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Alain Marciano *Editor*

Constitutional Mythologies

New Perspectives on Controlling the State

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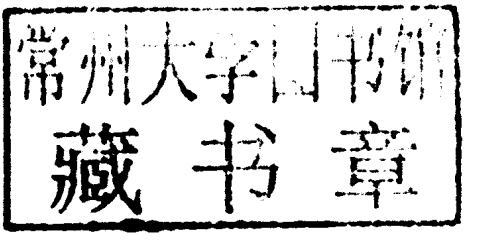

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Chapter 1
Introduction: Constitutional Myths

Alain Marciano

Human societies function correctly, at least in part, because the individuals who belong to them share some common beliefs about their origins, foundations and, as far as social sciences and political economy is concerned, how interactions are organized. These beliefs that are also called "myths" are therefore fundamental. They perform one or several functions – namely allowing societies to exist and to be ordered – that are *independent* from their empirical validity. We do not mean that such beliefs are and have to be "wrong" to be efficient. But rather that their importance does not come from the fact that they would be "exact" or "true." Certainly, when these beliefs have emerged, myths may have been related to specific events. But it does not necessarily matter, for their efficiency or for their effectiveness, whether or not myths are actually related to historical facts. Thus, foundational "myths" – these stories that explain the origins of societies – tend to become widely held and, at the same time, might be false. Then, and precisely because of a loose connection to facts, history, events, myths are most of the time accepted as such. They are not subject to discussion, which is undoubtedly problematic. There is no need to enter into the details of what these problems are – broadly speaking, it can be said that myths create inertia, that is *too much* stability, and accordingly perpetuate social structures that eventually are inefficient and unfavorable to citizens. As Gordon Tullock noted in a short but important 1965 article, "[m]yths, as a part of literature, can be entertaining and even illuminating, but if they are believed and acted upon, they can be dangerous" (1965, p. 583). Thus, for all their importance, myths should be exposed, discussed, and questioned.

Among the social structures that have generated myths, and this was indeed the purpose of Tullock's article, Constitutions occupy a non negligible place. These

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documents – they exist even in countries with so-called unwritten Constitutions – of the utmost importance structure, shape our societies. They bind citizens together, creating unity among them, and form the framework within which, in particular economic, activities take place. As Nobel Prize laureate James Buchanan has always put forward: Constitutions contain the rules of the social game we play in our everyday life. Even more importantly, Constitutions also constraint the behaviors of political decision makers and elected officials. They guarantee the democratic content of a political regime. However, not so surprisingly, Constitutions escape from the control of citizens – which, for *demo*cracies, is paradoxical – since they are, most of the time, not debated by citizens. From this perspective, we do not only refer to the precise content and specific provisions that are included in such or such Constitutional document but rather to the general role that Constitutions have in a society, about which indeed exist common beliefs, myths, that we-as-citizens take for granted. This volume therefore aims at investigating and "deconstructing" a number of commonly held myths regarding the functions and the effects of Constitutions.

Constitutions, Consent, and Social Contracts

Let us start with an important myth among political economists or political scientists, which is discussed in the contributions gathered in the first part of this volume: the claim that Constitutions are "social contracts." This was argued by many theorists, such as (among others) Burlamaqui, Hobbes, Locke, Pufendorf, Rousseau in the seventeenth and eighteenth century, and revived, modernized, in the twentieth century by philosophers such as John Rawls or economists, as one of the founders of public choice and Constitutional political economy, James Buchanan. This view on Constitutions-as-social-contracts is the theoretical counterpart of one of the most important of the Constitutional myths that exist: Constitutions "belong" to citizens because they have consented to, and therefore agree with its provisions, the document that defines the rules of the social game. Thus, this is an important consequence of the idea that Constitutions are social contracts, they are *not* coercive.

The main and immediate criticism – one that has been repeatedly raised against "social contract" theories – is, of course, that no individual has ever signed a social contract. Human beings have always lived in social, and therefore organized, groups. The individualist, conflictual state of nature in particular depicted by Hobbes is a fiction, a metaphor. Therefore, no citizen has ever consented to the Constitution that frames his or her activities. One does not even need to reason in terms of social contract to see that the thesis of the consent to a Constitution is disputable – no living being was there when the Constitution of the USA was written and adopted in 1789. Then, as a consequence and as Randall Holcombe argues in his chapter, Constitutions cannot but be a set of "coercive" rules. The demonstration rests on an analysis of the nature of the agreement that supposedly takes place between citizens in the theories that depict Constitutions as social contracts. According to him, citizens have little to say about the provisions that

are included in the Constitutional contract, and those provisions tend to reinforce the government's ability to maintain power and collect revenues from the citizenry. After discussing Constitutional theory, the chapter examines real-world Constitutional contracts to support its theoretical demonstration, to conclude that "[t]o refer to government as the result of a Constitutional contract based on consent is an Orwellian misuse of the language" (Chap. 2).

