Studies in Public Choice

Alain Marciano *Editor*

Constitutional Mythologies

New Perspectives on Controlling the State

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New Perspectives on Controlling the State

Springer

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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.

As North et al. (2009, p. 33) note, when interacting with others every person has two parts: individual attributes (physical characteristics, intelligence, industry, ability, etc.) and socially ascribed attributes (status, power, rights, etc.). Behind the veil of ignorance people are ignorant of both. Renegotiating from anarchy, people have no socially ascribed attributes but retain their individual attributes. The next section examines this difference in more detail.

The most extreme example of a theory of agreement with the Constitutional contract was put forward by Rousseau (1762, Book IV, Chap. 1, no. 2), who says "The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares break any of them. … When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so." According to Rousseau there is a general will shared by everyone, and to which everyone agrees.[2] Dissent, in Rousseau's vision, is only an indicator that the dissenter is mistaken about the general will.

Buchanan and Tullock (1962, p. 13) reject Rousseau's notion of a general will, saying, "Collective action is viewed as the action of individuals when they choose to accomplish purposes collectively rather than individually, and the government is seen as nothing more than the set of processes, the machine, which allows such collective actions to take place… we have explicitly rejected the idea of an independent 'public interest' as meaningful…" The Constitutional contract is a way for individuals to cooperate to achieve their individual goals through collective action, not an expression of a general will.

To escape from the war of all against all that Hobbes views as anarchy, Hobbes argues that people must abide by the rules of the sovereign. Hobbes (1651, Chap. 26) says people must "…confer all their power and strength upon one man, or upon one assembly of men … every man should say to every man: I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner… to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence." This is the Hobbesian social contract. Everybody agrees to abide by the rules of the sovereign. Hobbes says that people must abide by all of the sovereign's rules. People cannot pick and choose the rules they believe they should obey, or the society will devolve back to anarchy. People who do not abide by the sovereign's rules can be killed. That is one mechanism to

[2] While this is a translation, it is interesting to note that Rousseau twice refers to people as a singular term ("the people is asked" and a few words later referring to the people as "it" rather than "they." This flies in the face of an individualistic notion of a society as a group of people, but is quite consistent with Rousseau's notion of a singular general will.

ensure unanimous agreement! But Hobbes saw it as necessary to prevent a war of all against all.

The contractarian view of agreement with the Constitutional contract relies on some notion of hypothetical agreement, not actual agreement, although the nature of the hypothetical agreement gets more sophisticated through the centuries. For Rousseau, those who disagree are wrong; for Hobbes, agreement is necessary for an orderly society, so everyone must agree or be ejected from the society. For Rawls and Buchanan, there are procedural tests to determine what provisions are a part of the Constitutional contract, but for both of them, people can express their disagreement yet still be said to be hypothetically in agreement if their procedural tests (agreement from behind a veil of ignorance; renegotiation from a hypothetical anarchy) are met.

Consenting to a Constitutional Contract: A Two-Person Case

To get an idea of how people might come to agree to a Constitutional contract, consider a hypothetical case of two people living in Hobbesian anarchy. There are no rules, so life is a war of all against all. Assume that one individual is physically stronger than the other, so the strong person is in a position to take anything the weak person produces, and to beat up and even kill the weak person. The weak person in this scenario will not fare well, being at the mercy of the strong person, but if the strong person is predatory, the strong person will not fare well either. The strong person can take anything the weak person produces, so the weak person has no incentive to produce anything, knowing that anything the weak person produces beyond what can immediately be consumed can be taken by the strong person.

Both people could profit by making an agreement whereby the strong person agrees to limit the amount he would take from the weak. The strong person could, for example, agree to take only 30% of what the weak person produces, leaving the weak person the opportunity to be productive and consume 70% of his productivity. Both would be better off if they could find a way to enforce the agreement. The weak person would be able to keep 70% of whatever he produced, which is better than living under the threat of having everything he produces stolen from him, and the strong person would have everything he produced plus 30% of the weak person's production. All that is required is some method of assuring the weak person that the strong person really will limit his take. This is the role of Constitutional constraints on government power, which will be discussed further below.

Consider this two-person case within the Rawlsian framework. If the two people were behind a veil of ignorance, neither would know whether they would be in the position of the strong person or the weak person once the veil was lifted. All it would take would be a small amount of risk aversion to see that the agreement described above would not hold up behind the veil. Individuals would be unlikely to want to gamble that if they turned out to be the weak person they would be taxed 30% of what they produced to pay off the strong person. If justice is fairness, a fairer outcome would be to set up a social contract wherein each individual was

able to keep and consume what he produced.[3] Perhaps they would agree to some redistribution, as Rawls suggests with his maximin criterion, but Rawls suggested that an agreement to redistribute would be based on the well-being of the individuals, not a bribe to pay the strong not to prey on the weak. The outcome described above is inconsistent with agreement from behind a veil of ignorance.

What will happen when the veil is lifted? In the simple two-person case described above there would appear to be nothing standing in the way of the strong person, now realizing his advantage, to threaten the weak to strike the above deal. The social contract will be violated. Keep in mind that nobody really gets behind a veil of ignorance and nobody actually agrees to anything. That agreement was all hypothetical and never really took place, so there never was an actual social contract to break.

Now consider Buchanan's framework of renegotiation from anarchy. People have no socially ascribed attributes but retain their individual attributes. The hypothetical bargain described above appears more likely in Buchanan's framework than in Rawls'. Indeed, the Hobbesian anarchy where Buchanan begins is exactly that situation where people have no socially ascribed attributes. So in the hypothetical renegotiation from anarchy the strong person makes the case that without the transfer, the weak person will be at the mercy of the strong, but that the strong will not bully the weak as long as the 30% income transfer is paid. It makes sense that the person with the better bargaining position can bargain for a better outcome.

This example illustrates a difference between Buchanan's and Rawls' hypothetical Constitutional contracts. This is significant because in the context of hypothetical agreements, there is ambiguity not only about the provisions of the social contract, but even on the criteria by which one would determine the terms of the contract. Rawls's criteria differ from Buchanan's, for example. One could hardly say that this theory has any applicability to the real world when even the hypothetical criteria underlying the contract are ambiguous and subject to different interpretations.

The Constitutional Contract: A Multiperson Case

Now extend the two-person case from the previous section to more people. Call the weak in the example above the citizens and the strong their government. Government, which claims a monopoly on the use of force, and has some ability to stand behind that claim, is able to use its force to compel citizens to tender 30% of their incomes to their government. With others entering the framework, some of those others will see the productive citizenry as a potential target for plunder, so third parties have an incentive themselves to do what the government is doing and take some of what the

[3] Rawls (1971) says justice is fairness, but there may be a subtle difference between them. Schurter and Wilson (2009) argue that justice implies that people get what they deserve, whereas fairness implies that everyone has an equal opportunity. Thus, if one were to determine by a coin toss which of two individuals would get a prize, the outcome would be fair, because both had an equal opportunity, but not just, because the winner of the coin toss did not deserve more than the loser.

citizens produce. As a response to the possibility of third parties looting its citizens, the government has an incentive to protect its citizens from plundering third parties, because protecting their property and their incomes also protects the government's source of income, which is the productivity of its citizens. This, as Holcombe (1994) describes, lays the economic foundations of government. Citizens want to have their property and productivity protected, and government has an incentive to protect those citizens, because it is protecting its source of income. Thus, the fundamental exchange in this exchange model of government is the exchange of protection for tribute. Citizens benefit from the protection, and government benefits from the tribute. This is why, as Holcombe (2008) explains, government provides national defense.

This framework is based on agreement in one sense. Citizens find themselves better off agreeing to the terms their government sets for them than resisting. Citizens do value the protection they get from government. The terms of the exchange, however, are set by those with the power to use coercion to enforce their demands. In a sense, one might say, when a highwayman confronts a traveler with the threat, "Your money or your life," that when the traveler tenders the money the traveler has made a choice and has agreed to transfer resources to the highwayman. Most readers would resist calling this a voluntary exchange on the part of the hapless traveler, however. How are things different when government requires citizens to pay taxes, using the same kind of threats? The fact that citizens get something in return – in this case, protection of their productive capacity – does not make the transfer any less forced.

Coercion Underlies All Government Activity

The only reason government exists is to force people to do things they would not freely choose to do themselves. If people would voluntarily abide by the government's regulations and pay their taxes, there would be no reason for government, because people would do what the government now compels them to do without being forced. The coercive infrastructure of government is costly to maintain – the tax collectors, the regulators, the inspectors – but those who wield political power apparently view the cost as worthwhile, because it enables them to maintain their power. The notion that government is based on agreement rather than force is a fiction, but one that has substantial propaganda purposes for those who want to maintain their ability to coerce others through governmental institutions. As Yeager (1985; 2001) points out, no matter how much someone agrees with the activities of government, the ultimate basis of government is force, not agreement. Government uses force against those who violate its mandates, or who try to pay less than it demands to finance its operations. Joseph Schumpeter (1950, p. 198) observed, "The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social sciences is from scientific habits of mind."

What about the argument that citizens agree to be coerced? They find themselves in a prisoners' dilemma setting where everyone is better off if they are forced to

cooperate rather than act in their own narrow self-interests. Even if people are in a prisoners' dilemma situation, the argument that they "agree to cooperate" obviously fails as a description of reality, because in fact people did not agree. Thus, the theory must rest on the notion of some hypothetical or conceptual agreement. Even the argument that the possibility of some free riders is what keeps everyone from voluntarily agreeing strains belief. Would it be plausible that in a group of any size everyone would be in agreement with anything? For example, in the Hochman and Rodgers (1969) argument, forcing higher-income people to transfer income to lower-income people can be a Pareto improvement, because in the absence of coercion people free-ride off the transfer payments of others. It is implausible that even in a group with hundreds of people – let alone millions – that there would not be a few people who would oppose the redistribution, either on principle or just because they were selfish. Any dissent at all means the coercion cannot produce a Pareto improvement. The argument that people agree to be coerced cannot possibly apply to any real-world government.

The Contractarian Counterargument

Setting aside reality, what about the contractarian arguments of Rawls (1971) and Buchanan (1975)? Following Rawls, Constitutional rules are the result of agreement from behind a veil of ignorance. Buchanan's Constitutional rules are produced from a renegotiation from anarchy. Both arguments are hypothetical, in that there is no real veil of ignorance, and people do not actually start from anarchy to set the terms of the social contract.

One of the features of these frameworks is that people start out in a relatively equal position as they bargain to determine the Constitutional rules. The purpose of the veil of ignorance, or renegotiation from anarchy, is to remove the bargaining advantages that individuals might have as a result of a pre-existing power structure.[4] Now consider the actual setting within which Constitutional rules are determined. The terms of the Constitutional contract are in fact determined by people who have the advantage of being able to use force to impose conditions on those with less power, they are determined by people who exist in a social network where some will have a status advantage over others, and they are determined in a setting where some will be more skilled in bargaining for Constitutional provisions. In other words, even if we accept the hypothetical framework of Rawls and Buchanan as defining what constitutes agreement, in reality the relatively equal bargaining power that the contractarian framework carries with it is not descriptive of the way in which actual Constitutional rules are established.

[4]With Rawls (1971), all advantages are removed because nobody knows any of their personal characteristics behind the veil. With Buchanan (1975), people lose any social or institutional advantages, but do not lose their personal identities, making it more plausible in Buchanan's framework that some people might have a bargaining advantage as a result of personal characteristics. One might think about the strong vs. the weak, as in the example earlier in the chapter, but in negotiating a social contract the more intelligent might also have a bargaining advantage in drawing up a contract.

Governments are imposed by force, not by agreement. Are there any counterexamples? If there are – I cannot think of any – they would be "the exception that proves the rule." The US government, often celebrated as a Constitutional democracy, was established by force as a result of a violent rebellion to overthrow British rule in the colonies. Its original Constitution lasted only a few years before being replaced by a new one in 1789, which Beard (1913) argues was designed to further the interests of its authors. The Constitutional convention met over an entire summer, meaning that those in attendance and writing the Constitutional had to be independently wealthy. Fortunately for the new country, their interests were aligned with commerce, the protection of property rights, and limits on the scope of government – to protect their privileged positions from the redistributive impulses of the masses. The Constitution was not written from behind a veil of ignorance, it was written to protect the property and income of those who already had property and income.[5]

The original writing of the Constitution is hardly relevant to the Constitutional rules that are currently in effect. Constitutional rules are subject to interpretation, and evolve over time. In the USA, the Supreme Court interprets the Constitution, and the actual Constitutional rules determined by the Court appear considerably at odds with the words of the document. For one (major) example, the Constitution specifies that the powers of the federal government are limited to those enumerated powers granted in the Constitution. There is no provision in the Constitution for the federal government to run a compulsory retirement system, yet in 1937 the Court declared the Social Security program to be Constitutional. Whether the program is desirable or not is beside the point. The point is that the scope and power of government is not determined by some social contract agreed to under some hypothetical terms. People with political power use the force of government to impose their will on others.

Taking Social Security as a case in point, regardless of whether people like the program they are forced by their government to participate. The program was imposed on citizens, and the legal challenges heard by the Supreme Court make it apparent that not everyone thought they were better off and agreed to be coerced. Might people have agreed to the program from behind a veil of ignorance? In this case it is unlikely, because the program is a scheme that transfers from younger generations, including the unborn, to older generations, so in the real world there would be minimal motivation to oppose the program for selfish reasons, or to be a free rider. The real-world opposition to the program would have remained behind a veil of ignorance.

Generalizing from this specific example, all government programs are imposed on citizens by those with political power and Constitutional constraints along the lines of anything that might have been agreed to from behind a veil of ignorance are irrelevant. The actual fact that in every real-world case government has been imposed

[5]It may be worth more than a footnote to remark that the Constitution even allowed slavery. Surely its authors were not behind a veil of ignorance, thinking there was some probability that after the Constitution took effect they would be slaves.

on people by force, and not in any sense agreed to by citizens, holds up well against the contractarian counterargument.[6]

Constitutional Constraints

Though government imposes its mandates by force, it does face Constitutional constraints, especially of a procedural nature. This gives the illusion that the power of government is constrained for the benefit of its citizens. While citizens do benefit from such constraints, the constraints are put in place not for their benefit but for the benefit of those with political power. Consider the earlier hypothetical example where government agrees to take 30% of its citizens' incomes in exchange for allowing them to be productive, and also provides them protection because the government is also protecting its source of income. This only works for government if citizens believe that once they produce wealth, the government will not use its power to confiscate it.

The incentive for government to break its side of the agreement and plunder its citizens will grow as time passes and citizens accumulate capital. Fidel Castro appropriated privately accumulated property when he imposed his new government in Cuba; Hugo Chavez appropriated private oil reserves in Venezuela. In Russia such appropriation has happened several times: after the revolution in 1917, and again when Vladimir Putin's government nationalized oil resources in Russia's growing post-communist oil industry. Thus, citizens will benefit from a Constitutional contract that can provide them some security for their property and income streams. But, as the original two-person example illustrated, those in government also benefit from Constitutional constraints on the scope of their power. Without such constraints citizens have no assurance that the government will not plunder their assets after they have accumulated some wealth, so the incentive for wealth accumulation is reduced, which reduces the government's tax base. Zimbabwe under the rule of Robert Mugabe provides an excellent example.

Constitutional constraints on government power are often depicted as a part of the Constitutional contract that limits the power of government for the benefit of its citizens, so it is important to recognize that those in government also benefit from those constraints. The constraints increase the security of citizens' property, which increases productivity, which increases the flow of tax revenues government can collect from its citizens. Surely elected political leaders in developed nations with strong Constitutional constraints are better off than political leaders in nations with weak Constitutional constraints, and therefore weak economies. In the USA, even though presidents are term-limited out of office, their status provides them with permanent

[6] Bailyn (1992) provides a possible example of citizen agreement to the social contract in the formation of medieval cities around 1050–1150. It was common for all residents of the city to meet in the town center and verbally affirm their agreement to abide by the city's rules. This may have provided a real-world foundation for the social contract theory. But the example has no relevance to any present-day government.

prosperity. Members of Congress, who are not term-limited, are almost always re-elected so can hold on to their power indefinitely, and as Parker (2008) notes, their time in office gives them brand-name capital and human capital that allows them to earn incomes well above what legislators earn after they leave office. The prosperous existence elected officials enjoy during and after their terms of office are only there because Constitutional constraints provide the incentive for wealth creation, which in turn can be plundered by those with political power.[7]

Some constraints come in the form of guaranteeing citizens that they can keep a share of what they produce, though typically not by setting a set percentage as in the simplified example above. Rather, the guarantees come in the form of procedural guarantees. Tax rates, regulations, and other mandates are determined by a procedure, and any changes in the burdens government places on its citizens must be approved by the agreed-upon procedure. This is consistent with the Rawls (1971) and Buchanan (1975) concept of a procedural theory of justice. Fair outcomes are the result of fair processes, so if the process is agreed to as fair, then the tax rates, regulations, and so forth that are mandated through the process are fair. Obviously, this procedural guarantee on the limit to government's take is more flexible than a guarantee of a fixed percentage tax rate, so will enable a revenue-maximizing government to adjust its rate over time to, in fact, maximize its revenues. But apparently, from looking at developed economies around the world, a procedural guarantee is sufficient to retain incentives for productivity and capital accumulation.

