon baselines set by vague reference to the “ordinary” or ideal difficulty of effecting political change.²⁴⁸ In the context of election law, courts and commentators have struggled over what, precisely, the right baseline should be.²⁴⁹ When it comes to the partisan gerrymandering of election districts, for example, political entrenchment must be measured against some baseline of politically “fair” districting. What the metric of

244. Cf. McGinnis & Rappaport, *supra* note 24, at 442 (arguing that there are “strong reasons grounded in administrative costs” for policing formal entrenchment mechanisms but not “informal ones,” such as Posner and Vermeule’s bicycles in the park example).

245. We return to these ambiguities below. See *infra* Section III.B.2.

246. See *supra* notes 60–64 and accompanying text.

247. See *supra* note 50 and accompanying text.

248. See *supra* Section I.A.

249. See Klarman, *supra* note 4, at 533–34. As Klarman (among others) has argued, these baseline problems can be sidestepped by a procedural solution to the problem of entrenchment through gerrymandering—turning over districting to some sort of impartial commission or to a computer program. See *id.* at 534.

fairness should be, however, is not clear. Courts and commentators have disagreed for decades about whether an unfair, or entrenching, partisan distribution of districts should be determined by reference to a baseline of majority rule, proportional representation, or something else.²⁵⁰ In *Vieth v. Jubelirer*, a plurality of the Supreme Court threw up its collective hands, describing the attempt to arrive at a judicially manageable standard as “[e]ighteen years of judicial effort with virtually nothing to show for it.”²⁵¹

A further difficulty is that laws that may have the purpose and effect of entrenching a party or policy may also have other purposes and effects worthy of democratic respect. Here again, election law is illustrative.²⁵² Campaign finance regulations might well benefit incumbents at the expense of challengers or one party at the expense of another, but they may also aim to mitigate the influence of wealth on elections and equalize the political influence of constituents across income groups.²⁵³ Ballot access restrictions and voter identification requirements can be used to entrench parties and incumbents, but they can also play a legitimate role in preventing voter confusion and fraud.²⁵⁴ Multimember districts can be used to dilute the voting power of racial minority groups and entrench white majorities and their preferred representatives, but they can also generate representatives who are responsive to the needs of the broader political community rather than to local, parochial interests.²⁵⁵ How courts would police the purpose or effects of laws like this to screen for entrenchment, and how they would balance the benefits of preventing entrenchment against the costs of sacrificing the non-entrenchment-related benefits of such laws, is also unclear.

Whatever the prospects for overcoming these dual difficulties of indeterminate baselines and mixed motives in the election law context,²⁵⁶ extending antientrenchment review to the vast universe of functional entrenchment would seem to present a challenge of a different order.

Starting with baselines, any attempt to operationalize a prohibition on the functional entrenchment of parties or political coalitions would have to

250. *See id.* at 533-34.

251. 541 U.S. 267, 281 (2004) (plurality opinion); *see also* Pildes, *supra* note 42, at 66-83 (discussing the difficulty of formulating a standard for partisan entrenchment).

252. *See* Klarman, *supra* note 4, at 529-30 (describing the problem of mixed motives in the context of election law).

253. *See id.* at 536-38.

254. *See id.* at 535-36.

255. *See id.* at 538.

256. *See id.* at 528-39 (suggesting ways in which courts might successfully implement a regime of antientrenchment review in the context of election law).

confront the fact that many changes in policy might be viewed as tilting the political playing field in favor of one side or the other. Imagine the position of a court charged with policing against partisan entrenchment through labor law. On the one hand, an expansive and protective labor statute might be viewed as entrenching Democrats because it facilitates the growth of unions, which in turn support Democratic candidates. On the other hand, a restrictive and punitive labor statute might be viewed as entrenching Republicans. From the perspective of a status quo ante baseline, *any* change in labor law could be viewed as entrenchment because one party or the other will likely benefit politically. Even *no* change in labor law might be viewed as entrenching, if the decision to do nothing were cast as refusing or failing to enact some salient pro- or anti-labor policy. The same quandary would arise in assessing any change (or even the absence of any change) in policy in the domains of tort reform, immigration, and many other areas with predictable political feedback effects.

As we have seen, it is not even clear whether—or when—the status quo ante should be the dispositive baseline for measuring entrenchment.²⁵⁷ If we looked instead to majoritarian preferences, that might lead to a different view of partisan entrenchment. Returning to the labor law example, suppose a pronoun policy shift has the effect of bringing previously disfranchised voters to the polls and thereby pulling partisan and policy support closer to majoritarian political preferences. Now a prior enactment diagnosis of entrenchment competes with a majoritarian baseline diagnosis of *dis*-entrenchment. A court called upon to police labor law for partisan entrenchment might well wonder what to do.

Comparable problems would arise in policing the entrenchment of any policy. In the absence of formal criteria for entrenchment, some assessment would have to be made of the difficulty of revising or repealing the policy once enacted, as compared to some baseline measure of the “ordinary” difficulty of policy change. A countermajoritarian measure seems unpromising, given the pervasively countermajoritarian tendencies of the American political system.²⁵⁸ According to one recent study, the probability that a policy change supported by three-quarters of Americans will be enacted into law is only thirty-nine percent.²⁵⁹ And, as elaborated below, it is quite likely that many, perhaps even most, of the policies that *have* been enacted into law would not have been chosen by present majorities. Short of concluding that much of current law is

257. See *supra* notes 21–25 and accompanying text.

258. See *infra* notes 287–288 and accompanying text.

259. See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 74 (2012).

impermissibly entrenched, it is hard to know how courts (or other assessors) would proceed.