Holcombe's perspective in fact is a criticism against what is known as a "constructivist" or top-down view on institutions: even if individuals supposedly sign the contract, the latter is actually imposed on them. Alternatively, it could be argued that Constitutions are not binding contracts but focal points around which people coordinate. This is the bottom-up perspective that is adopted by evolutionist scholars who argue that societies rest on the norms that emerge progressively from interactions between individuals. Actually, neither evolution not social contract can be observed in "pure form" as Peter Boettke and Alexander Fink stress in their chapter. What is important is rather "to craft rules that both bind government power and establish an environment that promotes social cooperation under the division of labor" (Chap. 3). From this perspective, it is crucial to take individuals as they are, by which Boettke and Fink mean, following Hume, that "in designing a government we must assume that all men are knaves." They then show how a Constitution can indeed be designed in order to control human opportunism. They apply their analysis to a historical case from the medieval Hanseatic League and the Constitutional moment of post communism in modern times to see how in fact efforts at Constitutional craftsmanship attempt to address the problem of agent type, establish credible and binding commitments, and either promote or hinder social cooperation under the division of labor that characterizes an economically progressive society.

From a different perspective, Alan Hamlin also argues that individual behaviors are at the core of Constitutions. More precisely, he claims that the standard perspective in 'Constitutional political economy' (CPE) – that analyses Constitutions as providing the rules of the political game – can be viewed as the instrumental form of CPE. By contrast, Hamlin proposes to adopt an "expressive" perspective on Constitutions that is an extension of expressive analyses of politics according to which political behavior can or should be understood in terms of individual identity – how political acts contribute to identify individuals. In his chapter, Hamlin analyses the relationships between individual identify and expressive behavior at the Constitutional level. From this perspective, a Constitution is supposed to represent, constitute, more than the rules of the political game. Rather, according to Hamlin, a Constitution "makes a statement about the political community that it relates to" that "may be read as identifying or situating the community ... in cultural, historic, religious, ideological or other terms." In other words, a Constitution does not (only) belong to the citizens because they have consented to it, to the rules it incorporates but because it expresses the image of the population as a community. The Constitution belongs to the citizens because it expresses or allows them to express their identity. The chapter written by Hamlin discusses the incorporation of the identity aspect of Constitutions into the CPE approach.

Citizens as the "Fountain of Power"

"We The People of America" is the first – one of its most important – sentence of the American Constitution, and its logical starting point. It means that citizens are the "fountain of power"; they are, to use and economic term, the "principals" who delegate to certain tasks political decision makers and retain "real authority" (Aghion and Tirole 1997) or sovereign power over political decisions. Actually, most of the time, citizens are excluded from the preparation and design of Constitutions. Holcombe has written his chapter around this fact, as noted earlier. As it is well known, citizens have not played a crucial role in the integration process in Europe and in the design of a Constitution for the European communities (see Josselin and Marciano 2007). It nonetheless remains that the role of citizens in a Constitutional democracy is an important of "Constitutional myth" and a huge amount of literature has been devoted to the question. It would be impossible to enter into all the details of the problems related to this myth. Two chapters analyze some of its aspects.

First, Elisabeth Dale proposes an historical discussion of how citizens were perceived in the nineteenth-century USA. She discusses a murder trial in Pennsylvania in 1843, using it to explore how people in the first half of the nineteenth century could and did lay claim to the right to be sovereign by asserting the right to take the law into their own hands. The possibility that the people asserted sovereign power in the first half of the nineteenth century runs counter to the standard Constitutional history of the USA. According to that narrative, the people, having delegated their sovereign power to their governments with the ratification of the Constitution, became observers, not participants in the Constitutional order. They would not return to active participation in that order until the rights talk revolution of the late nineteenth and early twentieth centuries gave them a means of challenging and limiting the power of the state. And even then, their sovereignty only gave them a check, a right of reaction that fell short of taking actual control of the law. Dale's study follows a handful of recent works that have begun to reclaim the people's Constitutional role in that earlier period. To do so, this article looks at both social practices and ideas, and considers the specific problem of how people exercised their Constitutional power over the common law.

If we admit Dale's conclusions, then the question might be: what remains of the Constitutional power that "we" as citizens do retain? Would the Constitutional power of the citizens not be more important in other forms of democracy, such as a "direct democracy"? This is, indirectly, the question that Bruno Frey, Alois Stutzer, and Susan Neckermann raise in their plea in favor of direct democracy. Their demonstration consists in analyzing a crucial aspect of Constitutional design, namely the provision of rules on how a Constitution is to be amended. If procedures for Constitutional amendment are very restrictive, changes will in all likelihood be implicit and above all take place outside the Constitution. The consequence is then that Constitutional reforms are likely to be against the citizens' interests and their ability to influence the political process. Thus, direct democracy should be preferred because it is a form of regime that allows citizens to participate in the amendment process. Frey, Stutzer, and Neckerman analyze the direct democratic process of institutional change,

from a theoretical and empirical perspective, introducing counter arguments and issues for a gradual introduction are discussed.