Democratic elections of government leaders also provide a procedural Constitutional constraint that limits the power of existing leaders by making their continuation in office subject to popular approval. This also provides the benefit to those with political power of a smooth transition should citizens become discontented with their political leadership. Rather than risking violent overthrow, in which leaders' lives could be in jeopardy, and in any event in which they would be forced to leave with diminished reputations and incomes, elections allow leaders to continue serving with the appearance of popular approval, and even losers in elections retain respectability. Two good examples from the USA are Jimmy Carter, who was soundly defeated in the 1980 presidential election by Ronald Reagan, after serving only one term, and Al Gore, who was President Bill Clinton's vice president and lost the 2000 presidential election to George W. Bush. Both Carter and Gore went on to win Nobel Prizes after their electoral defeats. Autocrats who are forced out of office almost always must seek refuge in another country and are often killed; democratic leaders who are forced out of office retain respectability, income-earning potential, and might even win Nobels.

While Constitutional constraints are often depicted as protecting the interests of citizens by constraining the actions of government, it is important to recognize that those constraints benefit the government too, by enhancing its revenue-generating potential and protecting other interests of political leaders. When one considers the actual process by which they are imposed, it becomes more apparent that they are there because those who have the power to impose them benefit, even though

[7]Cases of bribery and graft are not uncommon, but those leaving political office also have political connections and human capital that enables them to become effective rent-seekers. Former legislators are among the most effective lobbyists, for example.

they also benefit the relatively powerless. As Beard (1913) noted, the powerless do not design Constitutions; those with power do, and they design them to further their own interests.

Coercion and Legitimacy

Many of the Constitutional constraints placed on government also serve the purpose of making government action appear more legitimate. The more legitimate government action appears the easier it will be for government to enforce its mandates. One way to create the appearance of legitimacy, as Edelman (1964) notes, is to create the appearance that citizens have agreed to the mandates of government. Democratic institutions do this.

When a democratic government decides to raise the tax rates citizens pay, or undertake a military invasion of another country, or create a regulation that imposes costs on some citizens, the democratic procedure by which those in power got their power appears to make their actions the results of the decisions of the citizens. Presidents, prime ministers, and parliaments came to power through a process those leaders promote as legitimate; therefore, their exercise of power in those positions is legitimate. Had an autocrat unilaterally made similar decisions citizens might question their legitimacy, but in a democracy, citizens voted to give those powers to their elected officials. Applying a procedural theory of justice, the outcome of a legitimate process is a legitimate outcome.

Government institutions are designed to create the appearance of legitimacy, because by doing so the government lowers its cost of forcing people to abide by its mandates, and in some cases makes it possible to implement mandates that might otherwise meet with too much resistance to be implemented. As Higgs (1987) notes, in times of crisis government action to deal with the crisis can appear legitimate, when in normal times that government action would be resisted. Thus, Higgs argues that the scope and power of government ratchets up during crises, and remains above its pre-crisis level after the crisis has passed. This gives those in power an incentive to create and maintain a crisis atmosphere. This explains why dictatorships like Cuba and North Korea like to trumpet to their citizens the external threats the USA (and other countries) pose to their security, and why democracies like the USA have an incentive to play up the threat of terrorism.[8]

[8]It is implausible to think that a country like the USA faces a threat of foreign invasion, but the threat of terrorism can be used in the same way. Certainly a terrorist attack is possible, and one happened in 2001, eight years ago as this is being written. The USA has a five-tier terrorist threat system, and the threat level is currently at its second-highest level: "High Risk of Terrorist Attacks," where it has been since 2006, after being lowered from the highest level of "Severe Risk." The problem is, the threat advisory system, like the boy who cried "wolf," loses all meaning when during "normal" times the threat level is at the second-highest level. If it went up, people would see it as almost the same level it was before, so it loses its warning ability. However, keeping the threat level at the second-highest tier legitimizes government actions to respond to threats, enhancing the government's power.

The crisis of the external threat increases the appearance of legitimacy for any policies that are justified as responses to that crisis, which allows government to expand its power over its citizens.

Rahm Emanuel, President Obama's Chief of Staff, famously declared, "You never want a serious crisis to go to waste" in justifying Obama's ambitious agenda during the recession of 2008–2009. President Obama would have more leeway to implement policies he favored if those policies had the appearance of legitimacy in response to a crisis. What right did President Obama have to implement such sweeping economic policies? He was elected president through a democratic procedure that legitimized his holding of presidential power, and he proposed his policies to Congress, which voted to approve them. Democratic political institutions legitimize the outcomes they produce.

Coercing people to act in ways they would not voluntarily choose to act is costly. One can look at institutions like the Internal Revenue Service, which has the task of enforcing US tax law, and a whole host of regulatory agencies and agencies with police powers, to see some evidence of this cost. If government can make its mandates appear legitimate, then there will be less resistance and therefore its mandates can be enforced at lower cost. If everybody decided the government's powers of taxation were illegitimate and became tax resisters, it would be impossible for the government to collect anywhere near the revenue it does. Russia and Italy provide evidence this is the case. Because US citizens are more inclined to view the taxing powers of government as legitimate, they pay with less resistance. Government can then make an example out of the "tax cheats" it uncovers, using a combination of the appearance of legitimacy coupled with the threat of force against resisters to bring in its revenue.

Without the appearance of legitimacy, governments around the world would not be able to confiscate 30%, 40%, and not infrequently over half of a nation's income in tax revenues. Any reader who balks at viewing taxation as confiscation of citizens' resources should consider how much the government would collect if it allowed citizens to voluntarily decide how much to contribute. Even here, an Orwellian misuse of the language creates the appearance of legitimacy, as tax revenues often are referred to as contributions. They are confiscated, not contributed, if citizens are forced to pay them.

The Social Contract Theory and Legitimacy

Those with political power can minimize their cost of imposing their mandates on citizens by making those mandates appear to be legitimate, and government institutions such as democratic decision-making and Constitutional procedures for designing those mandates aid in creating the appearance of legitimacy. Institutions and procedures help provide the appearance of legitimacy, but they are much more effective when supported by propaganda that reinforces the idea that the institutions and procedures of the state are legitimate. Much propaganda has emotional rather than intellectual appeal. Respect for a nation's flag and other symbols, a national anthem,

and other appeals to patriotism reinforce support for government through emotional means. Other propaganda is designed to have more of an intellectual appeal.

The social contract theory of the state is propaganda designed to make an intellectual argument in support of the legitimacy of government activity. Even though the government actually operates through coercion, forcing people to obey its regulations and forcing people to pay their taxes, government could expend less on coercive infrastructure and command more power if people believed that citizens agreed to – and even designed and created – government's mandates. Thus, the social contract theory of the state is an attempt to use sophisticated arguments to portray the government as something that it is not: that is, to portray government coercion as the product of agreement.

Anyone can see that government does, in fact, operate based on coercion rather than consent. For propaganda purposes, an argument that people actually agreed to government's use of force would be useful, and the modern social contract theory provides that argument by concocting a framework within which even people who openly claim not to be in agreement with some (or many or all) of a government's activities nevertheless are conceptually in agreement because of a hypothetical social contract that would have been agreed to under circumstances far removed from any vestige of reality. Nevertheless, despite *my* claim that *I* am not in agreement, social contractarians insist that I am, because I am bound by some abstract theoretical construct like agreement from behind a veil of ignorance, or renegotiation from anarchy. This emperor has no clothes. Even if people like their governments, nobody agreed to a Constitutional contract. It was imposed on them regardless of whether they wanted it. Arguing that something that was forced on people is the product of agreement is like arguing that black is white; yet somehow, a not insignificant number of intellectuals have bought into the argument.

Procedural theories like those of Rawls and Buchanan have another propaganda advantage, in that they do not state what provisions actually are part of the social contract. Buchanan and Tullock (1962, Chap. 6) show how, conceptually, government policies produced through democratic decision-making procedures can meet the benchmark of unanimous agreement even though they are not, in fact, unanimously approved. Thus, one could argue, along the lines of Rousseau, that anything a democratic government does was agreed to as a part of the Constitutional contract, because the procedure under which the government action was taken is legitimately a part of the contract. The modern social contract theory places the entire burden of the argument on the procedure used to produce the outcome, not on an evaluation of the outcome itself. In this sense, the social contract theory can be used to support any tax, regulation, or government policy or program.

While one might argue that democratic governments can be just as coercive and exploitative as autocracies, undermining the perceived legitimacy of government action, the social contract theory comes to the rescue by arguing that those democratic decision-making institutions are a part of the social contract, agreed to by the citizens who are subject to government coercion. How can it be said that citizens are in agreement when they are protesting and objecting to government actions? The answer is that they are conceptually in agreement, even when they

actually disagree. The social contract theory is a component of the propaganda that is used to support the coercive apparatus of the state, and make coercion appear to be the product of agreement. Thus, the social contract theory provides an intellectual foundation for the legitimacy of government action.

Such an argument cannot be refuted because it is based on hypothetical, rather than actual, agreement with the Constitutional contract. It is not possible to find evidence related to hypothetical events, because those events are not real. But while one cannot find evidence to determine what people would do under hypothetical conditions that never existed and cannot exist, there is strong real-world evidence that government's actions are not based on agreement, but on coercion. That evidence is that in fact, people did not agree to a social contract, and in fact government threatens harm to those who do not follow its dictates.

Conclusion

The idea that there is a Constitutional contract that is the product of agreement among a nation's citizens is a fiction that is supported by the social contract theory of the state. In fact, governments are not the product of agreement, but of force, and in fact the foundation of all government activity is coercion, not agreement. If people agreed to voluntarily carry out government's mandates – abide by government regulations and voluntarily tender payment to finance government's activities – there would be no reason for government to exist. People would voluntarily choose to do what government now mandates. In fact, the only reason for government action is to force people to do things they would not voluntarily do without being coerced. The theory of the Constitutional contract attempts to make it appear that government is the product of agreement, when in fact it is the product of coercion. A fiction that purports to explain what would be the result of a hypothetical agreement under conditions that have never existed, and could not exist – such as agreement from behind a veil of ignorance, or renegotiating from anarchy – cannot turn force into agreement. People did not agree to any provisions of a Constitutional contract. The obvious fact that undermines these arguments about hypothetical conditions is, all real-world governments are based on coercion, not agreement.

Certainly there are social norms that can be thought of as a social contract, and people who violate those social norms are subject to sanctions such as excluding them from social groups, snubbing them in public, not engaging in economic transactions with them, and so forth. These are examples of real behavior in actual social situations. The Constitutional contract that purports the legitimacy of government coercion because in some hypothetical sense people are in agreement, is a fiction, not based on real behavior and at odds with the reality of government. It should be obvious, just looking at real-world facts, that government action is based on coercion, not agreement. All real-world governments were created by force, as some people took over and ruled others. The US government, often celebrated as a Constitutional democracy, was created by a violent revolution to impose a new government by

force, to replace British rule.[9] Similarly, no matter how much citizens like what their governments do, coercion stands behind all its activities. People who do not abide by the government's regulations, or pay the taxes it demands to finance its operations, face the coercive apparatus of the state that forces compliance. To refer to government as the result of a Constitutional contract based on consent is an Orwellian misuse of the language.

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[9]Note that in 1861, when some of the US states tried to declare their independence the same way the colonies did in 1776, the result was a Civil War in which those who wanted to secede were compelled by force to remain under the jurisdiction of the government they tried to escape. The US makes a good example because few nations can claim democratic foundations as solid, yet even in the best case it is apparent that government is the result of coercion, not consent.

Chapter 3
Agent Type, Social Contracts, and Constitutional Mythologies

Peter Boettke and Alexander Fink

Introduction

The quest to constrain the power of the state has been ongoing since ancient Athens. And the fundamental paradox of governance has been the same ever since, how can we empower government with the ability to govern over men, but also constrain government so it does not abuse the powers entrusted with it. This is the essence of the argument for limited government, and the Constitutional project. "If all men were angels," they would not have to be governed, and if we could select omniscient angels for government, the question of "who guards the guardians" would be obsolete. Realizing that men are neither perfectly noble nor all-knowing leaves us with the task of constraining those that do the governing. The social contract that defines the rules of the game of governing allows government to limit private predation and limit pubic predation by the government only if it is robust against the flaws of the available agent types. If rules of governing fail to account for men as they are, Constitutional mythologies of infallible government institutions are created (Tullock 1961). In this chapter, we discuss how social contracts can help alleviate the problem of agent type. We then apply our framework 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 the social cooperation under the division of labor that characterizes an economically progressive society.

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Knaves and the Reason of Rules

David Hume (1742) argued that when thinking about designing a government, the analyst should presume that all men are knaves. This assumption makes it crystal clear that the task of the political economist is to find a set of binding rules that will ensure that bad men can do least harm. Good governance is not about unleashing good men to do good things, but about establishing binding constraints on state power such that even if the worst elements in society gained political power they would be unwilling to behave with impunity. Good institutions of governance, in other words, do not require that perfect men are in power, or even that men become better than what they currently are. Instead, the political economy of good governance must be about treating men as they are – imperfect, prone to opportunism, and often delusional about their cognitive abilities. Better to err on the side of binding power to curtail evil, than unleashing power to pursue good if only the good, the just, the right, and the best of men were in power. At least that was the wisdom of David Hume and his fellow Scottish Enlightenment thinkers such as Adam Smith.

Almost simultaneously with this intellectual agenda, the political reality of the "founding fathers" in the USA was one of attempting to craft the foundation of such a government in postrevolutionary America. As Alexander Hamilton (1787) put it, the question fell to his generation to determine whether good government can be a consequence of reflection and choice, or will it forever remain a consequence of accident and force. In modern times, the elaboration of the implication of the Scottish Enlightenment and the exploration of the US Constitutional experience became the research agenda of political economists such as F. A. Hayek (1960) and James M. Buchanan (see Buchanan and Tullock 1962). It is an effort of developing a theory of "robust political economy" and it is synonymous with the development of the field of Constitutional political economy (see Boettke and Leeson 2004). To put it simply, can we take men as given with their ordinary motivations and their limited knowledge and find a set of rules that effectively ties the hands of the rulers in a way that allows them to govern, but not abuse the power so entrusted, creating the conditions under which members of society can freely engage in the complex coordination of economic activities to realize the gains from trade and innovation?

As points of emphasis in their respective works, Hayek concentrated on the limits on man's knowledge at the abstract level, and the contextual nature of the knowledge residing in the economy at the concrete level, while Buchanan stressed the institutional/organizational logic of politics and the systemic incentives that different rule environments generate (for a recent account of Buchanan's position, see Buchanan (2008)). To Hayek the puzzle was how to limit the rationalistic hubris of men, to Buchanan the puzzle was how to limit the opportunistic impulse of men. Both found hope in what they called a "generality norm" embedded in a Constitutional contract – no law shall be passed, or rule established, which privileges one group of individuals in society. Hayek (1960) seemingly relies on an evolutionary process of trial and error in rule regimes that selects for those rules that enable group success and weeds out those that derail group progress, while Buchanan proposes a

Constitutional "convention" that employs a "veil of ignorance" construct to ensure fairness in the social contract. In actual practice, we do not see either evolution or social contract in pure form, but instead, some combination where Constitutional contracts are based on evolved social norms if they are to "stick" in any given society (see Boettke et al. 2008).

We will not attempt in our historical cases to sort out the evolutionary elements from the contractarian elements, but instead focus on the intent to craft rules that both bind government power and establish an environment that promotes social cooperation under the division of labor. In thinking about the Constitutional contract, it is useful to use Buchanan's (1975) distinctions between the protective state (law and order), the productive state (public goods), and the redistributive state (rent-seeking), and to see the basic conundrum as to whether or not we can find a set of rules of governance that enables the protective and the productive state without unleashing the redistributive state.

Rules must bind the knavish behavior of politicians even though they do not transform human nature. In other words, men remain presumed to be knaves, but the rules of good governance within which men interact with one another discipline their knavery to such an extent that knavish behavior is held in check to the point of nonexistence. Rules of good governance can also limit the rationalistic hubris of politicians that is evident in their efforts to exercise command and control over the economy. Adam Smith (1776, Book IV, Chap. 2, p. 478) warned that politicians who attempt to control the economy would not only be operating without the knowledge of the local situation that businessmen and entrepreneurs possess, but would by the necessity of the task load themselves with a level of power that could not be safely trusted to any individual lawgiver or council or senate of lawgivers, and would nowhere be as dangerous as in the hands of those who "had folly and presumption enough to fancy himself fit to exercise it."

We have emphasized the problems of opportunism and the problems of hubris, but we have to lay out one other problem that must be confronted in Constitutional craftsmanship. The other problem is the problem of the status quo. Buchanan has stressed throughout his writings that in efforts of political economy reform one must begin with the "here and now" rather than some imaginary start state. That means that the existing property rights systems and the rent-claims (Tullock 1967) associated with that system must be the starting point of the analysis. It is from that position that negotiation for the new set of political and economic rules must begin. But contemplate for a minute the full implications of that reality constraint – if we are proposing reform, it means the current situation is one that requires reforming. From an economic liberal perspective – which is what we were are talking about if we are proposing Constitutional restrictions to limit government – the existing stream of rents associated with the property rights structure has to be rearranged. This presents us with what Tullock (1975) referred to as the "Transitional Gains Trap." Individuals who currently hold privileges will not be willing to voluntarily give those up unless compensated appropriately for losses they expect to sustain from the reform. The transitional gains trap is more complicated than merely compensating losers in the political game because in the way Tullock sets up the

problem the rents from the privileged position are capitalized in the opportunity cost of the rent-holders (e.g., taxicab medallions) yet despite the lack of super-normal return from the privileges, the holders still will suffer losses if the privilege is taken away. Tullock uses examples such as taxicabs and blue laws, but what he says about those examples is also true for the postal monopoly, public utilities, and state-owned enterprises in the former communist economies.