Switching to a status quo ante baseline would raise a different set of challenges. The question would then become whether a policy was, or was likely to become, more politically difficult to revise or repeal than it had been to enact in the first place. Answering this question would require some empirical assessment of the difficulty of effecting political change at different points in time. Such an assessment would need to control for the political *popularity* of the relevant policy. Again, entrenchment entails some impediment to the realization of political preferences; the accurate reflection of increasingly favorable preferences would be evidence of democratic responsiveness, the opposite of entrenchment. But distinguishing political popularity from the kinds of “artificial” impediments to policy change that should qualify as entrenchment is not straightforward. When should we view the strengthening of political opposition to change as a structural barrier evincing entrenchment as opposed to a perfectly valid expression of democratic will? Should we always think of policies that mobilize and empower supportive interest groups as becoming entrenched, or are there conditions under which we should view this dynamic as legitimately increasing political support? Answering these questions will require a much fuller account of the difference between well-functioning and distorted democracy than existing theories of entrenchment have contemplated.²⁶⁰

The problem of mixed motives and effects also seems more pervasive and severe as applied to functional entrenchment. As we have seen, labor law, tort reform, and immigration policy can serve as entrenchment mechanisms; but they are also *labor law* and *tort reform* and *immigration policy*. When entrenchment is accomplished through changes in substantive policy, there will always be a plausible case to be made that the motivation was policy rather than politics, and, to the extent this is true, invalidating legislation on entrenchment grounds would mean blocking the enactment of democratically preferred policies. Something similar is true of functional entrenchment by way of changing the locus of political decision making. Decisions to delegate to courts, administrative agencies, and international governance bodies create potential benefits that stand entirely apart from entrenchment and that would be sacrificed if these decisions were blocked on anti-entrenchment grounds. Whatever the democratic costs of entrenchment, the democratic costs of *preventing* entrenchment might also be substantial.

260. As we discuss further below, once we let go of formal markers—explicit prohibitions on repeal, supermajority requirements, and the like—the precise definition of entrenchment quickly begins to blur. See *infra* Section III.B.2.

All of these conceptual difficulties in identifying functional entrenchment would be compounded by empirical problems. Courts charged with policing entrenchment presumably would need to predict the effects of policy enactments and delegations, or (what is not so different) to ascertain the likely predictions, or motives, of enacting coalitions. Here courts would run up against not only their own institutional limitations but also the limits of political science. Notwithstanding the many plausible and instructive explanations for how various political arrangements have contributed to entrenchment, there is nothing like a reliable predictive model. Confronted with the question whether major policy reforms like the Affordable Care Act or Dodd-Frank are likely to become entrenched, social scientists can do little more than point to a number of possibly relevant variables.²⁶¹ Case studies suggest that subtle, contextual differences can often be determinative.²⁶²

For all of these reasons, functional entrenchment would be considerably more difficult to identify and police than at least some types of formal entrenchment. Even if the formal and functional varieties of entrenchment are equally harmful, therefore, legal regulation might sensibly focus only on the former—looking under the light at formal entrenchment while leaving functional entrenchment in the dark.

Like many partial solutions, however, this one raises a “second-best” concern. If avenues of formal entrenchment are foreclosed, the obvious alternative would be for political actors to pursue functional entrenchment strategies instead. As we have emphasized, such strategies often seem to be close substitutes for formal legislative and electoral entrenchment. No doubt they are not *perfect* substitutes. Political actors who make use of formal entrenchment devices presumably do so because they are more effective or less costly than the functional alternatives. At the very least, however, we should predict that shutting down formal entrenchment mechanisms would have the effect of increasing the use of functional alternatives.

261. See, e.g., Patashnik & Zelizer, *supra* note 12, at 1079-83.

262. For example, whereas recipients of non-means-tested programs like Social Security are “at least as active” as the public as a whole, other public-assistance programs, such as Aid to Families with Dependent Children (AFDC), appear to have *demobilized* their beneficiaries, leaving the programs quite vulnerable to retrenchment. Joe Soss, *Lessons of Welfare: Policy Design, Political Learning, and Political Action*, 93 AM. POL. SCI. REV. 363, 365 (1999) (quoting SYDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 210 (1995)). Scholars explain these variable outcomes by pointing to subtle differences in program design, such as how the beneficiaries’ relationship with AFDC caseworkers shapes their political attitudes. See, e.g., CAMPBELL, *supra* note 108, at 129. Case studies of legislative durability and the opposite are collected and analyzed in LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING (Jeffery A. Jenkins & Eric M. Patashnik eds., 2012); and PATASHNIK, *supra* note 12.

This substitution effect would obviously reduce the benefit of policing formal entrenchment. But it might also impose additional social costs. Unlike their formal counterparts, functional entrenchment strategies inject a particular type of strategic political consideration into substantive policymaking. Consider again the example of labor law. The approach to labor law that Southern Democrats found most effective for entrenching themselves in office may not have been the approach to labor law they would have chosen purely as a matter of policy; at the very least, labor law would have been less of a legislative priority had it not offered an alternative path to entrenchment. The same is true of other political actors who have turned to labor law as a vehicle of entrenchment: but for Senator Taft's political entrenchment goals, we may never have gotten the Taft-Hartley Act. Moreover, it seems reasonable to expect that policy made for reasons other than entrenchment will tend to be better policy from the perspective of public welfare. For example, despite the many policy advantages of a carbon tax, the goal of entrenching climate change legislation points away from such a tax and toward a cap-and-trade regime.²⁶³

In sum, functional entrenchment is *doubly* distorting – distorting on both a political and a policy margin.²⁶⁴ This at least complicates the case for policing formal but not functional entrenchment. That approach might yield somewhat less entrenchment, but the entrenchment that does result will tend to carry greater costs. Returning to the climate change example, we might well do better by permitting the formal statutory entrenchment of an efficient carbon tax than by encouraging political actors to substitute a relatively inefficient cap-and-trade approach in order to duplicate the entrenchment functionally. More generally, if functional entrenchment cannot be regulated effectively, policing formal entrenchment alone is not obviously the right fallback position.