Constitutions, Coercion, and Power

The logical counterpart of the myth discussed above should be that Constitutions, being or not social contracts, are coercive. In that sense, they are instruments of power and this power not being exercised through the consent of citizens or controlled by citizens is coercive. Is this statement legitimate? Are Constitutions really instruments of coercive power or, on the contrary, are they tools of freedom? Does the fact that citizens do not play a central role in the establishment and transformation of Constitutions necessarily imply that Constitutions are coercive? To answer the question Louis Imbeau and Steve Jacob propose a case study. They analyze the Canadian Constitution, with the purpose of unveiling some of the myths present in the Canadian Constitution. In a first part, they look at the Constitution as an instrument of *preceptoral* power, that is, as a document aimed at convincing the audience of the legitimacy of the distribution of power at the time of writing. With a content analysis of the Constitution, they identify the power relations among the main actors mentioned in the Constitution. Then, in a second part, Imbeau and Jacob compare the power relations discovered in the previous part to those assumed in public choice theories, considering the latter as the "true" power relations and looking for consonance and dissonance, cases of dissonance identifying "false beliefs or ideas."

A second answer to the question of Constitution-as-instrument-of-power is provided by Atin Basuchoudhary, Michael Reksulak, and William F. Shughart II in their analysis of how the state can be controlled through a Constitution. Are Constitutions powerful enough to control the state? They focus on the second amendment of the US Constitution, which is often interpreted by lawyers as a way of reducing the state monopoly on coercive power, and propose a model in which a state tries to corner the market for coercive power. This state faces potential entrants (empowered by the second amendment) who are trying to reduce the market power of the state. Basuchoudhary, Reksulak, and Shughart use this contestable markets approach to show that even with the second amendment the state can wield a monopoly on coercive power. This suggests that the role of the second amendment as a bulwark against a rapacious state may be a romantic fantasy – albeit one that the US Supreme Court seems to have bought into.

Quis Custodiet Ipsos Custodes?

Another question in terms of power and control and Constitutions relates to the control of the Constitution itself. This is one of the most vivid "Constitutional myths" that there exist "guardians" of Constitutions and that this role is devolved to

Supreme Courts. The question was raised by the Roman poet Juvenal and his question – *Quis custodiet ipsos custodes?* has been repeatedly posed. And, as it seems, no definite and really satisfactory answer has been given. In other words, it has never been proven that Supreme Courts are the impartial guardians Constitutions, and citizens, need. On the contrary, it has been demonstrated, in the case of the USA for example, that the Supreme Court has rather assumed another role than that of guardian of the Constitution (see our own study, Josselin and Marciano 2004). Another now well-studied instance is the European Court of Justice – as we have shown elsewhere, the EJC followed the path of the US Supreme Court and progressively increased its power and its sphere of competences rather than simply "guarding" the European Constitution. This was not surprising and not even the result of strategic behaviors: the incompleteness of the "contract" defining the tasks the ECJ had to accomplish obliged judges to travel this route (Josselin and Marciano 2000, 2001). In other words, in Europe, the Constitutional guardians tend to define their prerogatives while guarding the Constitution because there is no Constitution to guard. This is also the argument Giuseppe Eusepi, Alessandra Cepparulo, and Maurizio Intartaglia develop in their paper: The European Court of Justice is a unique institution where judges are guarantors of a European Constitution that *does not even exist*. They thus tend to enlarge their powers, even over those matters that traditionally are settled by the Constitutional courts of member states, such as fiscal controversies. More precisely, Eusepi, Cepparulo, and Intartaglia argue that the ECJ uses two related elements to increase its centralizing power – the prohibition of parallel imports and of competitive intergovernmental relationships. Through these provisions, the ECJ conveys a conviction that competition plays no disciplining role in either the economic market, or the political market. In fact, decisions are based on the principle of so-called harmful competition, which has been extensively used by the ECJ over time to promote its free self-assertion. However, when it comes to fiscal matters, Eusepi, Cepparulo, and Intartaglia show that competition is held to be harmful again. To the authors, the ECJ's behavior is ubiquitous and its structure is one of communicating vessels that are impeded to communicate.