Successful Constitutional reform results when we can see agreement reached on rules of governance that treat men as they are, limit their opportunistic impulse, and keep in check their hubris. Simultaneously, the new set of rules must serve as binding and credible commitment, allowing for the reassignment of the flow of rents and evading the creation of novel transitional gains traps (see Coyne and Boettke 2009). Otherwise, reform efforts will stall. Politics without romance is how James Buchanan has described his work in public choice and Constitutional political economy. The task of the political economist is to propose rule changes that will be Pareto improving, not to dream of ideal worlds where angels populate the halls of power, and brilliant saints populate the society.

Man, as he is, seemingly demonstrates two natural proclivities – to truck, barter and exchange, and to rape, pillage and plunder. The central message, from the classical political economy of Hume and Smith to the Constitutional political economy of Hayek and Buchanan, is that which proclivity is unleashed and which one is held in check is a function of the rules of the game present in society. And the societies that establish the rules that encourage man's propensity to truck, barter and exchange generate peace and prosperity. As Adam Smith argued, all it takes for a society to move from the lowest form of barbarism to the highest form of opulence is peace, easy taxes, and a tolerable administration of justice.[1]

It is our thesis that Constitutional craftsmanship is a necessary precondition for establishing a vibrant market economy. But not only must the rules be binding, the content of the rules must be liberal in nature and signal clearly to the citizenry (see Boettke 2009). Our discussion of the two proclivities of man was intended to highlight that if the discipline of economics is to explain the wealth and poverty of nations, then the explanation is to be found not in geography, or in natural resource abundance or even in the character of the people, but instead in the fundamental institutions of governance that curb the predatory proclivities of man. If the established rules successfully limit predation between private actors, then the gains from trade and the gains from innovation are powerful enough to put any country on the path to prosperity. But the prevention of private predation alone is not sufficient to raise a country to the highest form of opulence. Even the most advantaged country in terms of location, resources, and people will be mired in poverty and squalor, if the rules fail to successfully limit predatory behavior of members of the government. When the rules establish binding limits on private and public predation, then the creative powers of the citizens in that society will generate unimagined economic

[1]From Smith's notebooks found in the editors introduction to *An Inquiry into the Nature and Causes of the Wealth of Nations*. (1776, p. xl).

wealth and betterment of the human condition. But a sober assessment of human history reveals that the level of Constitutional craftsmanship and institutional innovativeness required to establish such a binding and credible commitment have mostly proven elusive.

The Constitutional moment comes and goes for most. But sometimes, at least for fleeting moments, such Constitutional craftsmanship does succeed.

Historical Efforts at Constitutional Craftsmanship

We have already pointed to Hamilton's question as to whether the US experience would answer whether men are able to form Constitutions of good governance through reflection and choice, or whether they would forever be the result of accident and force. The Founding Father's designed a system of governance that sought to check political ambition with political ambition, and thus neutralize ambition. The system of checks and balances, as well as the establishment of federalism ensured competitive forces would be enlisted to limit the potential for the abuse of political power.

These principles of the organization of governance were not limited to the American founding period, but common to all successful experiments in liberal Constitutional craftsmanship. It is important to remember: it is not the act of writing down rules, nor even getting an agreement over the rules that matters, it is the content of the rules that limit the predatory proclivities of both private and public actors so that freely choosing actors can pursue the gains from trade, and the gains from innovation.

We argue that an episode from a foreign trading post of the medieval Hanseatic League illuminates how a structure of rules provided by a Constitution can effectively mitigate problems arising from public and private self-dealings and the influence of politically ambitious special interest groups. John Stuart Mill in his Principles of Political Economy (1909, pp. 686, 882) commented on how the economies of the Hanseatic League were able to flourish despite difficult circumstances by establishing themselves as places of open exchanges.

The Hanseatic League became influential in international trade in the Baltic and North Sea area during the commercial revolution of the Middle Ages (Dollinger 1970; De Roover 1963, pp. 105–115; Lopez 1971, pp. 113–119). As an association, first of merchants and later of cities, the Hanseatic League facilitated inter-city and international trade for about 500 years from the middle of the twelfth century to the middle of the seventeenth century.[2] As integral parts of the Hanseatic League, German merchants organized trading posts in foreign ports. Four trading posts, so-called

[2] From roughly the middle of the thirteenth century to the middle of the fourteenth century the Hanseatic League developed from an association of merchants into an association of towns (De Roover 1963, p. 111; Dollinger 1970, pp. 45–61).

Kontore, stood out in terms of significance for the trade of the Hanseatic merchants. The Kontor at Novgorod in Russia was essential to the Hanseatic east–west trade.[3] Founded at the end of the twelfth century it was frequented by summer and winter travelers from Germany (De Roover 1963, p. 112).

From the start and until roughly the middle of the thirteenth century, the inner organization of the Kontor was autonomous from both the Russian rulers and individual Hanseatic cities (Henn 2008, p. 21; Zeller 2002, p. 31). The political organization of the Kontor was based on a Constitution that qualifies as a genuine social contract (Fink 2010). The first Constitution of the Kontor, the so-called Skra, contained a preamble and nine articles, applying to all merchants who joined the Kontor in Novgorod. The first sentence of article one of the Skra laid out the rule for the determination of the political leader of the Kontor:

> As soon as they arrive at the Neva River, summer travelers and winter travelers shall elect one olderman for the court and one olderman for St. Peter who may be from any city.
>
> Schlüter 1911, p. 50, authors' translation from the original Middle Low German[4]

The elected olderman of the court served as highest judge, headed the plenary meetings, the so-called Steven, and represented the Kontor to the outside (Henn 2008, p. 20). The Kontor's olderman thus presided over the legislative and judicial system of the Kontor.[5] The plenary meetings at which all merchants were required to participate served as the Kontor's legislature, enacting internal rules of the Kontor and trade regulations (Zeller 2002, p. 31; Gurland 1913, pp. 14–15; Angermann 1989, p. 238).

These Constitutional rules facilitated social cooperation among the population of the Kontor by reducing problems that arise from opportunistic actions in the market place as well as in the political arena. First, opportunistic behavior by individuals holding public offices was reduced. The elected olderman of the Kontor served as political authority only for the length of the stay of either the summer or winter travelers at Novgorod. The term limit itself reduced the relative attractiveness of opportunistic behavior engaged in by the primus inter pares because the immediate returns to policy changes in his favor weighed relatively little compared to the returns from being a respected member of the merchant community. Accordingly, the most powerful punishment mechanism at the hands of the olderman's fellow merchants was ostracism, wiping out the reputation capital he built up previously. In fact, article 1 of the first Constitution of the Kontor not only posits that the elected olderman may choose four assistants from among the merchant population but also determines a fine for those selected assistants who refuse to take their post (Schlüter 1911, p. 50). The explicit statement of a fine for refusing to take over a political

[3] The other three major trading posts were established at Bruges, London, and Bergen. These four trading posts are known as the *Kontore* of the Hanseatic League.

[4] Schlüter (1911) provides the original text of seven versions of the Constitution of the *Kontor* in Novgorod.

[5] The olderman for St. Peter was subordinate to the olderman of the court and had merely administrative duties (Gurland 1913, pp. 28–19).

office suggests that the advantages that came along with holding the office of the olderman were so minor that an olderman was not even able to provide considerable benefits to members of his political cloud, implying that opportunism by public officials was effectively deterred.

Second, the rule structure set up through the Constitution of the Kontor helped to deter opportunistic private behavior. The authorization of the olderman to serve as first among equals in juridical matters for a defined period of time facilitated the settlement of intragroup conflict. According to article six of the first Kontor Constitution all conflicts that involved a merchant had to be presented to the olderman of the Kontor. Although lesser conflicts among the aides of the merchants could be settled by the aides' olderman, more severe conflicts among aides had to be reported to the olderman of the Kontor too (Schlüter 1911, p. 58). The olderman was given the authority to initiate the prosecution and impose punishments, including capital punishments, on delinquents (Henn 2008, pp. 20–21) for whom a prison was available on the Kontor's premises (Schubert 2002, p. 15). Based on the social contract a system of adjudication between Germans was established and the Constitutionally constrained olderman was in the position to serve as third party arbitrator for the members of society.

Third, the Constitutional setup mitigated problems arising from special interest politics. The internal rules of the Kontor and the rules for trading with outsiders were determined by the Steven, the assembly of the merchants in which according to article two of the first Constitution of the Kontor all merchant members had to take part in (Schlüter 1911, p. 52). We can presume that this form of direct democracy limited the extent to which special interest groups were able to concentrate benefits among their members and disperse costs among the overall population. Article two of the first Kontor Constitution mandates that merchants who refrain from attending the plenary meetings be fined (Schlüter 1911, p. 58). A pecuniary fine for abstaining from taking part in the voting process can be regarded as a means to reduce the phenomenon of "rational abstention" – and to a lesser degree to reduce the phenomenon of "rational ignorance." Providing an incentive for the members of the Kontor to attend the Steven had to directly decrease the abstention rate. Further, the increase in the number of attendees indirectly decreased the level of rational ignorance among the merchant population. It is likely that a lower abstention rate and better informed voters contributed to more effective constraints on the influence of special interest groups, limiting the extent of regulatory measures that give rise to transitional gains traps.

The episode from the Kontor society suggests that through the Constitution a set of rules was implemented that was robust against men's imperfections and therefore effectively limited private and public predation and the political ambitions of interest groups, allowing for a relatively high level of social cooperation.

The efforts at Constitutional craftsmanship in East and Central Europe and the former Soviet Union since 1989 and 1991, respectively, led to some gains in human well-being as well as some frustrated expectations. In Russia, for example, the transition to a true democratic political regime has often been halting at best, while its economy has fared slightly better depending on the world oil market. What has not

happened is the economic miracle expected, but that is mainly because the market economy has not been freed and the political regime has not been appropriately restrained. Politics still dominates economics; predatory proclivities are still unchecked. There is no doubt that much has changed in postcommunist Russia in terms of basic consumer product availability, and even entrepreneurial opportunity. But it has not changed as much as was expected.

On the one hand, the argument could be made that the expectations were unrealistic, and that Russia's transformation has resulted in the country becoming a "normal" country. This is the thesis of Andrei Shleifer (2005), who marvels that from its poor initial condition due to communism, Russia has in less than a generation become a middle income country. And he reminds the reader what middle income countries, as for instance Mexico, are like – they are rarely functional democracies, but instead tin-pot democracies with autocratic leaders and rampant cronyism. Shleifer's argument is an important one, and it is one that demands realistic expectations in transition studies. But Leeson and Trumbull (2006) challenge Shleifer's interpretation by arguing that while the middle-income country hypothesis is interesting, a better comparison group for Russia might be other postcommunist countries. And in doing so, they find that Russia actually performs worse than other postcommunist countries that started with worse initial conditions.

If we look at the postcommunist experience both in terms of the political transition to a Constitutionally limited democracy, and the transition to a free market economy based on private property, freedom of contract, and protected by the rule of law, we can easily see that some countries performed better than others (see Table 3.1).

By looking at the Polity IV we just get a base measure of political and economic transition as a starting point for our discussion of Constitutional craftsmanship in postcommunism. In broad brush statements, the countries in our first grouping have done much better at establishing rules of good governance, than those in the second group, and the countries in the third group have basically failed in the mission of postcommunist Constitutional craftsmanship, and as a result private and public predation often go unchecked[6] (Boettke 2001).

Just consider the postcommunist history of Russia vs. the situation in Hungary, Poland, Slovakia, and the Czech Republic. Russia under Yeltsin and then Putin paid lip-service to Constitutional reform, but the political and policy reality was one of

[6]For a contrary perspective, which sees the problems in Russia for example, as a consequence of a naïve faith in the free market and not enough attention to the role of government see Klein and Pomer, ed. (2001), and especially Stiglitz's preface and Pomer's introduction. It would take us too far afield to address this alternative perspective for our present purposes. But suffice it to say that we disagree, and would even disagree with the claim that the failures were a question of bad implementation of good public policy. Our argument is that the rhetoric employed during the era of "shock therapy" far outdistanced the reality, and thus what we got was implementation of bad policies causing the disappointing postcommunist record. As Elster et al. (1998, p. 27) point out, failure in Constitutional craftsmanship results whenever there is an inability to protect the three fundamentals of social order – protection of life, property, and liberty.

Table 3.1 Political freedom in postcommunist countries in 2009

	Polity IV Score for 2009
Liberal democracies	
Hungary	10
Lithuania	10
Poland	10
Slovak Republic	10
Slovenia	10
Albania	9
Bulgaria	9
Croatia	9
Estonia	9
Macedonia	9
Montenegro	9
Romania	9
Czech Republic	8
Latvia	8
Moldova	8
Serbia	8
Average	9.06
In transition to liberal democracies	
Ukraine	7
Georgia	6
Armenia	5
Russia	4
Kyrgyzstan	1
Tajikistan	–3
Average	3.33
Authoritarian regimes	
Kazakhstan	–6
Azerbaijan	–7
Belarus	–7
Turkmenistan	–9
Uzbekistan	–9
Bosnia	Coded as "In Transition"
Average	–7.60

continued discretionary rule by the political elite and policies that privileged some and punished others. While various measures of "regime uncertainty" (see Higgs 1997) are at best imperfect, a pattern of risk constrained economic behavior in the economy does indicate that there has been a failure to establish a binding and credible commitment by the government to limit its opportunistic and hubristic behavior. Capital flight, exchange rate volatility, black market dealings, etc., all suggest that the official rules of governance over the economy have fallen short of establishing an environment where individuals are free to bet on their economic ideas and find the financing to bring those bets to life to realize gains from trade and gains from

innovation. To put it another way, while the rules established in the trading post of the Hanseatic League discussed above enable individuals to realize the gains from trade even under rather unfavorable circumstances, in Russia the rules were such that many potential gains from trade were left on the proverbial side-walk (see Olson 1996).

A crucial idea in Buchanan and Tullock (1962) is the concept of deriving rules of governance behind a "veil of uncertainty." This analytical concept is important, because it ensures that the rule makers do not corrupt the rules of governance to favor themselves in the postconstitutional environment. If by construction those who are making the rules do not know where in society they will be located in the postconstitutional environment, or are restricted in their ability to hold office after the Constitutional moment, the theory suggests that they will design institutions that would pass a conceptual unanimity test. Such exercises are a bit fanciful, but the basic idea is logically coherent and in fact normatively desirable if the goal of Constitutional craftsmanship is not only to establish rules that govern and constrain the behavior of ordinary citizens in the society but also to constrain the behavior of those governing.

Efforts of Constitutional craftsmanship were in fact successful if the opportunity of the Constitutional moment was used to establish rules that restrict the benefits realizable in the period after the Constitutional moment by those who took part in the designing of the institutions. These efforts led to the establishment of multiparty systems with competitive elections. In the less successful attempts of Constitutional craftsmanship, the Constitutional moment was not characterized by intentions to establish "politics by principle," but the influence of special interest groups dominated the process and set the stage for prolonged "politics by interests." As a result, discretionary power remained in the hands of those who designed the institutions of governance.

In addition to the difficulty of realizing rules in the Constitutional moment that establish a system of democratic deliberation that limits state power, there is a fundamental tension that exists in the realization of the two liberalisms; political and economic. As Russell Hardin (1993) has pointed out, the fact that individuals will seek out the gains from trade under any conceivable set of circumstances means that economic liberalism is a natural human practice in search of a legitimating theory, while political liberalism is actually unnatural and is instead a theory in search of an application to the real world. Economic liberalism requires the state to refrain from interventions, political liberalism, in contrast, requires the state to actively build institutions that govern the ordinary workings of politics (rules for election, rules of parliament, etc.), as well as define the rights of the citizens and the obligations of government to the citizens. Political liberalism is therefore by definition constructivist, while economic liberalism cannot be attained by constructivist means and is the foundation for spontaneously evolving phenomena. When liberal Constitutions are established, the regime of political liberalism creates the space for the economic liberal order to evolve unimpeded by political machination. Such a strict demarcation is often too difficult for countries to realize, and such has been the case for many of the countries we listed above in Table 3.1.

Conclusion

Adam Smith (1776, Book IV, Chap. V, p. 50) argued that self-interest "when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often incumbers its operations." But there is some tipping point where the obstructions threaten the freedom and security of individuals. This is why the central principle of political economy is the warding off of predation by either private or public actors. Mankind's predatory proclivity must be checked.

This explains the connection between the different positions in our title – agent type, social contract, and Constitutional mythologies. As we stated upfront, we follow Hume's dictum that in designing a government we must assume that all men are knaves. We highlighted how our knavish behavior comes in the form of both hubris and opportunism. We then argued that the key was to find a set of rules that effectively limits our hubris and our opportunism. Such a social contract, we argued, would enable individuals to realize the gains from trade and the gains from innovation which resulted in the creation of wealth and generalized prosperity. Failure to establish such institutions, on the other hand, results in poverty and squalor.

The Constitutional mythologies referred to the legitimating character of the rules that produce social order. In the case of Madison and the founding fathers, the idea of governing fallen angels provided a basic animating metaphor. If men were angels, there would be no need for government. And if government were run by omniscient angels, then there would be no need for Constitutional restraints. But precisely because men are asked to govern other men, we have to first empower the government and then severely restrict its power for fear of abuse. If the rules are robust against the flaws of the agent types that we are, Constitutional mythologies that declare government organizations infallible have no appeal because, as Buchanan puts it, "Constitutions work."[7]

Merchants at the trading post of the Hanseatic League were able to establish rules of governance that enable them to realize the gains from trade. On the other hand, the countries of East and Central Europe and the former Soviet Union, often times faced insurmountable difficulties in realizing opportunities of Constitutional craftsmanship even under favorable circumstances. But whenever and wherever the rules of government are crafted that limit state power effectively and create the social space for the market economy to flourish, political freedom and economic prosperity follow. There is, as James Buchanan has repeatedly stressed, freedom in Constitutional contract.