The greater identifiability of formal entrenchment techniques suggests a final reason for skepticism about making those methods the exclusive focus of judicial scrutiny. As generations of constitutional theorists have argued, judicial review might be best reserved for cases of political process failure.²⁶⁵ To be sure, entrenchment might be viewed as one such failure. But at least in some contexts, that failure will be preventable by voters and interest groups mounting political resistance to entrenchment efforts. The more visible these efforts, the more resistance might be generated. If this is right, then there

263. See Lazarus, *supra* note 14, at 1193–95.

264. To the extent functional entrenchment strategies involve delegations, the relevant distortion would be in the structure of government and processes of political decision making. Here, too, we should expect considerable spillover costs.

265. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

might be somewhat less of a need for judicial review in the context of formal entrenchment, which is relatively visible, than in the case of functional entrenchment, which is harder to identify and to distinguish from ordinary or benign politics. In this regard as well, public law's current approach to regulating entrenchment may have things backwards.

3. *(In)conclusion*

Once the continuity between the circumscribed categories of formal entrenchment and the vast terrain of functional entrenchment has been recognized, could we nonetheless conclude that a sensible regulatory regime should continue to focus exclusively on the former while ignoring the latter? Perhaps. At least some types of legislative and electoral entrenchment are easily identifiable and formally distinguishable from the workings of ordinary politics. Even if these mechanisms of political entrenchment are no more socially harmful than many others, the lower enforcement and error costs might lead courts and other legal regulators to conclude that it is optimal to address some part of the entrenchment problem while leaving the rest alone.

We have sought to show, however, that this analysis is, at the very least, incomplete. Some types of formal entrenchment are easier to identify and quarantine than others. And the same might be true of some discrete types of functional entrenchment, which might turn out to be no less amenable to regulatory spotlighting and excision if courts or scholars ever decided to make the attempt. A more comprehensive assessment of the workability of policing entrenchment would have to get down to cases and institutions, in the manner of ongoing debates over the viability of policing partisan gerrymandering and other entrenchment devices in election law. Such an assessment would also have to reckon with the realistic scope of the substitution and double-distortion problem: in contexts where barriers to formal entrenchment create hydraulic pressure to substitute more socially harmful strategies of functional entrenchment, the regulatory calculus will be different. Further, the extent to which entrenchment might be self-correcting through ordinary political processes should also bear upon the need for judicial and other forms of legal regulation. In the absence of a more comprehensive assessment along all of these lines—and, indeed, in the absence of any prior recognition by courts and scholars of functional entrenchment as a potential problem—there is little reason for confidence that the prevailing approach of public law toward entrenchment is in any way optimal.

The same is true of the prior, and more fundamental, question of whether formal entrenchment—or any other category of comparable political behavior—is actually harmful or socially undesirable. As the discussion of constitutional entrenchment below will elaborate,²⁶⁶ it is far from obvious whether entrenchment generally should be viewed as a democratic pathology that we should be striving to extirpate, or, instead, as a socially beneficial constraint on untrammelled majority rule. Probably the best answer is some of both. Some uses of entrenchment will be widely perceived as beneficial, others as clearly harmful, and still others debatable. One need only consider examples like Social Security or Lazarus’s entrenchment scheme for climate change legislation to appreciate the difficulties and disagreements that will inevitably arise in distinguishing socially beneficial from socially destructive entrenchment. In these and other cases, we might wonder how the potential benefits of credible commitment and political stability should be weighed against the democratic sacrifice of present majority will, or how to distinguish the kinds of “good” policies that should be entrenched from the “bad” ones that should not. These difficulties and disagreements are only compounded when the relevant assessment is categorical. A robust normative theory for sorting socially beneficial versus harmful types of entrenchment would have to be combined with a well-developed empirical sense, or prediction, of the distribution of these various kinds. But there is no reason to believe that these lines would break along a simplistic division between formal and functional entrenchment. If public law theorists who selectively condemn electoral and legislative entrenchment are conducting categorical cost-benefit calculations along these lines, they have never shown their work.

B. Extensions

1. The Uncertain Case for Distinguishing Constitutional Entrenchment

Condemnation of formal entrenchment in the electoral and legislative spheres sits uneasily with public law’s longstanding, if at times ambivalent, embrace of constitutional entrenchment. The difficulty of achieving a constitutional amendment through Article V raises well-rehearsed concerns about the countermajoritarian, or anti-democratic, nature of constitutionalism that run parallel to the standard set of concerns about entrenchment at the electoral and legislative levels. Entrenched constitutions are said to substitute the “dead hand” control of the past for present majority will. Moreover,

²⁶⁶. See *infra* Section III.B.1.

entrenched constitutional rules and rights can serve to lock in maladapted or evil political arrangements in much the same way as entrenchment at the electoral or legislative level. Consider the constitutional entrenchment of slavery, requiring a bloody civil war to eradicate, or the Supreme Court's entrenched constitutional objections to the New Deal's recovery program, which sought to prevent the collapse of capitalism and democracy.

The accepted wisdom appears to be that constitutional entrenchment comes with a set of benefits outweighing these costs.²⁶⁷ But these benefits are no different in kind than the potential benefits of electoral or legislative entrenchment. At the constitutional and subconstitutional levels alike, the risks of locking in bad decisions must be weighed against the rewards of precommitting to good decisions that might otherwise be sacrificed on account of short-term interests or political pathologies—whether free speech or sound monetary policy. Similarly, the benefits of political stability—cashed out in terms of credible commitment, beneficial reliance, or dampened political contestation—seem broadly similar in the constitutional and subconstitutional contexts.