One of the reasons for which Supreme Courts may not be neutral guardians is their lack of independence. This is the aspect that is analyzed by Fabien Gelinas in his chapter. He considers the rationale of judicial independence in Constitutional discourse. A look at the evolution in the expression of this principle in normative instruments of various periods and sources shows how the universal requirement of independent adjudicators, which aims at ensuring justice in the particular case, and the widely shared desideratum of a powerful judiciary, which aims at checking the exercise of power by the political branches, provide two distinct grounds for protecting judicial independence. These grounds overlap in many respects but must be distinguished in order to satisfactorily work out the detailed requirements of independence in particular scenarios. This has become pressing in the current setting where adjudication is more and more often entrusted to tribunals whose members are not part of any judiciary.

Judicial independence can be compared to the situation of Central Banks (other guardians, whose independence is supposed to be particularly important for a good

economic health). George Tridimas proposes this comparison and, more precisely, investigates whether judicial independence (JI) and central bank independence (CBI) are positively correlated. After analyzing and comparing the meaning, rationale and institutional arrangements for JI and CBI a more nuanced pattern of similarities and differences emerges. Estimation of the statistical significance of the coefficient of correlation between JI and CBI for an international sample shows that there is no significant correlation between indicators of legal independence but a significant correlation between indicators of actual independence.

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Chapter 2
Consent or Coercion? A Critical Analysis of the Constitutional Contract

Randall G. Holcombe

Introduction

Humans are social creatures, and any social organization requires an understanding among its members about how individuals in the society interact, what their obligations are to fellow members of society, and what they can expect from others. This understanding is the social contract. The social contract is universal, in that as far back as history can trace, and in every place around the world, humans have always lived in groups and have always worked cooperatively. Constitutions are a formalization of the parts of the social contract that specify what obligations the group compels from its members, and what rights group members are entitled to in return. In contrast to the Constitutional contract, social norms are a part of the social contract that conveys behavioral expectations, but without a formal set of sanctions for those who do not conform. If a person is rude, individuals may choose informal sanctions (such as avoiding interactions with a rude person), but if one violates the Constitutional contract, for example, by not paying taxes that the contract levies, or violating regulations the contract specifies, there are formal institutionalized sanctions imposed on violators. At a very minimum, in this sense, the Constitutional contract implies coercion. Institutionalized sanctions are imposed by force on those who violate the Constitutional contract.

Social contract theory argues that even in cases such as this the rules and sanctions may be consensual, if members of the society agree to the social contract. At a Constitutional level everyone agrees to the rules, so any coercion used in conformity with the social contract is the result of previously agreed-upon rules. To create an orderly and productive society, members agree to be coerced. This is the argument that will be critically examined in this chapter. The argument deserves close scrutiny

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because the agreement social contract theory refers to is only a hypothetical or conceptual agreement. In fact, most people did not agree to their government, to its taxing and regulatory powers, or to its control over their lives. Government forces them to comply whether they want to or not, so the social contract theory underlying at least a part of Constitutional economics bears a heavy load in demonstrating that the Constitutional contract has its foundation in consent rather than coercion. This chapter argues that social contract theory breaks under that load.

Theories of Constitutional Consensus

Modern social contract theory argues that the terms of the social contract are determined by a hypothetical agreement from behind a veil of ignorance, following Rawls (1971), or in a renegotiation from anarchy, following Buchanan (1975). The contractarian framework views the Constitutional contract as those provisions that individuals would agree to from behind a veil of ignorance where they know nothing about their own personal characteristics; or would agree to in a renegotiation of the contract from anarchy, where there are no Constitutional provisions governing social interaction. Starting from a situation in which there are no Constitutional rules, the Constitutional contract consists of provisions that people would approve of under these conditions.

This social contract theory is a procedural theory, meaning that the terms of the contract are those that would emerge from the process of agreement. The Constitutional consists of those provisions people would agree to under the specified conditions. This leaves some uncertainty as to what provisions people actually would be able to agree. To choose a contentious issue as an example, some people will argue that behind a veil of ignorance people would agree to a Constitutional rule prohibiting abortion; others will argue that people would agree to a Constitutional rule allowing it. While the actual provisions of the Constitutional contract are certainly of interest, they are outside the bounds of this chapter, which focuses on consent vs. coercion in the creation of Constitutional rules.

There is a potentially significant difference between Rawls's agreement behind a veil of ignorance and Buchanan's renegotiation from anarchy. With Rawls, people know nothing about their own personal characteristics as they negotiate the Constitutional contract. With Buchanan, people lose any privileges they get from the social structure, because in anarchy there is no royalty, there are no elites, no social status, and there is no enforcement of property rights or contracts. Buchanan's anarchy is the one described by Hobbes, which is a war of all against all, and where life is nasty, brutish, and short.[1] But while people in Buchanan's anarchy lose any privileges given by institutions and social status, they retain their own personal identities.

[1] Not everyone shares this vision of anarchy. See, for example, Rothbard (1973), who describes an orderly anarchy based on markets and exchange.