[7]On April 28, 2010 James Buchanan delivered the Otto A. "Toby" Davis Memorial Lecture at George Mason University and entitled his talk "Constitutions Work."

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Chapter 4
Constitutions, Politics, and Identity

Alan Hamlin

Introduction

What are Constitutions and, if Constitutions are constitutive, what do they constitute? Each of these questions might give rise to at least two different answers. In a legalistic vein a Constitution might be defined as a document or set of documents that codify the role and process of government by enumerating and limiting the powers of government and describing the processes by which government operates. In a more social vein a Constitution might be taken to be the complex of laws, customs, traditions, norms and conventions that, taken together, provide a more or less complete description of the way in which the society operates.

Similarly, a dictionary may offer at least two definitions of the idea of a constitutive relationship: on the one hand X may be said to be constitutive to the extent that it institutes or enacts, on the other hand X might be constitutive to the extent that it embodies or exemplifies essential features.[1] The distinction here might be illustrated by reference to the game of football. On the former definition it might be said that the laws and rules of the game constitute the game of football in that they provide the framework within which the game is played, and which distinguishes it from other games. On the second definition it might be argued that the formal rules and laws do not capture the essence the game of football which is something to do with its ethos, spirit and skills rather than its formal or technical details. In this latter sense children playing in the local park are clearly playing football even if they do not know and are not abiding by many of the rules or laws.

[1] A third possibility is that X constitutes Y if and only if X and Y are identical. I shall not consider this possibility here. For an entry into the relevant debate see, for example, Johnston (1992) and Noonan (1993). It should be clear that the sort of "identity" at stake in that debate is very different from the "identity" at issue here.

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When we turn to more explicitly political Constitutions, these distinctions help us to identify a range of approaches. Rather than enumerate a range of very different approaches, I wish to focus attention on the Constitutional Political Economy (CPE) approach deriving from work in the Public Choice tradition and particularly associated with the work of James Buchanan,[2] which famously adopts the analogy between a political Constitution and the rules of the game, so as to motivate the key distinction between the Constitutional and the political levels of analysis. It is a vital part of the CPE approach that the Constitutional framework is itself considered to be an object of design and choice, at least to some extent. In its traditional form, and partly as a result of the commitment to the idea of Constitutional choice, the CPE approach tends to focus on formal or codified Constitutions rather than the more informal elements of the broader Constitutional structure, and on the idea of the Constitution institutionalising or enacting the political structure of the relevant society. I will also refer to this traditional form of CPE as the instrumental form of CPE.

On this instrumental reading, a political Constitution provides the rules of the political game. Of course, this reading of a Constitution may include elements that are not strictly capable of being interpreted purely as procedural rules, and which might carry substantive implications (as, e.g., in a Constitutionally entrenched bill of rights) but even here we can usually think of a Constitution as specifying a combination of political procedures and the domains to which they apply. In this way, Constitutions are seen as both enabling and restricting political activity, and both empowering and regulating government. This instrumental account of political Constitutions prompts a research agenda that focuses attention on the analysis of the operational properties of various alternative institutional and Constitutional arrangements and, therefore, on the arguments that inform the design and reform of those arrangements.

But I want to explore an alternative reading of CPE, one that is more expressive, or identity based, than instrumental. On this more expressive reading, a political Constitution makes a statement about the political community that it relates to. This statement may be read as identifying or situating the community in some way: in cultural, historic, religious, ideological, or other terms. Of course, such a statement may or may not be descriptively accurate as a matter of fact, but it may play an important role regardless of its descriptive accuracy. Recognizing the expressive or identity-based aspect of a Constitution within a CPE approach raises at least two sets of issues: one concerning the impact of expressive ideas on the choice of Constitutional arrangements; the other concerning the expressive effect of Constitutions.[3]

Just as one might distinguish between the rules of football and the essence of football; so one might distinguish between the political and procedural infrastructure of a state, and the essence and image of that state as understood by its members (and others). A change in the detailed voting mechanism, or the precise pattern of

[2] See, for example, Buchanan and Tullock (1962); Brennan and Buchanan (1985); Buchanan (1990a).

[3] See Brennan and Hamlin (2000, 2002, 2006).

representation may seem significant Constitutional changes when a Constitution is understood through the lens of traditional CPE and in purely instrumental terms, but such technical changes may not really engage with the population's image of itself as a political community and so may not loom large in the broader, more expressive Constitutional setting. Just as minor changes in the rules of football may come and go without really touching on the essence of football. But, at the same time, other changes in the political and social landscape which may have little or no formal status as part of the Constitution may excite considerable popular attention as potential changes in the basic, Constitutional understanding of society.

Of course, the instrumental and expressive readings are by no means mutually exclusive. A Constitution can (and usually will) play both expressive and instrumental roles. And the two roles may be expected to interact and so offer trade-offs that are obscured whenever one of the roles is taken as the only focus of attention. These interactions and trade-offs will be of particular interest here, as well as the link from the more expressive reading of CPE to more standard understandings of identity politics. But before considering these topics explicitly we must first be rather more explicit about each Constitutional role taken separately. Since the instrumental approach within CPE is relatively familiar, I will begin with a very brief sketch of just one or two key ideas, before moving to the expressive approach and considering both the expressive choice of Constitutions and the expressive role of Constitutions. I will then pick out some themes in the recent literature on identity politics before returning to the interactions between instrumental and expressive issues and drawing some conclusions.

Instrumental Constitutional Political Economy

Traditional CPE may be described as doubly instrumental. At one level, it views the Constitution instrumentally in the sense that it considers and evaluates alternative institutional arrangements in terms of their impact on social, political, and economic outcomes. At another level, it also assumes that the motivations of the individuals who are to live within the Constitution under consideration are exclusively instrumental in their political decision making. This double instrumentality is important to the structure of the argument concerning the choice of Constitutional arrangements.

A characteristic feature of traditional CPE is the idea that the shift from the in-period or political decision making setting, in which individuals interact within relatively fixed and known institutional and Constitutional structures, to the Constitutional decision making setting, in which individuals interact to determine the institutional and Constitutional structure, operates as a "veil of uncertainty" and so encourages individuals to evaluate alternative Constitutional arrangements from a perspective that is less idiosyncratic and less dependent of immediate personal interests. It is this move that provides much of the normative bite in traditional CPE. After all, if institutions and Constitutions were chosen by individuals acting and

inter-acting purely and directly in their own self-interests, it is difficult to see how the institutions so chosen might be seen to be legitimate in any substantial sense.

It is the idea that the shift to considering institutional arrangements that will persist over time and be relevant to many different circumstances will induce individuals to take a longer-term and less narrowly self-interested view that is crucial in building legitimacy. An example will illustrate the argument. Imagine that a group of individuals are set the task of deciding how to make collective decisions in their shared future, where the chosen method will be used for the indefinite future and over a wide range of different decisions. In such circumstances, each individual may begin by attempting to identify the collective decision making rule that would best serve their own interests. But the uncertainty over which specific issues will arise for decision over the lifetime of the rule, together with the uncertainty of whether it will be in the interests of the individual to decide for or against any particular proposal, will make it difficult, and in the limit impossible, for any individuals to reach a clear view as to which decision making rule will be most advantageous to him. More particularly, each individual, regardless of their particular interests, will face similar uncertainty and similar difficulty in defining their most preferred decision rule. In such a setting, it is relatively straightforward to argue that a majority decision rule may be the outcome that attracts widespread, even unanimous, support, since it is the rule that offers the best ex ante balance between the risks of having others impose an unwanted decision on you and being unable to obtain a wanted decision.[4]

While the shift from in-period or political decision making to Constitutional decision making cannot be expected to transform self-interested individuals into public-spirited angels, it does tend to reduce interpersonal conflict and engage with individual interests in their more enlightened form, and so add at least a degree of legitimacy to the choices made.

But note that this argument depends on the background adoption of the doubly instrumental perspective: it simply assumes that individuals evaluate decision rules and Constitutions more generally by reference to the political and social outcomes that can be expected to be realized under those Constitutional rules, and that they are correct to do so.

The Expressive Approach[5]

The expressive approach grows out of an analysis of the incentive to vote in large-scale elections, where the probability of any individual being decisive is vanishingly small. The inconsequential nature of the individual vote challenges any instrumental account of voting in large elections, and expressive voting has been

[4]This is essentially an informal version of the argument formalized in the famous Rae-Taylor theorem (see Rae 1969; Taylor 1969).

[5]The ideas in this section are developed and extended in Hamlin and Jennings (2011).

suggested as an alternative account of voting that remains within the general family of rational choice accounts, by developing an account of potential benefits of voting that depend on the act of voting rather than the outcome of the election. The expressive account, once developed, may then be applied to range of behavior extending well beyond the case of voting in large-scale elections.

However, there is a basic difficulty in providing a simple statement of the distinction between instrumental and expressive accounts within a rational-choice framework. If an act is rational it is explicable in terms of the achievement of some purpose, and so the act can be seen as instrumental to the achievement of that purpose. In this very general sense all rational action is "instrumental." However, the real distinction between instrumental and expressive accounts of behavior operates at a slightly finer granularity. First, distinguish between direct and indirect accounts of choice/action, where a direct account focuses attention on some property of the choice/act itself as the source of motivation, while the indirect account focuses on some more remote outcome that follows (logically, causally, or probabilistically) from the choice/act. Next, within the class of direct accounts, distinguish between two types of benefit: consumption benefits; these are the kind of benefits that are familiar in any act of final consumption. In contract to these direct consumption benefits, consider the subclass of direct benefits that derive not from the consumption aspect of the act/decision, but from its symbolic or representational aspect: not from the act, but from its meaning. It is this subclass of direct benefits that are engaged in expressive accounts of behavior.

With these ideas in place, we might attempt to construct comparative statements of the instrumental and expressive cases in what might be termed their "pure" forms. In the instrumental case, acts/choices have no symbolism or meaning in themselves, so that individuals act/choose in ways that respond only to indirect benefits and direct consumption benefits. They act/choose is such a way that the acts/choices maximally serve their interests (whether narrowly or broadly defined). By contrast, in the purely expressive case, the individual responds only to the meaning of the act/choice, so as to act/choose in a way that maximally expresses the individual. Indirect and consumption benefits are irrelevant in such a purely expressive account, individuals undertake action *Z* in order simply to express some relevant meaning bound up in *Z* (and, perhaps, being seen to *Z*).[6]

But, of course, "pure" cases are rare. Most cases involve both instrumental and expressive considerations. In all-things-considered choice individuals respond to all types of benefit, giving each the appropriate weight. It should be clear that, in our view, expressive concerns are best conceptualized as a proper subset of the concerns that will be considered in a fully rational analysis of all-things-considered evaluation and choice. And exactly the same may be said for instrumental concerns. Each is a part of the whole.[7]

[6] To be a "Z-performer" as Schuessler (2000) puts it.

[7] Although we must recognise that some writers do not use the terms "instrumental" and "expressive" in this way, but rather seem to use "instrumental" to identify what we have termed "all-things-considered" choice.

Just as the idea of expressive benefits should be seen as narrower than the idea of direct benefits, so the simple idea of "expression" may be in another way too broad. Consider my behavior when I accidentally hit my thumb with a hammer. I may cry out in pain, and that cry may naturally be termed an expression of my pain. But is this the sort of expression that we are concerned with in developing a theory of expressive behavior? Our approach is to place the theory of expressive behavior firmly within the rational choice approach, so that the types of expression that concern us are those that relate to the motivating of rational action. We might term this subset of expressions the set of motivating expressions. Now, in the case of my hammering, the possibility of a painful blow certainly provides me with reason to be careful, but the idea of the expression of pain (as distinct from the pain itself) plays no obvious motivational role.[8]

So far, then, we have done no more than mark out the territory that we believe the theory of rationally expressive behavior seeks to occupy. It aims to focus attention on the potential motivating effects of certain forms of expression that attach directly to actions or choices. The theory may be seen both as capable of offering distinctive understandings of particular situations where instrumental rational choice theory fails to convince; and of contributing to the more general understanding of rationality in a wider range of situations. Expressive considerations may not be relevant in all choice situations, or may be of vanishingly small importance in some situations, but the general idea that expressive ideas may be relevant alongside more instrumental considerations is important; not least since it points to the idea that expressive and instrumental motivations are best seen as parallel inputs into an overall analysis of behavior, rather than alternative models.

Including issues of expressive concern into an analysis of rational political choice may yield different outcomes from those that would be revealed by a more rigidly instrumental approach, even if the institutional circumstances were not such as to approximate to the case of "pure" expressive choice. If expressions matter, they can affect behavior; and building this feature into our definitions and analysis may be important in many cases. Second, institutional circumstances will be important in influencing the balance between instrumental and expressive issues as they appear to actors, and so directly influence behavior under those institutional circumstances. In this way, the articulation of the expressive/instrumental distinction helps us to approach the idea of the endogeneity of political behavior with respect to political institutions.

In summary, behavior is expressive to the extent that it reflects, wholly or partly, underlying concerns that derive directly from the meaning or symbolic significance of actions or choices themselves, rather than their indirect consequences or consumption benefits. Expressive concerns sit alongside instrumental concerns

[8] Of course, one can always add special features to the example – perhaps I am concerned not to cry out because it may wake a sleeping child – but while such additional features may make the possibility of my crying out relevant, this relevance is achieved by adding further instrumental detail rather than focussing on the expressive aspect of the cry.

within a structure of overall rational choice.[9] Institutional contexts will influence the balance between instrumental and expressive considerations in particular cases. Pure cases arise when one class of consideration is entirely suppressed. More generally, there may be a trade-off between instrumental and expressive considerations.

Expressive Constitutional Political Economy: Choice of Constitution

One way in which the distinction between the instrumental and expressive aspect of Constitutions may matter is when one considers the processes by which Constitutions are formed and reformed. Of course, there are many routes to Constitution making, ranging from the imposition of Constitutional arrangements by a governing elite to the use of referendums and plebiscites which often require supermajorities of the relevant population. But here I focus not on the descriptive variety of Constitutional reform processes to be found in the real world, but rather on the normatively charged process typically considered as appropriate in the traditional CPE literature, a process which must engage widely with the public and which must command close to unanimous consent.

But the expressive account of political behavior throws at least some doubt on the traditional CPE account of Constitutional reform. More specifically, it challenges the idea that the "veil of uncertainty" acts as a device which tends to reduce the influence of narrow self-interest and shifts decision making in a more impersonal and normatively attractive direction. Constitutional referenda provide a good example of the type of situation in which no individual can consider herself as likely to be decisive, and therefore provide a good example of a situation in which we might expect voting to be expressive in nature. If voting in Constitutional referenda is expressive, and this is understood by political and institutional entrepreneurs, we would then expect the Constitutional proposals that are put to the public and receive their support to reflect expressive concerns rather than instrumental concerns. In this way we would expect the referendum process, or any process that relies upon widespread popular support, to generate reforms that express popular feelings about the society, or reflect widespread concerns, rather than reforms that are motivated by their procedural properties in relation to expected political outcomes.[10]

Here then, it is the very fact of the engagement of large-scale popular support that threatens to tip the decision from the realm of the instrumental into the realm of

[9]Note that this is entirely consistent with specifying rational choice in terms of the maximization of a utility function that includes both "instrumental utility" and "expressive utility". Hillman (2010) offers one such formulation, using "material utility" rather than "instrumental utility." We would resist the use of "material utility" since it suggests that all instrumental utility relates to physical or material goods. We also note that specifying "expressive utility" in this way does not imply that all expressive utility derives from a particular source (e.g., the confirmation of identity).

[10]See Brennan and Hamlin (2002, 2004).

the expressive. But need this be a bad thing? Expressive concerns are, after all, real concerns and if there is to be some balance between instrumental and expressive or identity-based concerns in political life, this is one way in which that balance might be struck. If "the people" wish to express their commitment to some Constitutional proposal for reasons that do not depend on its operational or instrumental properties, then this may truly reflect an important aspect of their values. In short, if the people speak with sufficient unanimity, does it matter what motivates their speech?

The answer here is unlikely to be unequivocal, much will depend on the details of individual cases. Imagine, for example, a situation in which the choice is to be made between two detailed electoral rules,[11] it might be that the formal analysis of the two systems under consideration is not clear – all voting systems are imperfect and the specific imperfections of different systems are such that there is certainly room for genuine uncertainty as to which might be better in instrumental terms. But it might also be that the two systems come with very different expressive connotations; perhaps because one is the long-established tradition while the other is seen as the new comer, or perhaps because of the character of individuals who advocate each of the systems, or for some other noninstrumental reason. In a situation like this, neither the instrumental nor the expressive arguments pull obviously in one direction or the other, and so it is difficult to argue that a decision made on expressive grounds will carry significant instrumental costs (or vice versa). If expressive considerations play a significant role in generating near-unanimity, it would be difficult to argue that there is real problem.

Equally, there may be situations where it is perfectly possible to argue that, on all all-things-considered basis, the expressive concerns associated with a particular choice outweigh the instrumental concerns, even though it is clear that the two types of concern pull in opposite directions. For example, if a proposed rule or institution was seen as essentially racist, or discriminatory, that might be a sufficiently strong expressive consideration to ensure rejection, even if it were agreed that the proposal could be expected to generate net instrumental benefits.