Not surprisingly, then, some theorists have viewed constitutional and subconstitutional entrenchment as normative equivalents—equally bad, or equally *not* bad. Klarman takes the former view, emphasizing that constitutional entrenchment shares the democratic pathologies of electoral and legislative entrenchment, and viewing all as equally suspect.²⁶⁸ Posner and Vermeule take the opposite view, pointing to the parallels with constitutional entrenchment as an argument for treating legislative entrenchment as no less pernicious or permissible.²⁶⁹

More commonly, however, public law theorists who condemn electoral and legislative entrenchment embrace entrenchment at the constitutional level.²⁷⁰ In fact, the prohibition on legislative entrenchment is sometimes cast as an entrenched constitutional rule—and one that should inarguably command our

267. See, e.g., Eule, *supra* note 67, at 390 (“It would appear, therefore, that whatever practical objections can be raised against entrenchment are concerns that the Framers were willing to put aside for the benefits that barriers to change bring with them.”).

268. Klarman, *supra* note 4, at 502-09.

269. Posner & Vermeule, *supra* note 24, at 1670-71 (“[A]n entrenching statute is like a mini-constitution in its self-conscious effort to control the voting practices or policy choices of future majorities.”).

270. See, e.g., *Hearings*, *supra* note 72 (“[O]nly by a constitutional amendment can one truly bind the future: unless we keep clearly in mind that distinction between a constitutional amendment and a bill or resolution, we have really lost our way.”).

respect.²⁷¹ This raises the question of what, if anything, beyond positive law differentiates constitutional from subconstitutional entrenchment?

One possibility relates to the process through which constitutional rules and rights are enacted. Most obviously, in contrast to ordinary legislation, constitutional ratification and amendment formally require supermajoritarian political support.²⁷² To the extent broader political support correlates with better decision making, the benefits of entrenching constitutional norms might be higher, on average, than the benefits of entrenching the products of majoritarian legislative processes.²⁷³ Beyond formal voting rules, a “dualist” perspective on constitutional democracy portrays constitutional norms as emerging from rare moments of “higher” politics, involving greater popular participation, deliberation, or public-regarding motivation than the kinds of disengaged, compromised, and self-interested “lower” politics that ordinarily prevail.²⁷⁴ In this view, entrenching the products of higher-quality constitutional decision-making processes against revision through the corrupted processes of ordinary politics might augment popular sovereignty and improve social welfare. Entrenching the inferior products of ordinary politics would carry no such benefits.

Another possible basis for differentiating constitutional entrenchment relates to the kinds of political outcomes that are being protected against change. Perhaps the most important thing the Constitution has accomplished is to establish and solidify the basic structural framework of government—the bicameral structure of Congress; the procedural outlines of the Article I, Section 7 lawmaking process; the electoral cycles and terms of office for representatives, senators, and presidents; and the like. Entrenchment of the basic institutional structure of political decision making may be especially valuable. The alternative to settled and stable agreement at this fundamental level of political organization is not organized democratic contestation but

271. There is no logical contradiction here. If a prohibition on subconstitutional entrenchment can be derived from the text and structure of the Constitution, that is reason enough to respect it, without inferring any prejudice against the entrenchment of the Constitution itself. Setting aside the dictates of positive law, however, the differentiating features of constitutionalism remain to be identified.

272. Depending on the baseline being used to measure entrenchment, the symmetrical supermajoritarian hurdles necessary for constitutional enactment and constitutional revision could mean that constitutional law is not entrenched at all. *See supra* note 25 and accompanying text.

273. *See* McGinnis & Rappaport, *supra* note 24, at 426-29 (defending the distinction between constitutional and legislative entrenchment on the ground that constitutional law requires a supermajority to enact, and supermajoritarian decision making tends to be higher quality).

274. *See supra* note 96 and accompanying text.

sheer anarchy. Moreover, the costs of entrenchment at this level may be relatively low. To the extent the constitutional structure of government creates a relatively even playing field for competing political interests—setting the rules of the political game, without determining the winners and losers—fairness concerns about artificially privileging particular partisan or policy interests will be mitigated.²⁷⁵ One could argue, then, that the constitutional entrenchment of the basic structures and processes of political decision making is both more valuable and less destructive than the entrenchment of specific power holders and policy outcomes—more democratically *enabling* than *disabling*.²⁷⁶

Neither of these approaches to differentiating constitutional entrenchment is straightforward or self-evidently persuasive. Parties, political movements, and policies that command supermajoritarian or qualitatively higher-order democratic support might stake a comparable claim to entrenchment through electoral or legislative pathways. And electoral and legislative entrenchment might also contribute to locking in the basic institutional structures of government, given that most of the rules structuring the administrative state, the democratic process, the internal workings of Congress, and other aspects of the organization and operation of government are the product of subconstitutional law. Indeed, it is these two features that motivate theorists to reconceptualize some formally subconstitutional rules as functionally constitutional. Thus, in the view of some theorists, small-c constitutional rules are just those that serve to “constitute” the government, a set that includes the many formally subconstitutional rules relating to the structure of governmental

275. This is clearly an oversimplification. Enumerated rights and other constitutional provisions operate to entrench policies in much the same way as legislative and electoral entrenchment. Thus, constitutional prohibitions on slavery and Jim Crow segregation effectively entrench a policy regime of racial integration and equality; the First Amendment entrenches a policy slant toward religious liberty and free speech; the constitutional protection of abortion rights prevents their reversal; the Second Amendment blocks the enactment of comprehensive gun control laws; and so on. Constitutional structure, too, can be understood as a means of generating and entrenching certain policy outcomes. The original design of the federal government was supposed to protect vulnerable minorities, including creditors, religious sects, and slaveholders, against hostile majorities, and to do so in a more durable way than rights and other mere “parchment” barriers. Whatever is left of that idea, constitutional structure continues to generate predictable policy outcomes, or at least general biases. For example, by providing for exit and inciting jurisdictional competition, constitutional federalism makes certain kinds of redistribution more difficult to accomplish than would be the case in a completely centralized system of government. See Weingast, *supra* note 163. To this extent, the policy consequences of constitutionally entrenched federalism will overlap in some predictable ways with the policy consequences of entrenching Republicans in office or legislatively entrenching lower tax rates.

276. See HOLMES, *supra* note 28, at 6–8.

institutions or the workings of the political process.²⁷⁷ At the same time, as we have seen, other theorists view the special democratic pedigree of statutes like the Civil Rights Act as markers of quasi-constitutional status.²⁷⁸ The functional lesson here is that (formal) constitutional law does not have a monopoly over the entrenchment of structural arrangements or of the fruits of higher-order democratic politics.

A functional perspective complicates the assessment of constitutional entrenchment in other ways as well. Most fundamentally, once we look beyond the formal notion that constitutional change can only be accomplished through Article V, the extent to which constitutional law is in fact politically entrenched becomes an open question. Constitutional rules and rights that can be changed simply by shifting the vote of a single Supreme Court Justice (or the opinion of a single President) may be no more entrenched, and may be quite a bit less entrenched, than an ordinary statute.²⁷⁹ The formal vision of an entrenched constitution contrasts with the widely recognized reality of continuous constitutional change through processes of judicial interpretation, political construction, and popular acceptance.²⁸⁰ Dramatic structural changes—such as the growth of the administrative state, the decline of federalism, and the expansion of presidential power—have taken place through these channels, in response to shifting patterns of political demand. The scope and existence of constitutional rights—for example, in the contexts of economic liberty, free speech, race and gender equality, and sexual orientation—have also changed markedly in response to shifts in public opinion and political mobilization.²⁸¹ Generations of political scientists and legal scholars have documented that the content of constitutional law tends to converge with the preferences of national-level majorities.²⁸²

277. See Llewellyn, *supra* note 95, at 31; Young, *supra* note 99, at 415-16.

278. See *supra* notes 97-98, 101 and accompanying text.

279. Recall Young's observation that the Social Security Act's promise of government financial support in old age is less likely to be abolished than canonical constitutional norms such as abortion rights. See *supra* note 100 and accompanying text.

280. See generally STRAUSS, *supra* note 29 (arguing that the Constitution is shaped akin to common law to reflect contemporary norms).

281. *Id.*

282. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."); Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among

None of this belies the possibility that at least some aspects of constitutional law are at least somewhat entrenched against majoritarian demands for change. A number of the most important structural features of the U.S. government—the bicameral structure of Congress; the basic outlines of the Article I, Section 7 lawmaking process; the electoral cycles and terms of office for representatives, senators, and presidents; and the like—have remained mostly noncontroversial and more or less intact since the Founding, even as their original claims to functional and political efficacy have eroded. For example, it seems unlikely that Americans writing on a blank slate would recreate the rule of equal state representation in the Senate; yet that rule would now be formidably difficult to dislodge. Even very popular Presidents do not run for third terms or dissolve Congress. In these and other respects, constitutional rules and rights appear to create effective constraints on political preferences.

Beyond these anecdotal observations, however, we know very little about the precise patterns of entrenchment that make some constitutional rules and rights more difficult to change than others.²⁸³ We also know very little about the mechanisms through which functional constitutional entrenchment comes about. We should expect, however, that these mechanisms will operate quite similarly in the constitutional and subconstitutional domains—by way of selectively empowering certain groups whose interests and incentives align with compliance and preservation.²⁸⁴ The overarching point is that, whatever the formal rules governing political and legal change, change will in fact always be possible and predictable whenever it serves the interests of powerful political actors. As James Madison famously put it, constitutional and other legal rules may create merely “parchment barriers” that can be ignored or overridden at will.²⁸⁵ As Madison also recognized, however, parchment prohibitions can be converted into meaningful constraints when the political process is arranged in such a way that political actors who support constitutional rules and rights have the power to defend them.²⁸⁶ These are precisely the kinds of political arrangements and dynamics that we saw in Part

the lawmaking majorities of the United States.”); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1749–50 (2001) (stressing how rarely the Supreme Court’s constitutional interpretations have diverged from the political preferences of national majorities).

283. See generally Levinson, *supra* note 17.

284. See *id.* at 672–716 (assimilating political and constitutional entrenchment and identifying a set of mechanisms common to both).

285. THE FEDERALIST NO. 48, *supra* note 102, at 276.

286. See Levinson, *supra* note 17, at 665–70.

II, operating to stack the deck in favor of subconstitutional policies and the constituencies that support them.

Indeed, from a functional perspective, it becomes difficult to see any clear distinction between political entrenchment at the constitutional and subconstitutional levels. As theorists of the small-c constitution recognize, and as we have emphasized here, many subconstitutional rules and arrangements are at least as entrenched as many constitutional norms (in addition to sharing other indicia of constitutionality, like heightened democratic support or structural significance). And many formally constitutional rules and rights seem *not* to be especially entrenched against functional change. Rather than viewing constitutional entrenchment as a separate and superior category, public law scholars might do better to recognize the continuity of political entrenchment at the constitutional and subconstitutional levels.

2. *The Uncertain Categorical Boundaries of Entrenchment*

Up to now, we have attempted to show that the kinds of political arrangements and consequences that are described as “entrenchment” in the formal electoral, legislative, and constitutional contexts have functional analogues that share all of the relevant features and that cannot be meaningfully distinguished. In advancing these arguments, we have taken for granted that political entrenchment can be usefully understood as a distinctive and reasonably well-defined phenomenon. But once we move beyond formal definitions of entrenchment, the boundaries of the category, and hence its analytical value, begin to blur.

As we have seen, entrenchment tends to be identified with barriers put in place by upstream decision makers that impede political changes preferred by present majorities or that make the status quo more difficult to change than it was to create in the first place. Upon reflection, however, there are innumerable political arrangements that fit these descriptions.