But even if expressive choice may sometimes legitimately dominate instrumental concerns, there may also be cases where we would expect decisions made on expressive grounds to be bad decision, all-things-considered. And this is particularly the case if we allow for the potential manipulation of proposals by political entrepreneurs. The expressive significance of particular political institutions or rules is often a matter of social construction: is the proposal seen as "fair" or as embodying some other favorable characteristic; can it be successfully cast by its supporters as "British" or "American" or whatever (or as un-American by its opponents). The development and amplification of such expressive significance will be strongly incentivized in situations where voters can be expected to respond to such expressive signals rather than to underlying instrumental concerns, and so the contest becomes one between supporters and opponents in terms of their ability to convince the public of the

[11] As it happens, the UK is about to hold a referendum on the choice between the traditional first-past-the-post or plurality voting system and the Alternative Vote system, for use in national general elections.

expressive salience of their position. And here there seems no reason to assume that the proposal that is best, all-things-considered, will necessarily win such a competition.

Here then, as elsewhere, the problem is not so much with the idea of expressive consideration being relevant to Constitutional decision making, but rather with the possibility that expressive and identity-related concerns may be rather easily manipulated and presented in ways that distort decision making. To put the same point in relation to the analysis of Constitutional choice, rather than in relation to Constitutional choice itself, the problem is the somewhat restrictive nature of the traditional CPE analysis. If the doubly instrumental nature of traditional CPE is more myth than reality, its analysis may mislead by blinding the analyst to the full range of issues arising.

Expressive Constitutional Political Economy: Role of Constitution

So, what might the expressive role of Constitutions include? At one level we might think of relatively explicit statements of identity in religious, national, ethnic or similar terms, and these are indeed common enough in the formal Constitutional documents of a wide variety of countries.[12] But there are also rather more subtle cases to consider. For example, one might read the US Constitution as embodying a version of "the American Dream" as much as codifying a set of political procedures, so that the Constitution reflects a sense of aspiration and independence (Hartog 1987). And this reading of the US Constitution might go some way to providing an explanation of the status of the Constitution in US society, where it seems to play a role far beyond simply specifying the "rules of the political game" and takes on an almost devotional aspect within a civic religion (Levinson 1979).[13] In short, many Americans see their Constitution not just (and perhaps not principally) as a manual for the operation of government but also (and importantly) as a defining statement of American virtues: as a statement of the essence of America.[14]

And America is by no means an isolated example, we may even find evidence that a major role of a European Constitution is connected with the establishment and development of a European identity. Armin von Bogdandy (2005) provides a detailed

[12]For examples and further discussion see Brennan and Hamlin (2006)

[13]Levinson quotes Lerner (1936): "Every tribe clings to something which it believes to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe" The American tribe is no different. "In fact the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of a 'higher law', and a country like America, in which its early tradition had prohibited a state church, ends by getting a state church after all, although in a secular form." Levinson goes on to discuss "protestant" and "catholic" approaches to the civic religion centred on the Constitution – where the "protestant" view relies directly on the text, while the "catholic" view allows for more interpretation through the courts.

[14]For a detailed discussion of the foundation and development of the US Constitution that pays attention to issues of identity, see Ackerman (1991, 1998).

review of these arguments and the ways in which the draft Constitution attempted to create a sense of common identity and shared values. He also explicitly raises the contrast between a reading of the draft European Constitution in terms of expressing a collective identity, and a reading that emphasizes the instrumental pursuit of self-interest, arguing that a shift away from considerations of identity toward considerations of instrumental value might, in this case, help to avoid controversy and ensure progress. But this claim seems to ignore the possibility, carefully documented in the earlier discussion, that there is considerable value to be found in the idea of identity, even if it may be difficult to construct a collective identity in practice.[15]

These two cases are clearly quite different in at least one respect, in the American case we are concerned with the ongoing relationship between a well-established Constitution and an equally mature American identity, while in the European case we are concerned with an attempt to genuinely create European identity, and the role that a Constitution at the European level might play in that process. This distinction points to the fact that the relationship between Constitutions and identity operates in both directions. Constitutions may contribute to a sense of identity, just as identity issues feed into Constitution setting and reform. The European example illustrates the difficulty of getting such a mutual relationship off the ground: without some sense of a common European identity it is clearly more difficult to motivate the sort of European Constitution that would then reinforce that sense of identity. The particular circumstances of the origins of the US Constitution/identity were such as to allow that mutually supportive relationship to develop, but such circumstances are not common and we might expect many Constitutions fail to capture the imagination of their people.

But both of these cases point to the possibility that a Constitution, whether we limit attention to a relatively formal set of legal documents or a more general conception of a Constitution, can carry meaning for individuals well beyond the specification of the rules of the political game, and that understanding the role that a Constitution plays in both expressing and reinforcing the identity of its people may play an important part in a more general understanding of Constitutions and their dynamics.

But even if a Constitution and a sense of identity may, in some circumstances, be mutually reinforcing, there may be other dynamic forces at work that threaten that relationship. Identities and populations change over time both in physical terms (e.g., in respect of migration) and in terms of their commitments and understandings (e.g., in respect of religion or ideology), there are also clear cases where any notion of a common identity is unsustainable (e.g., as in ultimate cases of civil war). Such change can generate pressure on a Constitution and on political institutions more generally. Flexibility in Constitutional interpretation and understanding can provide valuable accommodation for such changes, although the pressure for formal Constitutional reform or even the wholesale abandonment of one Constitution in favor of another is required.[16]

[15] For discussions of the European case that reflect traditional CPE and a more expressive version of CPE, respectively, see Buchanan (1990b, 1991) and Brennan and Hamlin (2004).

[16] Ackerman (1998) provides discussion of both the changing nature of the US Constitution and the belief that there has been historical continuity – neatly balancing the pragmatic need for flexibility with the demands of a civic religion of Constitutionalism.

Identity Politics, Groups, and Constitutions

"Identity politics" is a broad church, open to many approaches and defined by many themes.[17] One theme relates to the personalization of politics, representing a shift from the questions raised by politics seen as social organization, toward the questions raised by considering politics as part of the individual's effort to define and understand themselves. Another theme relates to the politics of multiculturalism and of specific groups within multicultural societies: women, religious, ethnic, or language groups. Another theme relates to the construction of identity. It is the intersection of these three themes that I engage with here.

One approach to identity is to see the key idea as being the individual's identification with a group, or, perhaps better, individuals coming together to form a group that reinforces and expresses their common identity.[18] Of course, some identities may be informed largely by exclusion from particular groups, so that they are formed in opposition to some "other," but the relationship between individual and groups is still key. Of course, this is not intended to suggest that group membership is the only significant aspect of identity, only to suggest that group membership is often an important aspect of identity. Of course the groups that are relevant for identity are of many types. They may be almost entirely "virtual" in the sense that members do not interact and the group plays no specific role as a collective, the group of people who self-identify as supporters of a particular football team might provide an example. Such groups may be important to their members, but they require no Constitution. But to the extent that groups are both of significant size and take on collective functionality they require a Constitution, however formally or informally the Constitution might be framed. In this way, we can see the tension between the instrumental and the expressive as being present in the most basic understanding of a Constitution. A Constitution is both the means of organizing the group's collective functionality and the way of sustaining the group as a body. Now, of course, it is clear that some groups are primarily identity groups in the sense that their collective functionality is relatively unimportant (even to its members), other groups are primarily functional groups in the sense that no members derive a significant aspect of their identity from membership of that group. But in many cases both aspects are of importance.

The identity of any individual is influenced by the overlapping membership of a variety of groups. In this sense, membership of a state, under a particular political Constitution, is just one membership among many and may not be the most important for any particular individual. However, the additional significance of the state is that the state's functionality may be such as to include an element of regulatory authority or control not only over the individual but also over many other groups that the individual may relate to and identify with. In this way, the state and the

[17] For a variety of approaches see, for example, Taylor (1989); Scott (1992); Bondi (1993); Calhoun (1994); Hetherington (1998); Charney (2003); Akerlof and Kranton (2005).

[18] For an account of group membership in both instrumental and expressive terms, see Hamlin and Jennings (2004).

political Constitution has both a direct and an indirect effect on the identity of the individual. The direct effect, which may be either positive or negative, refers to the specific relationship between the individual and the state as constituted. The indirect effect may be important even if there is neither a positive nor a negative relationship in identity terms between the state and a particular individual, and refers to the way in which the state conditions the groups within society and the membership of groups by its citizens.

A state may support, promote, protect and enhance some particular groups, while restricting, penalizing, undermining, or outlawing other groups. This raises the further complication that individuals will have identity-based, but nevertheless instrumental, reasons for preferring some Constitutions to others simply because different Constitutions will be differentially supportive of nonstate groups that are important for the identities of individuals. Of course, this is an area in which concerns of identity and expressive concerns may come apart. If I have an identity-based reason for supporting Constitution A, but am facing a referendum choice between Constitutions A and B in which my vote has no significant chance of being decisive, I will be incentivized to vote expressively on the direct characteristics of the alternative Constitutions. This then provides us with a final warning. The set of concerns that relate to identity, and the set of concerns that are expressive in nature, overlap but are by no means identical. There are instrumental aspects of identity, and there are nonidentity aspects of expressive behavior. The logic of expressive behavior in political and Constitutional settings alerts us to a connection with the politics of identity, but the connection is by no means simple.

Concluding Comment

Traditional Constitutional Political Economy has been based on an idealized view of Constitutions as providing the rules of the game for politics. While this idealization and the associated commitment to an instrumental account of political institutions and Constitutions has been useful, challenging the rules-of-the-game myth and admitting expressive considerations alongside instrumental considerations now promises to expand the scope and relevance of Constitutional political economy.

One important aspect of expressive behavior relates to the politics of identity: much political behavior can be understood in terms of the symbolism and meaning of acts, and the way in which both political acts and membership of political groups identifies an individual. When these relationships between identity and expressive behavior are considered at the Constitutional level, rather than the political level, further complexities arise. The standard CPE analysis of Constitutional choice neglects both expressive and identity concerns. Some progress has been made on the introduction of a version of CPE which incorporates expressive elements, and so connects with issues of identity, but this work tends to open up additional and intriguing questions rather than providing clear or neat answers.

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Chapter 5
Is the "Veil of Ignorance" in Constitutional Choice a Myth? An Empirical Exploration Informed by a Theory of Power*

Louis M. Imbeau and Steve Jacob

Introduction

A Constitution is a social contract defining a set of rules by which the governed agree to be governed. As such a Constitution ascribes power resources to governors while restraining the way they are expected to use them. But a Constitution is also a discourse on the prevailing conceptions of power relations in the society where it originated. More specifically, it tells a story about the types of power that need to be ascribed or restrained and those that need not. Looking at a Constitution from both viewpoints opens a new window for uncovering the motivations that drove its drafters in the Constitution-making process in which they were involved. In particular, it helps reveal the impact of uncertainty on Constitutional choices.

The idea that Constitutional choices are made under uncertainty and that this uncertainty determines the characteristics of such choices was first presented by James Buchanan and Gordon Tullock in their seminal work, The Calculus of Consent. They wrote:

> Recall that we try only to analyze the calculus of the utility-maximizing individual who is confronted with the Constitutional problem. Essential to the analysis is the presumption

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> that the individual is *uncertain* as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason he is considered not to have a particular and distinguishable interest separate and apart from his fellows. This is not to suggest that he will act contrary to his own interest; but the individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future. He cannot predict with any degree of certainty whether he is more likely to be in a winning or a losing coalition on any specific issue. Therefore he will assume that occasionally he will be in one group and occasionally in the other. His own self-interest will lead him to choose rules that will maximize the utility of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed.
>
> Buchanan and Tullock 1962, p. 78

Buchanan and Tullock's perspective was positive as they wanted to describe how Constitutional decisions were actually made. Following their lead, John Rawls (1971) then proposed his maximin criteria in a normative perspective. He saw a decision behind a "Veil of ignorance" (i.e., under uncertainty) as a thought experiment that could show how rational decision makers should attend to the preferences of the least-advantaged group in society when they are ignorant of their actual and future positions in society. We argue here for a return to the original positive perspective to assess the role of uncertainty in Constitutional choice.[1] We explore the implications of such a perspective for the analysis of the actual content of the Canadian Constitution showing that it has characteristics that are consistent with the motivations of Constitution drafters deciding under uncertainty.

Constitutional political economy distinguishes between Constitutional choice and "in-period" choice, or equivalently between choice among constraints and choice under constraints. The first refers to the choice of rules, the second to choice within rules (Brennan and Hamlin 2001, pp. 120–127). Brennan and Hamlin argue that these two types of choice have important characteristics that differentiate them – motivational, informational, social-capital, and public-good characteristics. We focus here on motivational characteristics, i.e., on the degree decision makers choose in their own private interest or in the general interest when making choices. In Constitutional choice, rational decision makers attend to the interest of the many. Because they do not know what their future position in society will be, their "individual interests fade into the background and are replaced by the general interest of all agents" (Brennan and Hamlin 2001, p. 120). Indeed, "the uncertainty introduced in any choice among rules or institutions serves the salutary function of making potential agreement more rather than less likely. Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize the prospects for potentially disastrous results" (Brennan and Buchanan 1985, p. 30). However, "in-period" choices are devoid of this type of

[1] For example, such a perspective has been applied to the analysis of the Constitution-making process that followed the breakdown of the Soviet Empire in the early 1990s. Rowley (2008, p. 24) noted that "scholars recognized that Rawls's 'veil of ignorance' played no role in [that] process."

ignorance as they are to last for a shorter period of time and as they are easier to change once adopted. In this context, decision makers choose in their own interest. Assuming that a given Constitutional document ensues from the Constitutional level of decision making,[2] we may expect that it is submitted to the same motivational characteristic. Therefore, its content should reflect the general interest more than particular interests.

In this chapter, we propose an empirical exploration of the theory of the veil of ignorance in the Canadian context. Adopting a cognitive perspective, we read the Canadian Constitution as an indication of the motivations that the Constitution drafters had at the time of adoption so as to assess whether the Constitution reflects more of their own private interests than the general interest. We proceed in three steps. First, we formulate a conceptual framework based on power analysis to distinguish three distributions of power that decision makers want to maintain or modify through their choices. Second, we detail a content analysis method that helps us systematically extract the power relations embedded in the Constitution as discourse. Third, we describe and discuss our results, showing that the two Constitutional documents we analyzed reflect the general interest more than the Constitution drafters' private interests.

Theoretical Approach

In this section, we propose a conceptual framework based on the concept of power within a rational choice perspective.[3] Then, we look at the interaction of power and decision making behind the veil of ignorance assuming that maximizing rational individuals want to maintain or to improve their relative position in the distribution of power in society for all the benefits that power brings.

Power and Rational Choice

In general, neoclassical economists have ignored power. In economics, argues Keith Dowding, the concept of power "has implicitly been analyzed away" (Dowding 2009, p. 40). Bowles and Gintis share that opinion when they write "Economists have treated power as the concern of other disciplines and extraneous to economic explanation" (Bowles and Gintis 2008, p. 1). Another expression of the same opinion is Randall Barlett's: "Neoclassical reference to power, when it exists at all, is so far on the fringe that it has not penetrated the consciousness of the profession"

[2] As Brennan and Hamlin argue, "capital-C Constitutions [i.e., Constitutional documents] are only a small part of the set of rules that govern 'in-period' choices. Equally, capital-C Constitutions often include elements that are not small-c 'Constitutional' in our sense at all" (2001, p. 117).

[3] For a general discussion of the concept of power in policy analysis, see Imbeau and Couture 2010.

(Bartlett 1989, p. 4). But, political economy needs to integrate the concept of power among its conceptual tools. As Bowles and Gintis argued, "the fact that the exercise of power is ubiquitous in private exchange shows that it is mistaken to think of society as composed of a political sphere, meaning governments and other bodies with formal powers of coercion, and a private economic sphere in which the exercise of power is absent" (Bartlett 1989). Indeed, the economy has traditionally been seen as a voluntary process of exchange between individuals.[4] But the conditions of exchange dramatically vary from one context to another. The price of a good is usually considered in absolute terms: a kilogram of potatoes is worth $2.00 on the market because buyers and sellers are willing to exchange it at that price. But things change if we consider prices relative to income or relative to wealth. One might be willing to trade one's gold ring for $100 in normal times, but if one were in a situation of starvation, one might accept to trade it for a meal. The situation has changed one's bargaining power. The concept of power in a rational choice perspective allows us to analyze the interactions among individuals not only in terms of exchange – which is one form of power relation as we will argue shortly – but also in terms of coercion and of persuasion: in all three cases, the outcome of the interaction depends on the relative bargaining power of each actor, i.e., on the resources that she controls.

Power is the ability to produce intended effects (Russell 1962). Two dimensions of power are to be distinguished, instrumental power or "power to," and social power or "power over." Instrumental power is "the ability of an actor [to act on events or things] to bring about or help bring about outcomes." Power indices, for example, measure instrumental power. They focus on the capacity of an actor to influence, through his or her vote, the decision reached by a voting body, i.e., they focus on the voting power of committee members.[5] Social power is "the ability of an actor deliberately to change the incentive structure of another actor or actors to bring about, or help bring about outcomes" (Dowding 1991, p. 48). Or, borrowing Dahl's words: "A influences B to the extent that he gets B to do something [or to refrain from doing something] that B would not otherwise do [or would do]" (Dahl 1963, p. 40). Social power implies instrumental power but the reverse is not true. One may have the ability to make a gift to a charitable organization (instrumental power), thus modifying the distribution of wealth in society (ceteris paribus, the giver has less wealth, the organization has more), without having any social power over that organization. But consider this other example. In order to change the incentive structure of a fast driver through the threat of punishment, a policeman must have the instrumental power to implement his threat in case the driver does not comply, or at least he must so convince the driver.