As a first cut, to the extent entrenchment is identified with impediments to present majority will, it becomes difficult to distinguish from the many other countermajoritarian features of the U.S. political system. Some of these features are a product of constitutional design.²⁸⁷ In addition to the formal supermajorities required to ratify a treaty or convict an impeachment, bicameralism and separation of powers, combined with the different electoral

²⁸⁷. On the countermajoritarian and more generally counterdemocratic features imposed by the U.S. Constitution, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001); and SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

bases of the Senate, the House, and the President, impose a de facto supermajority requirement for enacting legislation. The constitutional malapportionment of the Senate and the Electoral College, combined with internal legislative rules and arrangements, like the Senate filibuster and the congressional committee system, create further minority veto gates that are often used to block majority-preferred actions. And of course, constitutional rights and judicial review at least sometimes impose countermajoritarian constraints. Beyond the constitutional structure of government, numerous other institutional arrangements and familiar features of democratic politics conspire against perfect responsiveness to majoritarian preferences: the disproportionate influence of well-organized, well-connected, or wealthy minorities and interest groups; the vagaries of cycling and agenda setting; information deficiencies; political geography; and so on.

In short, frustration of majority will—and even *supermajority* will—is a pervasive feature of American politics.²⁸⁸ Against this background, demarcating a discrete category of entrenchment defined in terms of political constraints on present majority will presents a conceptual challenge. It is not obvious on what basis the paradigm cases of formal electoral and legislative entrenchment or the functional analogues we presented in Part II should be distinguished from the broader universe of countermajoritarian features of the American democratic system.²⁸⁹

Another intuitive understanding of entrenchment emphasizes the asymmetrical difficulty of reversing prior political decisions and, as a consequence, the disproportionate influence of past decision makers over present and future ones. Thus, political entrenchment is thought to arise when “a temporary political majority (in the society and in the legislature) . . . extend[s] its hold on power into the future,”²⁹⁰ or when a political action “limits the policy choices available to future governments.”²⁹¹

Here again, however, it is hard to see the boundaries of any category defined in this way. Nearly every political action—as well as every instance of *inaction*—has some constraining effect on the choices of downstream decision

288. See *supra* notes 16-19 and accompanying text.

289. One limiting feature of entrenchment, as compared to the broader category of countermajoritarianism, is that entrenchment is focused on impediments to political change. Yet countermajoritarian political decision making can also be a source of political change. Minorities can block political changes preferred by majorities, but they can also enact political changes *dispreferred* by majorities.

290. Klarman, *supra* note 4, at 498.

291. Serkin, *supra* note 3, at 888.

makers.²⁹² At a minimum, every political decision will generate different “facts on the ground” that subsequent political actors will have to reckon with. Political actors at Time One who decide (not) to start a war, slow global warming, foster economic growth, borrow money, or invest in education will bequeath different states of the world to their successors—and therefore different political options, with different costs, benefits, and distributive consequences. Decisions at Time Two will invariably depend on the environment and political calculus created by decisions at Time One.

One way of limiting the category of entrenchment is to focus on the purpose or motivation of present decision makers. As we have seen, concerns about formal, legal entrenchment have focused on *intentional* efforts by parties and politicians who are self-consciously seeking to secure their hold on power or the durability of their policies at the expense of rivals.²⁹³ (As we have also seen, functional entrenchment strategies can be deployed intentionally and strategically in just the same way.) But if the salient feature of entrenchment is control of the future by the past, it is not obvious why the purposes or motivations of political decision makers should matter at all. From the perspective of the present, the constraints imposed by past decisions will be the same regardless of whether they were intended or entirely inadvertent.

As it happens, the phenomenon of entrenchment as it has been understood by social scientists and historians (and even the occasional legal scholar) is in no way limited to the self-consciously strategic efforts of political actors. To the contrary, in many contexts the focus is on “entrenched” rules, policies, and institutions that have become socially and politically difficult to change owing to path-dependent processes of political development that were never intended or foreseen by their creators.²⁹⁴ In fact, social scientists view this kind of unintentional entrenchment, or “lock in,” as a quite general phenomenon, resulting from a somewhat predictable set of political dynamics—including, in particular, the political feedback effects of empowering winners while disempowering losers that we highlighted in Part II.²⁹⁵

292. See Dana & Koniak, *supra* note 67, at 530-31 (recognizing that “in some sense all acts of present legislature[s]—for example, decisions about whether to declare war, how much money to print, whether to invest in infrastructure, and whether to invest in education—limit what future legislatures might do”); Klarman, *supra* note 4, at 504-05 (“[V]irtually any action taken by today’s majority may (deleteriously) affect the future.”); Serkin, *supra* note 3, at 888 (“In principle, this definition is sufficiently broad to encompass every single act that a government undertakes.”).

293. See *supra* Section I.B.

294. See Starr, *supra* note 10.

295. See *id.* at 23-26.

Examples can be found in nearly every area of policy and politics. In contrast to President Roosevelt's strategic posture toward entrenching Social Security, there is no reason to believe that the designers of Medicare were plotting entrenchment, yet the program appears just as deeply entrenched as a result of more or less the same set of political dynamics.²⁹⁶ Or consider the home mortgage interest deduction, which created—apparently quite by accident—a constituency of homeowners and mortgage lenders that is deeply committed to, and formidably capable of, preserving their entitlement.²⁹⁷ Along the same lines, the casual, short-sighted decision of Congress to exempt existing coal-fired plants from the stringent regulations of the 1970 Clean Air Act gave rise to a powerful interest group that served as a major impediment to subsequent antipollution and climate change measures.²⁹⁸ Legal scholars have documented how rules of corporate law relating to ownership structure have become entrenched through a political-economic feedback cycle in which existing rules and arrangements increase the wealth and political power of corporate stakeholders who have an interest in maintaining or enhancing these rules and arrangements.²⁹⁹ Regulatory regimes governing corporate ownership structure and telecommunications have become increasingly difficult to modify as influential stakeholder groups become more deeply invested in, and better able to defend, existing arrangements.³⁰⁰

Relatively localized examples like these could be multiplied countlessly, but inadvertent, functional entrenchment also operates on a broader scale. For instance, the political economy of modern capitalism probably involves a similar “rich get richer” dynamic, in which economic winners wield their newly acquired wealth and power to preserve and augment institutions that allow them to become ever more wealthy and politically influential.³⁰¹ Even more broadly, Acemoglu and Robinson's account of why some nations become wealthy while others fail describes a similarly self-reinforcing historical

296. See *id.* at 31-35.

297. See Hal R. Varian, *An Opportunity To Consider if Homeowners Get Too Many Breaks*, N.Y. TIMES (Nov. 17, 2005), <http://www.nytimes.com/2005/11/17/business/17scene.html> [<http://perma.cc/9WXV-JFGC>].