These definitions are dispositional in the sense that they focus on a dispositional property of an agent, that is, on the ability or the capacity to do certain things. From this point of view, saying that A has the capacity to influence B does not imply that A actually influences B. A might decide not to use her power in which case social

[4] For an articulate argument contesting this view, see Chap. 2.

[5] For a survey, see Felsenthal and Machover 1998. For a nice collection of recent analyses, see Braham and Steffen 2008.

Table 5.1 The forms of social power

	Forms of social power		
	Political	Economic	Preceptoral
Resource	Force (or: Authority)	Wealth (or: Things of value)	Knowledge (or: Information and rhetoric)
Method	Threat	Exchange	Persuasion
Impact on incentive structure	Costs	Benefits	Beliefs about costs or benefits

power remains potential. Furthermore, A does not have to act in order to exercise her social power. For example, the silence of the Pope vis-à-vis Nazis' exactions was sufficient for him to exercise power over German Catholics. Bachrach and Baratz (1963) coined the phrase "nondecision" to refer to this possibility in the policy process.

Power as a capacity is based on the control over resources. In the context of public policy processes, the three most important power resources are: force or authority, wealth or things of value, and knowledge or information combined with rhetoric. Each power resource may be associated with a method and a main impact on incentive structures. Thus we identify three forms of social power: Political, economic, and preceptoral (see Table 5.1). Political power refers to the use of force or authority to increase the cost of the recalcitrant through the use of threat or punishment. The policeman exercises political power when he threatens one of a fine – and of prison if one ever refuses to pay it – if one does not slow down on the expressway. This threat increases the cost one would incur if caught and may change one's behavior if the probability to be arrested is high enough and the benefits one draws from fast driving low enough. Economic power refers to the use of wealth or things of value in order to change the benefits of the other party in an exchange. For example, when the minister of Finance issues a government bond at a given interest rate, he uses the economic power of the government to act on the incentive structure of potential investors so as to make them willingly transfer part of their wealth to the public treasury. Thus the minister of Finance exercises economic power over the investor.[6] Preceptoral power is based on "knowledge," i.e., information and rhetoric. Its exercise consists in the influencer using her knowledge in order to change the beliefs of the influenced concerning his costs and his benefits through persuasion. An expert might use her knowledge to persuade a politician that he would be better off adopting one policy line rather than another. Preceptoral power pervades all societies. It is recognizable under many forms including commercial advertising, religions proselytism, capture relationships, expert consultation, agency relationships, political propaganda, etc.[7]

Not only does a power perspective allow us to characterize power relations among agents but it also gives us an indication as to the broad types of outcomes

[6]For an empirical analysis of the relationship between the ministers of Finance, taxpayers and investors in the Canadian provinces, see Imbeau 2009.

[7]For a discussion, see Imbeau 2007, pp. 177–181.

that rational actors want to bring about. The events or things that are the object of instrumental power and, ultimately, of social power are conceived as the maintaining or the modification of the distributions of political, economic, or preceptoral powers. Indeed, power is unequally distributed. Some have more, others have less. Some individuals have more political power in the sense that they control the resources necessary to influence a larger number of people through the use of threat or to modify, through the use of coercion, the distribution of political power – for example, by defrauding one of his political power – or to modify the distribution of economic power – for example, by depriving one of his property rights over part of his wealth – or to modify the distribution of preceptoral power – for example, by unilaterally imposing a theory or a belief as the truth thus making the defenders of this theory or belief more persuasive.

The same logic applies to the holders of economic power or of preceptoral power. They can use the resources they control to maintain or modify the distributions of political, economic, or preceptoral powers. Wealth may be exchanged for a political appointment thus modifying the distribution of political power, or for a gold ring thus modifying the distribution of wealth, or for a university position thus modifying the distribution of knowledge. Knowledge may be used to persuade the prime minister to make a specific appointment to the cabinet thus modifying the distribution of political power. It may also be used to make one buy something that he would not buy otherwise thus modifying the distribution of economic power, or to persuade an audience that one's argument is stronger than that of one's opponent, thus modifying the distribution of knowledge in society. In a nutshell, depending on the resources she controls, a power holder can force one to do something that he would not do otherwise, or she can bribe one into doing something that he would not do otherwise, or she can persuade one that doing something that he would not do otherwise is what he actually wants. These are all exercises of power.

Power Relations Behind the "Veil of Ignorance"

The theory of the veil of ignorance tells us that the informational characteristics of the decision-making context determine the choice made by decision makers. When she is relatively certain about her future position, the decision maker chooses according to her own preferences to maximize her utility. But when she is uncertain about her future position – i.e., when she stands behind a veil of ignorance – the decision maker moves away from her own preferences to attend to the preferences of another individual. The identity of this individual is a matter of contention. For Buchanan and Tullock, the uncertain decision maker would "support Constitutional provisions that are generally advantageous to *all* individuals and to *all* groups" (1962, p. 78; emphasis added) hence their focus on unanimity rule. Rawls rather proposed a maximin criterion according to which decision makers under uncertainty should attend to the preferences of the least-advantaged group in society. A median-voter theoretic interpretation would suggest that median preferences should be attended to

(Congleton 2003), whereas a probabilistic voting theory would target the preferences of the mean voter (Lafay 1992). These divergent views may be reconciled in the following principle: in Constitutional choice, uncertainty makes decision makers move away from their own preferences toward the preferences of a less-privileged individual. A simple illustration may be useful here. Power, like income, is asymmetrically distributed in any society and decision makers typically are located in the positive tail of the distribution. Attending to the preferences of a less-privileged individual implies a movement toward the opposite tail: toward the mean, the median, or the least privileged. For our purposes, it is not necessary to decide where precisely the target individual stands on the distribution. Suffice it to say that he stands on the left of the decision maker on the relevant distribution of power.

Therefore, as the theory has it, decision making under uncertainty is typical of Constitutional decision making. Because Constitutional choices last longer, the uncertainty of decision makers is more prevalent than in in-period choices. Hence decision makers tend to serve the preferences of a less-privileged individual as her future situation might later be closer to his than it now is. But the veil of ignorance is lifted in in-period choices. The time horizon is shorter and the majority requirement for changing the rule is less stringent thus making it easier for one to see that his interests are attended to. Therefore, when the decision maker is relatively certain about her future position, she chooses according to her own preferences. As it is more difficult to gather a winning coalition under a more demanding Constitutional decision rule when everybody follows his or her own preferences than when each tends to move toward the preferences of a less-privileged individual, Constitutions contain choices mainly corresponding to areas of uncertainty for the Constitution drafters.

In a power perspective, the preferences of agents are evaluated in terms of their power position in society. They use their power to maintain or improve their position, somewhat like an entrepreneur uses his wealth to produce more wealth (or to avoid losing too much). Therefore, uncertainty refers to the future power position of an agent: will she be higher or lower in the future distribution of power. If she is uncertain about her future position, she will choose according to the preferences of a less-privileged individual. If her co-deciders make the same evaluation concerning their own future positions, the decision-making body will more easily arrive at a decision. However, under relative certainty, the opposite will prevail. Constitution drafters will follow their own private interest and no Constitutional decision will be made, the issue being postponed to the in-period process.

Now it goes without saying that Constitution drafters occupy the higher part of the three main power distributions in society. They generally have more authority, more wealth, and more knowledge than the average individual in each of these distributions not to mention the least-privileged one. Unless they are uncertain about their future position, they will work hard to protect or to improve their position. But if they think that they might drop toward a lower position, then they will be careful to adopt rules that would protect them in the future.

The volatility of power positions is not equal from one distribution to the next. We can safely say that volatility is higher in the distribution of political power,

especially in democratic regimes where majorities often shift with electoral results. When this occurs, a whole class of decision makers changes position on the distribution of political power, some leaving, others entering government circles. Thus Constitutional drafters are quite uncertain about their future political position. But they are less uncertain about their economic power position. Without being absolutely certain, they expect to keep their economic position in the future and even to bequeath their wealth to their children. The distribution of wealth is much more stable than the distribution of authority but still relatively less stable than the distribution of knowledge. Indeed, those who are considered as knowing – clergy persons in some societies, policy experts in others, etc. – occupy a preceptoral-power position that is quite stable. It takes a long time for a society to change its criteria of truth and good. Consequently, there is less uncertainty in preceptoral power than in economic power and less in economic power than in political power. It follows that Constitutional documents should be more concerned with political power than with economic or preceptoral power. It also follows that by adopting the preference of a less-privileged individual in the distribution of political power, Constitution drafters tend to limit political power rather than to abscribe political power. These are our main hypotheses.

Research Design

To test the hypotheses that Constitutional documents in Canada have much more references to political than to economic or preceptoral power, and that there is more occurrences of limitation than of ascription of political power, we content-analyzed the two most important Canadian Constitutional documents, the British North America Act of 1867 and the Constitution Act of 1982, henceforth referred to as the 1867 Act and the 1982 Act.[8] We identified every case of power relation in these two texts. These are our units of analysis. Here a "power relation" is a description of the relationship between two agents – social power – or between an agent and an object (thing, event, or result) – instrumental power – such that an agent has the capacity to act, or is prevented from acting, upon another agent or upon an object. There can be as many power relations as there are combinations of agents, objects, and types of power. We then coded each unit on five characteristics: Type of power (instrumental or social); direction of power (positive or negative – increasing or restraining the power of an agent); resource of the influencing party (authority, wealth, or knowledge); object of influence of instrumental power (distributions of authority, wealth, or knowledge); resource of the influenced party in a social power relation (authority, wealth, knowledge). A single coder (a research assistant) was trained to the extraction of units of analysis and to their coding. The assistant then extracted

[8]The Canadian Constitution is scattered in 42 laws, most of which are statutes of the United Kingdom. For a list, see http://canada.justice.gc.ca/eng/pi/const/index.html.

the power relations in each text and coded them. The result of her analysis was then systematically reviewed by the first author. The proportion of intercoder agreement was extremely high (over 90%) for the coding part but was much lower for the extraction part (52%). This was due to a misunderstanding as to the nature of instrumental power.[9] After discussion and proper adjustment we corrected this problem.

Our method implies that the Constitution is conceived as a discourse describing the distribution of power in the Canadian society, ascribing social or instrumental power to a class of citizens and restraining the social or instrumental power of others. Consider, for example, section 38(1) of the 1982 Act:

> An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
>
> (a) resolutions of the Senate and House of Commons; and
> (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

This clause gives the Governor General the instrumental power of amending the Constitution through a proclamation. It further gives the Senate, the House of Commons, and a certain number of provincial legislatures the instrumental power to authorize such proclamation and therefore the social power over the Governor General to prevent him or her from doing so.

Thus, this clause assigns various actors a given position in the distribution of power.[10] These power relations are depicted in Fig. 5.1. They are coded as four power relations, one instrumental power relating a holder of authority (the Governor General) to the distribution of political power (the capacity to issue an amendment to the Constitution), and three social power relations linking holders of authority (the Senate, the House of Commons, and provincial Legislatures) to a holder of authority (the Governor General).[11] Here is the actual coding ascribed to these four relations:

Type of Power	Direction	Resource of influencing party	Object of instrumental power	Resource of influenced party
Instrumental	Positive	Authority	Authority	n.a.
Social	Positive	Authority	n.a.	Authority
Social	Positive	Authority	n.a.	Authority
Social	Positive	Authority	n.a.	Authority

[9] This content analysis was very useful to the authors to refine their conceptual framework. We think that this low intercoder agreement does not invalidate our results as the whole process was done over again so as to make sure no misunderstanding remained.

[10] Of course, Constitutional conventions have stripped the Governor General of almost all real power in favor of the Prime Minister. We ignore these, concentrating as we are on Constitutional texts.

[11] Instrumental power relations which are, by assumption, associated with social power relations were ignored.

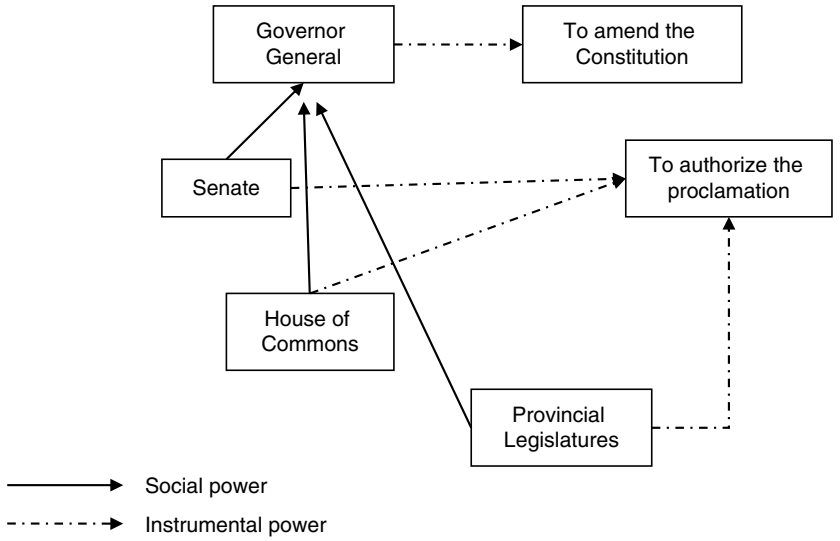

Fig. 5.1 Power relations in section 38(1) of the 1982 Act

Applying this method, we were able to identify every power relation in the two Constitutional documents. Our first hypothesis is that the number of power relations considering a holder of authority as the influencer or as the target will be significantly higher than those considering holders of wealth or holders of knowledge as influencer or influenced or the distributions of wealth or of knowledge as target. Our second hypothesis is that the number of occurrences of negative power will be significantly higher than positive power.

Results

Density and Type of Power

We found 260 power relations in the two Constitutional texts that we analyzed, 187 in the 1867 Act and 73 in the 1982 Act. This represents an average of 1.34 power relations per section in 1867 and 1.24 in 1982 (see Table 5.2). The density of power relations is comparable in the two texts. One hundred and twenty-five years apart, the drafters of these two texts seem to have had a similar view about the importance power relations should have in such texts. These writers also seem to have had a similar idea as to the type of power to be concerned with as they emphasized instrumental power (84%) over social power (16%). This means that they were more concerned with the capacity of agents to act on things and events (like the power of

Table 5.2 Characteristics of power relations in two Canadian Constitutional documents (percentage)

	1867 Act	1982 Act	Total
Resource of influencing party			
Authority	100	100	100
Wealth	0	0	0
Knowledge	0	0	0
Direction of power relation			
Positive	84	27	68
Negative	16	73	32
Type of power			
Instrumental	84	84	84
Social	16	16	16
(Number of observations)	(187)	(73)	(260)

the Queen to make laws for the Peace, Order and Good government of Canada[12] or like the power of a provincial legislative assembly to limit the application of an amendment to the Constitution that derogates from the legislative powers of a province[13]) than to act over other people (like the necessity for the Queen to get the advice and consent of the Senate and the House of Commons, i.e., the power of Parliament over the Queen[14] or like the necessity for the Governor General to get the authorization of the Senate, the House of Commons and a number of provincial legislative assemblies to amend the Constitution, i.e., the power of the Parliament and provincial legislatures over the Governor General.[15] This emphasis had the same magnitude in the 1982 and the 1867 Acts.

Whose Power? Which Target? Our First Hypothesis

A power relation includes an influencing party and a target. When we asked what the resource controlled by the influencing party in a power relation was, we got a strong univocal response: force or authority. The source of power is always authority. Wealth and Knowledge as power sources are completely ignored. This confirms our first hypothesis. Our hypothesis is also confirmed when we look at the target of social power. It is always holders of authority. Things are somewhat different when considering the target of instrumental power, that is, power over events or things. Here, events or things related to the distribution of authority are still more numerous, thus confirming our hypothesis (64% authority, 32% wealth, 4% knowledge).

[12] 1867 Act, section 91.

[13] 1982 Act, section 38(3).

[14] 1867 Act, section 91.

[15] 1982, section 38(1).

Table 5.3 Targets of power relations by type of power (Percentage)

	1867 Act	1982 Act	Total
Instrumental power			
Authority	50	98	64
Wealth	44	0	32
Knowledge	6	2	4
(N)	(159)	(61)	(220)
Social power			
Authority	100	100	100
Wealth	0	0	0
Knowledge	0	0	0
(N)	(28)	(12)	(40)

However, when we differentiate the two Acts, we find that only 50% of instrumental power relations have authority as target in the 1867 Act compared to 98% in the 1982 Act. Our hypothesis is still confirmed in the two acts but something is going on in the 1867 Act that needs further analysis.

Positiveness: Our Second Hypothesis

Our second hypothesis predicts that the Constitutional documents restrain power rather than give power. In terms of our design, this means that power relations are more often negative than positive. This hypothesis is contradicted by our results as 68% of the power relations found in the two texts is positive. They more often ascribe power than restrain it (see Table 5.3). But something peculiar appears when we compare the two texts. The 1867 Act is positive in 84% of the cases, whereas the 1982 Act is negative in 73% of the cases. In other words, our second hypothesis is confirmed with the 1982 Act but not with the 1867 Act. The difference is highly significant ($X2 = 77.287$, $df = 1$, $p < 0.001$). That is to say that the 1867 Act tends to ascribe power, whereas the 1982 Act rather tends to limit power. This is what one would expect given the fact that the purpose of the 1867 Act was to create a new federation and as such had to ascribe both instrumental and social powers. Being based on the 1867 Act, the 1982 Act could concentrate on limiting already ascribed powers. The Charter of rights included in the 1982 Act seems to account for much of this difference as each right conferred to "Every citizen of Canada" or to "Everyone" or "Every individual," etc., is a limit to the instrumental power of the holders of authority positions. This result would suggest that the theory should be amended to differentiate founding Constitutional documents from amending Constitutional documents. The effect of uncertainty would be less important in the former than in the latter.

Discussion

According to Voigt (1997) one finds four concepts of Constitution in the Constitutional choice literature. A Constitution is either a social contract à la Buchanan, or the product of a principal–agent relationship, or a precommitment device – Ulysse's problem – à la Elster, or the result of a cultural evolution à la Hayek. Ours may be related to the first conception where Constitution drafters choose among a set of rules to be applied in their future interactions. We know of no other empirical study in the social-contract perspective. However, Robert McGuire and Robert Ohsfeldt provided empirical results that may be related to ours, though from different conceptual and methodological perspectives.

McGuire and Ohsfeldt analyze the drafting and ratifying process of the American Constitution in a principal–agent conceptual framework. For them, the delegates to the federal Convention who participated in the drafting of the Constitution in 1787 and the delegates to the 13 state ratifying conventions in 1788 are conceived as agents representing their constituents electing and supporting them, the principals. According to the principal–agent model, there is a strong incentive on the part of agents to shirk from their principals' ideology and interests and to attend to their own ideology and interests. Using econometric techniques on a large dataset on individual delegates' votes and characteristics, McGuire and Ohsfeldt estimated the effect of delegates' and constituents' ideology and interests on roll call votes. Their findings are quite interesting as they find, like we do, two contradictory results at two different stages of the Constitutional process. They show that at the ratifying stage, the support for the proposed Constitution is significantly related to the interests and ideology of the delegates (McGuire and Ohsfesldt 1989b). But McGuire (1988) shows that at the drafting stage (the Federal Convention of 1787), the constituents' interests are a better predictor of a delegate choices than his own interests. He writes: "In many cases, the statistical results support the argument that the delegates were more responsive to their constituents' interests and ideologies than to their own interests and ideologies"; to conclude: "The empirical evidence, thus, offers support for Buchanan and Tullock's (1962) positive theory of Constitutions" (McGuire 1988, p. 519).

Voigt suggested an ad hoc hypothesis to explain the difference found by McGuire and Ohsfeldt: "An ad hoc-hypothesis for this difference could be that the Philadelphia-delegates were more narrowly constrained in their voting behaviour than those in the 13 states because the Constitution would not have turned into effect if not at least nine of the 13 states had ratified it" (1997, p. 32). We propose an alternative explanation. Delegates faced greater uncertainty at the drafting stage as the content of the Constitution was still in the making. Things were quite different in the ratifying stage as the Constitution project had been known and discussed for quite some time by delegates and their constituents. In other words, the delegates to the Philadelphia Convention voted behind a veil of ignorance that was more opaque than that behind which the delegates to the 13 state ratifying conventions stood. This uncertainty incited the first group to attend to their constituents' interests more than their own. Coherent with this interpretation, the authors note "that the ratification process can

hardly be claimed to have taken place behind a veil of uncertainty à la Buchanan and Tullock and that it seems therefore justified to assign its ratification to the operational as opposed to the Constitutional level" (McGuire and Ohsfeldt 1989a, p. 184, quoted in Voigt 1997, p. 32). Thus McGuire and Ohsfeldt's results are a confirmation of the theory of the veil of ignorance, at least at the drafting stage. The delegates' responsiveness to the interests of their constituents, like our own findings, confirms the theory of the veil of ignorance.

This distinction made by McGuire and Ohsfeldt between the drafting and the ratifying stages could not inform our own research as our data do not allow us to separate the two stages in the Canadian case.[16] Our findings rather point toward a distinction between founding and amending Constitutional documents. Voigt suggested that two types of Constitutional change should be considered: Explicit change through amendment and implicit change through reinterpretation:

> Explicit change occurs when the text of the Constitutional document is modified, implicit change can be brought about by all three branches of government: by the executive if it interprets Constitutional rules differently over time, by the legislature if it passes laws that would have been considered unconstitutional in some former time and by the judiciary if it lets the executive and the legislature get away with their modified interpretation (Voigt 1997, p. 34).

It would be difficult, if at all possible, to apply our approach to implicit changes as there are no formal texts in which these "changes" are documented. Our finding is related to an "explicit change" to the 1867 Act.[17] Voigt focuses on demands, by pressure groups, for explicit changes to the Constitution. Here the issue of the motivation of the drafters of an amendment is particularly interesting in the context of our own approach. Are the drafters going to attend to the interests of the pressure group (interests that may be seen to correspond to their own as a pressure group will typically pay a rent for the desired amendment) or will they attend to the interests of the larger population? Again, this depends on the degree of uncertainty in which decision making occurs. Because of the rent paid by the pressure group in exchange for a Constitutional amendment, we might be tempted to assume that the decision maker is in a brand new situation as the promise of a rent would tear the veil apart. The decision maker would now be certain of the short-term advantage she would get from the amendment and would therefore be less concerned with the long-term consequences of her decision. The fact of a decision maker introducing an amendment would be a proof that she is now considering the short-term advantage she draws from the pressure group (her rent) rather than the long-term uncertain effects of the amendment given her future possible power position. Therefore, there should be less of an impact of uncertainty on amendments than on founding documents.

[16] A systematic comparison of the discourse during the drafting stage prior to 1867 to the discourse during the ratifying process in each of the former British Dominions would be necessary to confirm McGuire and Ohsfeldt's results.

[17] The 1982 Act was not, strictly speaking, an amendment to the 1867 Act. In fact, the 1867 Act is not even mentioned in the 1982 Act. But, it was clearly a complement to the original act and as such may be conceived as an amending document in our terms or as an explicit change in Voigt's terms.

But, are we not allowed to go further and to say exactly the same thing about founding Constitutional documents? Indeed, Constitutional documents giving birth to a new polity are not created in some sort of ethereal world devoid of pressure groups. On the contrary, they are drafted by agents historically and socially located, that is, with private interests. From the perspective of a theory of pressure groups, the creation of a new polity would be prompted by demands emanating from particular interests, like merchants, entrepreneurs, religious or political elites, etc. Typically, these interests are many and they compete with each other. And the first locus of this competition is the securing of a sufficient number of decision makers sympathetic to one's cause and willing to support the desired amendment. Therefore, one would expect to have several decision makers promoting different views, according to their clients' interests. This is coherent with the work of McGuire and Ohsfeldt mentioned above.

Now, the theory of the veil of ignorance does not take into account pressure group demands for Constitutional amendments. It considers only the interests of the decision maker, both certain and uncertain to her, or known and unknown. Considering pressure groups is a way of making explicit the mechanism relating known interests to choices. But this does not interfere with the impact of uncertain interests on Constitutional choice. No matter how these interests are manifested, the prediction remains: Constitutional documents, both founding and amending, should be more concerned with political than with economic or preceptoral power, or, in terms of resources, they should be more concerned with authority and force than with wealth or knowledge. And the theory would tell us that it is so not because Constitutions are by essence related to the distribution of political authority but because Constitutional choices are made behind a veil of ignorance. We found empirical support for this hypothesis. However our second hypothesis is supported only for the 1982 Act as there are more negative power relations in this act but more positive power relations in the 1867 Act. Our ad hoc hypothesis explaining this finding is that there is a fundamental difference between founding and amending Constitutional documents. The first type of documents must of necessity ascribe powers (positive power relations), whereas the second are not in the same obligation. Restraining the use of power resources already ascribed by an existing Constitution is rational for Constitutional decision makers choosing under uncertainty. But to do so, there must be an explicit distribution of resources already in place, something that is absent when a polity is to be created.

Conclusion

The distinction between Constitutional and in-period choices suggests a major difference in the motivation of decision makers. They are more affected by the uncertainty of their future position in the distribution of power in society in the former than in the latter. When they choose "behind the veil of ignorance," decision makers move their preferences toward a less-privileged individual. Our content

analysis of two Canadian Constitutional documents confirmed this prediction and suggested that this effect was more acute in amending Constitutional documents than in founding ones.

Our findings obviously lack robustness as they are based on a single comparison between two Constitutional texts. Hence our subtitle: "An empirical exploration…." A more robust test would require a comparative analysis of several Constitutional documents in several countries. Any generalization would be premature at this stage.

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Chapter 6
Checks and Balances at the OK Corral: Restraining Leviathan

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> This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude *that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.* This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.
>
> The Federalist Papers No. 29, Alexander Hamilton, January 9, 1788

> The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. … Extravagant as the supposition is, let it however be made. … To these would be opposed a militia amounting to near half a million of citizens *with arms in their hands*, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.
>
> The Federalist Papers No. 46, James Madison, January 29, 1788

Introduction

The question was, in February of 2008, before the US Supreme Court: Does the convoluted phrasing of the Second Amendment to the Constitution confer an individual or a collective right to "keep and bear" arms?

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> Second Amendment to the US Constitution

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This dispute (District of Columbia v. Heller) arrived at the Supreme Court after a 68-year hiatus. The issue presented to the Court was "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns." The Court granted certiorari limited to the following question: "Whether the following provisions … violate the second amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?"

The Justices had set a precedent regarding the Second Amendment in 1939 in United States v. Miller (307 US 174) when they quoted Adam Smith's (1776) definition of a militia in the Wealth of Nations ("Men of republican principles have been jealous of a standing army as dangerous to liberty. … In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.") and stated that "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[1] Subsequent to that decision, most federal courts have understood this phrase to mean that any litigation related to alleged infringements of the Constitutional (individual) right to bear arms had to be considered in the light of their tendency to prevent the functioning of a well-regulated militia. The end-effect of this interpretation was that almost all such challenges were dismissed.

However, most recently a two-to-one majority of US Court of Appeals for the District of Columbia (USCADC) in the case (Parker v. the District of Columbia) that sent the underlying question to the highest court in the land did not mince words in its opinion: "To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms." (USCADC 2007, p. 46). This followed in the footsteps of a highly publicized statement by the Justice Department in 2004. An Office of Legal Counsel document repudiated the long held official position of the US government that the Second Amendment had a civic rather than an individual purpose and replaced it with: "The Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias." (Office of Legal Counsel 2004, p. 1). The USCADC's decision was also a direct and acknowledged repudiation of a detailed analysis of the Second Amendment by the US Court of Appeals for the Ninth Circuit (9th Cir. 2002). In Silveira v. Lockyer, the Ninth Circuit, while denying certiorari, analyzed at length the scholarship and precedent concerning the Second Amendment and emphatically rejected the idea that it applies to private citizens. The opinion by Circuit Judge Stephen Reinhardt reads: "Because the Second Amendment does not confer an individual

[1] Available at http://supreme.justia.com/us/307/174/case.html, last accessed July 04, 2011.

right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that Constitutional provision" (9th Cir. 2002, p. 1118).

In this paper, we investigate an economic model of the Second Amendment which suggests that the founders intended to confer the right to keep and bear arms to entities other than those under the control of the federal government. Our analysis is to a large extent independent of the particular interpretation of this Amendment's scope concerning individual or collective rights that the current Supreme Court justices weighed in early 2008. We present a short review of relevant scholarship in the next section. Our theoretical model and its implications are outlined in Sect. 3. Section 4 concludes.

Literature Review

There has been, in recent decades, a renewed interest in the interpretation of the Second Amendment by legal scholars. Spurred on by legislative attempts to ban (specifically assault) weapons through regulation and subsequent litigation and – most recently – aided by the aforementioned reversal of a decades old point of view of the Amendment by the Justice Department, its 27 words and three commas have been subjected to renewed and ever more probing scrutiny.[2] One of the most influential articles – cited by both the 9th Cir. and the USCADC – is "The Embarrassing Second Amendment" by Sanford Levinson. Published in 1989, it has paved the way for subsequent analyses attempting to overturn the then-conventional wisdom of a

[2] Interestingly, given the heavy meaning that has been imbued (or not) into the "prefatory clause" of the amendment, a recent Op-Ed article in the *New York Times* (Adam Freedman, "Clause and Effect," December 16, 2007, available at http://www.nytimes.com/2007/12/16/opinion/16freedman.html) mocked the seriousness with which scholars discuss the placement of the perplexing commas in this passage. He writes: *"… Refreshing though it is to see punctuation at the center of a national debate, there could scarcely be a worse place to search for the framers' original intent than their use of commas. In the 18th century, punctuation marks were as common as medicinal leeches and just about as scientific. Commas and other marks evolved from a variety of symbols meant to denote pauses in speaking. For centuries, punctuation was as chaotic as individual speech patterns.*

The situation was even worse in the law, where a long English tradition held that punctuation marks were not actually part of statutes (and, therefore, courts could not consider punctuation when interpreting them). Not surprisingly, lawmakers took a devil-may-care approach to punctuation. Often, the whole business of punctuation was left to the discretion of scriveners, who liked to show their chops by inserting as many varied marks as possible.

Another problem with trying to find meaning in the Second Amendment's commas is that nobody is certain how many commas it is supposed to have. The version that ended up in the National Archives has three, but that may be a fluke. Legal historians note that some states ratified a two-comma version. At least one recent law journal article refers to a four-comma version.

The best way to make sense of the Second Amendment is to take away all the commas …."

collective rights interpretation of the Second Amendment. Levinson used the word embarrassing to describe the mindset of those who "view themselves as committed to zealous adherence to the Bill of Rights …" but who also "fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." (Levinson 1989, p. 637).

This conclusion foreshadows the authoritative discussion of the "Origins of the Bill of Rights" by the Pulitzer Prize winning author Leonard W. Levy (1999). He prefaces his detailed discussion of historic precedent and English common law traditions concerning the Second Amendment with the following unambiguous statement: "Believing that the amendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right" (Levy 1999, p. 134).

Illuminatingly, an 80 page analysis of "The Second Amendment: Structure, History, and Constitutional Change" (Yassky 2000) concludes with a section titled "United States v. Miller and the Failure of the Courts." Yassky criticizes the absence of a comprehensive "textually holistic and historically sensitive methodology" (p. 668) in understanding the text's meaning. The courts' failures to concentrate on important "historical and structural concerns" (p. 667) – in his opinion – have muddied the waters of public debate.

The failures of the courts, not withstanding, the competetive nature of the federal judicial system – except for the Supreme Court – often has produced detailed reviews of applicable scholarship. Both previously cited decisions, the one by the Ninth Circuit in 2002 as well as the 2007 decision by the USCADC, support their completely diverging opinions with a comprehensive analysis of Law Review articles, Encyclopedia entries, quotes from the Federalist Papers and books, which would be superfluous to replicate here in detail. Both opinions and appended dissents discuss the three categories of Second Amendment interpretation that have taken hold, which entail a traditional individual right, a limited individual right, or a collective service in a well regulated militia.

The traditional individual right interpretation claims that the prefatory clause is to be understood as applying to all citizens and proceeds to concentrate on the "operative clause" ("the right of the people to keep and bear arms shall not be infringed"), which is here recognized to imply private use and ownership of guns. Under the limited individual right view, "… individuals maintain a Constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service." (9th Cir. 2002, p. 1125). A collective right reading restricts the right to bear arms entirely to collective service in a militia and denies any individual right. From the latter, it follows directly that state and federal governments have unfettered authority under the Constitution to regulate the possession of any firearms.

There are a number of especially noteworthy discussions with respect to this analysis. Bellesiles (2001) provides an insightful collection of firearms regulation throughout history. His argument is that – excepting the period since World War II – "few people contested the state's right to control the possession and use of firearms." (p. 137). Of course, just because a right has been dormant for decades, if not centuries,

does not mean that it loses its power once recognized by the courts; as has been demonstrated by the varied applications of the equal protection clause of the 14th amendment, for example, to the question of civil rights.

The Founding Fathers did of course express often and strongly their aversion to standing armies. The Declaration of Independence explicitly indicts the "King of Great-Britain" for keeping "among us, in Times of Peace, Standing Armies, without the consent of our Legislatures" and for "quartering large Bodies of Armed Troops among us." Examples abound of exhortations to prevent the imposition of an unjust central power by means of a strong federally controlled army. To be able to resist such a development, Levy (1999, p. 144) writes that "Samuel Adams urged that the Constitution should expressly provide that it could never be construed 'to prevent the people from keeping their own arms.' Lexicographer Noah Webster agreed, observing that the national government would not be able to enforce unjust laws because the 'whole body of the people are armed' and could defeat any federal army." Famously, as recounted by Friedman (1969, p. 1518), Madison – while making the case for "sufficient powers" for the federal government – nevertheless warned that "the greatest danger to liberty is from large standing armies."

Given the heavy emphasis in attempts at contemporaneous interpretation of various amendments to the Constitution that is put on the Federalist Papers, Maggs (2007) may become an important source. His essay details three different definitions of "original meaning," recounts the creation and publication of the Federalist Papers from a legal perspective, analyzes theoretical bases for citing those papers as evidence of original meaning and, finally, outlines grounds for impeaching such claims. This is an constructive continuation of Posner's (2003) argument against mindless literal interpretation, which could construe the Second Amendment to "… entitle[s] Americans to carry any weapon that a single individual can heft, including bazookas and surface to air missile launchers" (pp. 962–963).

As our economic analysis below demonstrates, however, only such an obviously ludicrous literal interpretation of the Second Amendment may be able to preserve the implicit threat of entry into the market for coercive power that is so vital for the effectiveness and efficiency of its restraints on Leviathan.