298. See Richard L. Revesz, “War on Coal” or “Original Sin”? Power Plants, Public Health, and Climate Change (Sept. 1, 2014) (unpublished manuscript) (on file with authors).

299. See Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 157-60 (1999).

300. See *id.* (discussing corporate ownership structure); Starr, *supra* note 10, at 27-29 (discussing “policy-technological lock” in the context of communications policy).

301. See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008) (describing how this political-economic dynamic has worked in the contemporary United States).

process, through which an initial set of political arrangements produces economic consequences that in turn reinforce the initial political arrangements, resulting in deeply entrenched political-economic regimes that persist for centuries—well beyond the time horizons or design capabilities of any group of political actors.³⁰² Along the same lines, any kind of path-dependent account of historical processes will portray initial choices or contingencies as shaping future decisions and outcomes in a manner that could be assimilated to entrenchment. For example, the vast bodies of work exploring the “historical legacies” of colonialism, communism, or slavery, documenting broad patterns of economic, political, and social development that stem from prior conditions, could be understood as addressing entrenchment writ large.³⁰³

Recognizing the general path-dependence of human history is obviously a long leap from the specific phenomena of legislative and electoral entrenchment and their close functional analogues. But that is the point. If the salient feature of entrenchment is that past political decisions continue to hold sway over the present, then entrenchment is a vastly broader category than is commonly perceived. To the extent history matters—which is to say, to a virtually unlimited extent—present political decisions will be shaped and constrained by prior choices. Ongoing rule by the dead hand of the past is a ubiquitous and unavoidable feature of temporally extended democracy.

This is not to prejudge any effort toward usefully differentiating a more circumscribed category of political entrenchment. It is merely to point out the absence of conceptual resources for doing so in the existing literature on entrenchment. Once we blur the distinction between formal and functional entrenchment, the question of how else the category of political entrenchment might be usefully bounded becomes open.

CONCLUSION

Courts and legal scholars have focused considerable attention on the problem of political entrenchment. Yet their focus has been oddly myopic,

302. See *supra* note 11 and accompanying text. Other accounts of the development of the system of modern capitalism—both of its origins starting in sixteenth-century Europe and of its culmination in contemporary America—describe a similar process of self-reinforcing entrenchment, in which the rich get richer and more powerful and use their snowballing advantages to entrench capitalist arrangements. See Daron Acemoglu et al., *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 *AM. ECON. REV.* 546 (2005).

303. See Starr, *supra* note 10, at 36-45.

narrowly directed toward the formal “rules of the game”³⁰⁴ governing elections, legislation, and constitutional amendment, each considered as its own independent domain. By failing to appreciate both the common denominators among the various impediments to political change in these areas and the vast terrain of functional analogues, public law has avoided confronting entrenchment as a general feature of the democratic process. This narrow focus has limited the extent to which courts and scholars have developed a coherent understanding of what political entrenchment is, why or when it is bad, and what – if anything – legal regulators should do about it.

This Article has sought to broaden the frame that public law places around entrenchment. Its core contribution has been to call attention to the ways in which politicians, parties, and policies can be entrenched against change not just by changing the formal rules of the political game but by playing the game in strategic ways: enacting substantive policies that strengthen political allies or weaken political opponents, shifting the composition of the political community, or altering the structure of government decision making. These kinds of functional entrenchment strategies allow political actors to achieve the same results without resorting to the kinds of formal rule changes that would raise red flags from the perspective of public law. Recognizing the continuity of formal and functional entrenchment thus invites the question of why public law identifies and condemns the former while ignoring or pardoning the latter.

It also raises a broader set of questions about the phenomenon of political entrenchment. To start, the familiar set of commitment and stability benefits stemming from entrenchment in many different contexts, ranging from sovereign debt to environmental stewardship, complicates the common (if not consistent) public law intuition that impediments to political change should be suspect. Political entrenchment, whether formal or functional, has potential benefits as well as costs that must be assessed contextually and empirically. Public law’s longstanding embrace of entrenchment by way of constitutionalism is a rather significant illustration of this point. What is it that differentiates constitutional entrenchment, or the entrenchment of monetary policy through independent central banks, from the kinds of electoral and legislative entrenchment that public law regards as obviously problematic? Under what conditions should we view the entrenchment of politicians, parties, or policies as beneficial, benign, or pathological? And then, at a conceptual level, once we move beyond the myopic focus on formal entrenchment and expand our frame of vision to encompass close functional substitutes, the boundaries of the category of political entrenchment become

304. Issacharoff & Pildes, *supra* note 26, at 709.

difficult to discern. How should we understand and differentiate entrenchment from the inevitable influence of the past on the future and the ubiquitous path-dependence of political decision making? Definitive answers to these questions await further inquiry, but an important first step is to frame the questions clearly and explain why they are important, as we have attempted to do here.

The analysis of entrenchment presented in this Article feeds into several more general currents in public law and democratic theory. There is a vast literature in political science and law on the various mechanisms of democratic design that impede or facilitate political change. These include studies of supermajority and other kinds of voting rules that impose varying degrees of difficulty on departures from the status quo; “temporary” legislation and other timing rules that formally require or expire political actions;³⁰⁵ institutional arrangements that create or mitigate gridlock in political decision-making processes;³⁰⁶ the propelling and paralyzing effects of presidential versus parliamentary systems, or party-unified versus divided government;³⁰⁷ the role of the judiciary in accelerating or braking legal and political transformations;³⁰⁸ critical theories advocating greater “plasticity” in democratic and social structures;³⁰⁹ and, of course, constitutionalism.³¹⁰ Viewing political entrenchment alongside these and other theoretical perspectives on the pace and pathways of political change might be mutually illuminating.

Our analysis of entrenchment also links to other areas of public law in which functional perspectives have complicated conventional understandings of formal rules and arrangements. Some of these connections we have noted: the reality of constitutional change through channels other than the Article V amendment process,³¹¹ the dependence of constitutional entrenchment and constraint upon underlying political commitments to maintain and respect

305. See FRANK FAGAN, *LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION* (2013); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

306. See, e.g., KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998).

307. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

308. Compare Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994), with Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994).

309. See ROBERTO MANGABEIRA UNGER, *PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS* (1987).

310. See, e.g., MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 156-59 (2007) (arguing that constitutional entrenchment is at odds with fundamental democratic values).

311. See *supra* notes 95-98 and accompanying text.

constitutional rules and rights,³¹² and the existence of “superstatutes” and other formally subconstitutional policy instruments that share some (if not all) of the functional attributes of constitutionality.³¹³ Other recent works in public law describe how party politics have functionally transformed the formal system of separation of powers³¹⁴ and federalism,³¹⁵ how the formally counter-majoritarian capacity of judicial review has been tempered by the functional realities of politics,³¹⁶ how states and localities exercise meaningful forms of power despite the erosion of their formal sovereignty,³¹⁷ and how the political reality of presidential leadership and executive dominance has come to trump the legal formalities of a more limited executive role.³¹⁸ Many more examples could be added to this list, but the general point should be clear: political entrenchment is far from the only area in which the formal legal rules do not fully capture—and may in fact obscure—fuller and more realistic understandings of how political processes and institutions function for purposes of public law.

Finally, our account of political actors’ ability to use functional entrenchment devices to navigate around prohibitions on formal entrenchment seems of a piece with a broader body of scholarship cataloguing the ways motivated parties avoid the dictates of public law by resorting to legally permissible means of accomplishing ends that public law intends to prohibit. Such public law “workarounds” take many forms, potential and actual.³¹⁹ For example, although the Constitution contemplates a President elected according to the votes of the Electoral College, states could ensure that the President was elected by a national popular majority by directing their electors to vote for the

312. See *supra* notes 93, 278–281 and accompanying text.

313. See *supra* notes 97–100 and accompanying text.

314. See Levinson & Pildes, *supra* note 307.

315. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

316. See FRIEDMAN, *supra* note 282.

317. See Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).

318. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

319. See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009). Tushnet says that “constitutional workarounds” are possible “(a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution’s text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution.” *Id.* at 1503.

person who wins the national popular vote.³²⁰ Even the Constitution's core rights-granting provisions are subject to workarounds. For example, although abortion cannot be banned directly, the procedure can be put out of reach through the imposition of multiple confining regulations known as TRAPs (targeted regulation of abortion providers).³²¹ More generally, notwithstanding the unconstitutional conditions doctrine, governments are often permitted to accomplish indirectly what they are forbidden from doing directly by using the incentive of conditional funding.³²² In the statutory context, campaign finance law's susceptibility to workarounds is well known and well captured by the metaphor of "hydraulics."³²³ When the law closes one channel for political spending, political actors simply open up substitute channels. Similarly, state and local actors can often find ways to avoid the preemptive effect of federal statutes.³²⁴ For example, although federal law preempts essentially all state and local regulation of union organizing, states and cities have averted this bar through creative partnerships with unions and employers.³²⁵ Similar possibilities for working around environmental, ERISA, and immigration preemption are also available.³²⁶ Thus, functional entrenchment is another reminder that political actors can often navigate around public law rules, and that public law often serves to channel means rather than dictate ends.

320. See *id.* at 1500. For another example, the infamous "Saxbe fix" has been used to work around the Emoluments Clause, allowing, for instance, Hillary Clinton to be appointed Secretary of State despite the fact that the salary for that position had been increased while Clinton was serving in the Senate. See *id.* at 1501.

321. Cf. *Virginia: Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/virginia.html> [<http://perma.cc/T6VR-XLNH>] (describing various statutory regulations that effectively limit access to abortion).

322. For example, constitutional constraints mean that the government cannot directly prohibit private organizations from offering abortion counseling services, but the federal government was able to move in this direction by conditioning the grant of funding for family planning services on recipients' agreement not to offer abortion counseling. See *Rust v. Sullivan*, 500 U.S. 173 (1991). Similarly, constitutional limitations made it at least uncertain whether the federal government could mandate that states set their drinking age at twenty-one, but Congress was able to work around any such constitutional restriction by withholding federal highway money from states that allowed people under twenty-one to drink. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

323. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

324. See Sachs, *supra* note 317, at 1157-60.

325. See *id.* at 1154-56.

326. See *id.* at 1222.

We leave these further pathways of investigation for another day. For now, our more limited ambition has been to show that the conceptual boundaries and normative implications of political entrenchment overflow the formal and narrowly categorical terms in which the phenomenon has been cast in public law. At the very least, courts and scholars, along with voters and citizens, would do well to recognize that it is not only the arcane possibility of legislative entrenchment or the transparently strategic features of election law like gerrymandering and voter ID requirements that should be viewed through the prism of entrenchment. Labor law reform ought to be understood as a partisan battle between incumbent Democrats and Republicans fighting over their own election prospects, and not only as a contest over union organizing rights and labor-management relations. The same is true for immigration law, tort law, and many other policy initiatives. It is also true for the creation of central banks, human rights treaties, and the question of whether or not the District of Columbia should become a state. And it is true about environmental policy and the Affordable Care Act. Recognizing that these and many other policies and political arrangements have important implications for the prospects and pathways of change opens a new perspective on entrenchment as a pervasive feature of democratic politics.