Model

Given the foregoing, historical and legal discussion of the Second Amendment, we are now turning to an economic model of its language. As an allegory, it is not a stretch to argue that the framers had to reconcile – among many other equally important checks and balances – the question of the distribution and the reach of various powers. This included the allocation and reciprocal checks on governmental responsibilities at the federal level as well as striking a balance between state and federal jurisdiction. Furthermore, having just declared that all Men are endowed with certain unalienable Rights and proceeding to use this argument to dissolve the Political Bands with the King of Great-Britain, the framers also aimed to reserve authority to

WE THE PEOPLE. The latter was ultimately achieved with the ratification of the last two amendments in the so-called Bill of Rights, which stated, respectively, that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In the same collection of amendments, the Second Amendment in all three of its interpretations – traditional individual right, limited individual right, collective right – clearly establishes a check on the monopoly of coercive power by the federal government. The federal government's power to enforce the law using force emanating, as it were, from the barrel of a gun could then be countered with the same weaponry. Reflecting the debate between Federalists and Anti-Federalists, which is extensively discussed in the context of the Second Amendment elsewhere (Levinson 1989; Rakove 2002); this objective was to be achieved by creating and preserving a credible threat of entry into the market for compulsion. This credible threat would be rooted in the availability, to the people, of the same technology that the state had at its disposal. Implicitly rejecting the stark Hobbesian choice between absolute rule and social anarchy, the Second Amendment holds out the prospect of a rule that is not absolute because of the checks that are placed upon Leviathan by – among other devices – well-regulated militias.

An appropriate economic model for investigating the locus of rights conferred by the Second Amendment is the theory of contestable markets (Baumol et al. 1982). An industry characterized by contestability exhibits no sunk costs, no great investment needs, and no barriers to entry. A reasonable response by the federal government to such a threatened entry, then, is to pursue a strategy of sustainable prices. In such a scenario, the monopoly is preserved if the incumbent can leverage economies of scale or scope to set prices which prevent less-efficient suppliers (of coercive power) from entering the market even in the absence of other barriers to entry such as absolutely large capital requirements. "When applied to issues of market structure and market power, contestability theory stresses that the behavior of an industry … is determined, not by the mutual interdependencies and conjectural variations of the established firms, but rather by the pressures of potential competition" (Shughart 1997, p. 210). A practical effect of this state of affairs is the ability enforce other regulations aimed at restraining the monopoly's (or – as it were – Leviathan's) power.[3] The disciplining consequence of threatened entry suffices to prevent the deleterious effect on the body politic of having to shoot it out.

[3] "Similarly, there are conditions under which a monopolist's good behavior, in the form of prices compatible with Ramsey optimality, is rewarded automatically by making him invulnerable to entry. In other words, … even where monopoly is natural and entry never actually occurs, much can be accomplished for the public welfare and efficiency in resource allocation by freedom of entry and exit, together with freedom of the monopolist to choose his prices and other features of his operations." (Baumol et al. 1982, p. 192).

In our model, the state is attempting to maximize coercive power subject to cost constraints. The state's "output" is the amount of security it can generate for the people. We may operationalize this output, q, by thinking about it, for example, as the level of security that the state is able to provide. The state has a monopoly on this output.

The state "sells" this output to the people at a price p. The price of the security output is the citizenry's loss of freedoms. Evidently, there exists a level of foregone alternatives with regard to Life, Liberty, and the Pursuit of Happiness, which is unacceptably high. It is in that case, that the Second Amendment provides an avenue for The People to refuse to pay the price and – if necessary – overthrow their oppressors.

The demand for security follows the normal, inverse, pattern. More security can only be obtained at a higher price in terms of foregone liberty. The state therefore confronts a demand curve for security $p=p(q)$.

Say the cost of providing security is $C=f+cq$.[4] This cost may be better understood as the cost to state functionaries of providing security using force; that is, the potential for overthrow of these functionaries by the citizenry. There is a fixed cost element to this potential for overthrow. Leviathan may generate a costly loathing among its subjects that could lead to the guillotine irrespective of whether any security is provided or not! However, increased security can come only with increased cost in terms of the likelihood of overthrow as this security becomes even more onerous to the ruled. Note that the average cost of rebellion to the ruler falls as more security is provided. Mathematically, this happens in our model because the fixed cost is amortized over the quantity of security provided. Intuitively, as more security is provided by the state, the citizenry's natural aversion to being ruled (the fixed cost element) is distributed over the many aspects of security that the state may provide. That is, the citizenry's loathing of the Leviathan state is distributed among aspects of security supplied by the state – ranging from waiting to get a driver's license to being held by the secret police.

The Second Amendment then may be thought of as a mechanism that could provide the citizenry with access to the same technology as the ruler. The rebellious coalition of the citizenry will bear the same potential cost if they try to usurp the coercive power of the state. The guillotine does not distinguish between losers.

Then the coercive power of the state machinery is $\Pi^C \equiv \max_q \{[P(q)-c]q\}$ gross of the fixed cost f. Thus we model coercive power as the difference between the total liberty given up by the ruled to get security and the total cost of providing that security in terms of the potential for overthrow by subjects.

Tirole (1994, pp. 308–309) uses this simplified version of the Baumol et al. (1982) model to show that if there is only one incumbent producer then there exists a unique price quantity pair (p^*, q^*) generated by the mere threat of entry by firms with access to the same technology.[5] The intuition is simple, if the state charges a price $p<p^*$ then it loses power it need not because this price is below

[4] This is a standard example of increasing returns technology.

[5] This price output pair is obtained at the intersection of the average cost and the demand curve.

the average cost of providing security. However, if $p > p^*$ then enough entrants, given access to the same technology by the Second Amendment, will enter the contest for power – a revolution.

First of all, the Second Amendment, by providing the ruled the same technology as the ruler minimizes the net coercive power of the state. Second, the level of security provided by the state will be high in the presence of the threat of potential entry relative to security provided by a power-maximizing state in the absence of the threat of entry. In other words, contestable markets make it safer for the state to continue to provide security by reducing the average cost of overthrow. Thus, the state can diffuse the loathing generated by the Faustian social bargain between the state and an independent citizenry by providing more avenues of security. This in turn helps promote political stability.

Note that the discussion above rests crucially on our assumption that the Second Amendment gives people access to the same technology as the state. Thus, one can believe that the Second Amendment limits the power of a state only if the ruled have the same cost of providing security as the ruler. This may indeed describe the balance of power in a proto-state where the ruling coalition may be fluid – a situation that our founding fathers were in. This economic model of the Second Amendment seems to indicate genuine genius by the founding generation in foreseeing ways to control the interactions in political markets efficiently by imposing the correct ground rules, thus preventing the need for additional cost regulation. However, this beneficial outcome is only guaranteed if the assumptions hold. We now turn to a discussion of those assumptions in history and in our times.

Legislation related to the Militia at the time of the ratification of the Bill of Rights spells out the cost and investment required for partaking in militia activities in great detail. Those minutiae included

> That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.
>
> The second Militia Act passed on May 8, 1792, by the Second Congress[6]

From this context, it is quite clear that the investment although considerable was not insurmountable for the average citizen at the time of the Second Congress. Thus, the Second Amendment, in this proto-state could well be interpreted as a means of allowing to the citizenry the same enforcement technology as the state.

It is, however, unclear if the Second Amendment provides this same function of level-playing fields in at least two scenarios that describe well-established states.

[6] Available at http://www.Constitution.org/mil/mil_act_1792.htm, last accessed December 19, 2007.

First, more established states may have developed cost efficiencies through learning by doing that would deter higher cost entrants even in the presence of a Second Amendment. Second, it is possible to show in a repeated game framework that an incumbent may deter entry by moving first to choose the scale of operations. Thus the establishment of a standing Federal army may deter entry by second mover rebel militias even if the Second Amendment authorizes the establishment of such a militia. These possibilities suggest the limited efficacy of the Second Amendment in limiting state power for more established states. The need for other limits to state power then becomes paramount.

Concluding Remarks

On June 26, 2008, the Supreme Court of the United States held in a 5–4 decision in *Heller* (http://www.supremecourt.gov/opinions/07pdf/07-290.pdf) that:

> The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

Predictably, in the face of a withering dissent, the opinion goes on to consider the extent to which "regulation" of private gun-ownership by the states and/or the federal government is permissible. Justice Antonin Scalia, in delivering the opinion of the Court, specifically mentioned that this should not be "taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places" (p. 54). He did, however, caution that the Court was not undertaking an analysis "of the full scope of the Second Amendment" (loc. Cit.).

Already, the initial allocation of "legal property rights" is being influenced by the Court's ruling on the District of Columbia's wide-ranging restrictions on private gun ownership and by a follow-up 5-4 decision (http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf) in *McDonald et al. v. City of Chicago, Illinois, et al.,* which established the new rule that:

> … the Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense.

Nevertheless, even if the traditional individual rights interpretation had been struck down by the Supreme Court, the eventual outcome may have hinged on the understanding in a given state of what the "limited individual right" or even the "collective right" reading of the Constitution entails. In the formidable pressure cooker of competitive US state policies, this may have led to a patchwork of regulatory rules not very different from today, where, for example, some state and local governments do or do not allow law-abiding citizens to carry concealed weapons about their persons, to bear arms on college campuses, while driving, while worshiping at church, and so on.

Given that the Supreme Court followed the argument of the Appeals Court in *Heller* and specifically affirmed an individual right, regulating firearms has become more difficult but not impossible. After all, even the constitutional guarantee of free speech finds its limits, even though the First Amendment plainly says that "Congress shall make no law" abridging that right. Consequently, many an argument is plausible that would constitutionally permit the limiting of the individual right to possess and transport certain arms in public places. Once more, individual state regulations are going to be at the forefront in delineating the boundaries this right, albeit limited by the 2010 decision in *McDonald*.

Economically, we have been able to demonstrate that the "original intent" of the framers already has been consigned to the dustbin of history. If not in its textual meaning, the Second Amendment has already become an empty shell since the threat of entry against the federal government's monopoly of coercive force has been rendered impractical by the maintenance of a standing army, an outcome that the founders feared as much as they feared a tyranny of the majority.

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Chapter 7
Popular Sovereignty: A Case Study from the Antebellum Era

Elizabeth Dale

Introduction

For 2 days, Singleton Mercer stalked Mahlon Hutchinson Heberton through Philadelphia's streets. Finally, late in the afternoon of Friday, February 10, 1843, Mercer tracked Heberton onto the John Finch, a steamboat that ferried people between Philadelphia and Camden, New Jersey. As that boat docked on the Jersey shore, Mercer walked over to the carriage carrying Heberton, pulled out a gun, and fired four shots. Only one hit his target, but that was enough. Heberton died within the hour and Mercer, who had been seized immediately after the shooting, was taken to the Woodbury County Jail, where he was held without bail for a month and a half. At the start of the March Term of the Gloucester County Court of Oyer and Terminer, the Grand Jury met and promptly indicted Mercer on three counts of first-degree murder. His trial began on March 28 (Philadelphia Tragedy 1843).[1]

On the evening of April 6, 1843, gunshots echoed again, this time in Philadelphia County's Southwark District (Philadelphia Public Ledger [PPL], Apr. 7, 1843, p. 2; PPL, Apr. 8, 1843, p. 2). Shooting and shouting continued into the next morning, when a crowd of several hundred people gathered at Philadelphia's Market Street Wharf at 10:00 AM. Mob scenes were hardly unusual in antebellum Philadelphia; in August 1842 one diarist noted that the city had "been for the last two or three days a scene of riot and confusion" (Hone 1927, vol. 2, p. 614). Two years later, recording yet another riot in Philadelphia, the same writer grumbled that the City of Brotherly

[1] The murder and trial were reported extensively in the *Philadelphia Public Ledger* and *Spirit of the Times* (Philadelphia). For other accounts, see "The Trial of Singleton Mercer," 1843; *A Full and Complete Account of the Heberton Tragedy* 1849.

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Love's nickname had "of late become something of a misnomer" (Hone 1927, vol. 2, pp. 700–701). But on April 6 and 7, 1843, people came together in Philadelphia County to celebrate, not attack. Early in the evening of April 6, the jury of 12 men sitting in Gloucester, New Jersey had acquitted Singleton Mercer of all the charges against him, deliberating less than half an hour before they did so. When the verdict was announced the courtroom erupted with cheers. As Philadelphians added their voices to those that had celebrated in the New Jersey courthouse, none went so far as to claim that the verdict they rejoiced in could be squared with the law. While reaching their decision to acquit, the jurors not only disregarded the fact that Singleton Mercer confessed just minutes after the shooting, they ignored the judge's instructions, which had dismissed the legal arguments of the defense and all but told them to convict (Heberton Tragedy 1849, pp. 42–43).

In this chapter, I unpack the Mercer case to explore how people in the first half of the nineteenth century laid claim to the right to take the law into their own hands. My argument is that this was an assertion of Constitutional power, a claim to act as the sovereign people. The idea that the people exercised sovereign power in the first half of the nineteenth century runs counter to the standard Constitutional history of the United States. According to the usual narrative, "the people," having delegated their sovereign power to their governments with the ratification of the Constitution, became observers, their role in the Constitutional order confined (at best) to voting (Morgan 1989). They would not return to active participation 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, the turn to litigation only gave them a right of reaction that fell short of taking actual control of the law (Hall and Karsten 2009, pp. 283–289).

My analysis follows recent works by Christopher Tomlins, Larry Kramer, and Christian Fritz, who have explored popular assertions of Constitutional power from a variety of perspectives (Fritz 2008; Kramer 2005; Tomlins 1993). While I follow their effort to reclaim the people's Constitutional role, I expand their work in two respects. Where their studies explore the intellectual frameworks of popular sovereignty, this chapter looks at practice in order to trace the ways in which people actually exercised their Constitutional role. And I pay particular attention to how people exercised their Constitutional power over the common law, on the theory that claiming the right to decide what the law required was as much an assertion of sovereign power as the power to interpret the Constitution.

Taking the Law into His Own Hands

In February 1843, Sarah Mercer was a 15-year-old schoolgirl; one who had "never," in the words of one account, "deviated from the pattern of virtue, nor done anything to compromise her character. She was never at a ball, play, or any other public place of amusement. Her acquaintances were virtuous girls, and they were limited to four families, or at most five." Her social engagements were narrowly confined to family

gatherings, her activities restricted to attendance at school, church, and running errands or shopping with her friends (Philadelphia Tragedy 1843, p. 1).

That description of oppressive respectability was consistent with the prevailing discourse about the proper conduct for young women of Sarah Mercer's class (Pease and Pease 1990, pp. 4, 15, 140–141). Her father, Thomas Mercer, arrived at Philadelphia from Ireland around the turn of the century; by 1843 he was a semi-retired shipper with a fortune worth roughly $50,000 (PPL, Feb. 13, 1843, p. 2).[2] But while Sarah mingled with other young women from well-to-do families at school, her best friend in Southwark, a neighborhood of mostly protestant Irish artisans and laborers, was Mary Osborne, the daughter of a carpenter (PPL, Mar. 31, 1843, p. 2). With Mary and her sister, Sarah enjoyed the run of the neighborhood. They walked to and from each other's houses, did errands for their mothers, and went for strolls together.

Gendered discourse about the proper conduct for young women of her class notwithstanding, Sarah's relative freedom of the town was unremarkable. Since the American Revolution elite and working class women, young and old, occupied a complex space in Philadelphia's public sphere, one simultaneously shaped by religious belief and secular interests. Some of the city's religious groups encouraged women to preach, speak, and act publicly on matters of conscience or otherwise take a public role in their communities (Cope 1978, pp. 402, 442, 456, 480, 567; Dorsey 2002; Gallman 2006). Philadelphia relied on women shopkeepers, traders, and as shoppers (Branson 1996; Nipps 1998), and at least one Philadelphia merchant writing in 1844 expressed the hope that the women of the city would soon be employed in shops as clerks, as they were in France (Cope 1978, p. 501).

Sarah was with Mary Osborne in January 1843 when she first met Mahlon Heberton. As the two girls ran an errand late one afternoon, they passed a group of young men standing on a street corner. Sarah, believing that one of the men was a merchant named Bustedo whom she had seen at a party at her sister's house, pointed him out to Mary. Interest piqued, the men followed the girls for a few blocks, until the one Sarah had identified as Bustedo broke away from the rest and approached her. He walked and talked with the two girls for several more blocks, leaving them when they reached the Osbornes'. The next day, when Sarah went out on another errand by herself, she saw her acquaintance of the previous evening. They exchanged words of greeting and arranged to take a walk together a few days later. When they met on that third occasion, Heberton, for it was he, told Sarah his real name and expressed a desire to arrange a formal introduction to her family so that he could become better acquainted with her (PPL, Mar. 31, 1843, p. 2; PPL, Apr. 1, 1843, pp. 1–2).

He never sought that introduction; had he done so it is unlikely that the Mercers would have welcomed the acquaintance. The 23-year-old Heberton, a member of

[2] To put this wealth into context, $50,000 in 1843 would buy roughly $1,501,415 worth of goods in 2008 dollars. See "Measuring Worth: Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present," Economic History resources at EH.net, http://www.measuringworth.com/uscompare/.

Philadelphia's elite militia, the First Troop,[3] was the eldest son of the late John C. Heberton, a doctor. But Heberton lived a life guaranteed to worry the parents of any young woman: he raced dogs and horses, spent his days and evenings loitering about the city with other well-to-do young men, and bragged to his cronies about the number of women he had seduced (Philadelphia Tragedy, 1843; Spirit of the Times [ST], Feb. 10, 1843, p. 2; ST, Feb. 13, 1843, p. 2; ST, Feb. 18, 1843, p. 2).

Even without a formal introduction, it was easy enough for the two to meet regularly and take long walks together through the city. One cold afternoon, Sarah and Mahlon found themselves on Elizabeth Street, in front of a house that Heberton claimed was the home of a friend. Initially Sarah demurred when he suggested that they stop for a moment to warm up; but he overrode her objections and knocked on the door. It was answered by a woman who addressed Heberton by name; she invited them in and directed them to a room upstairs to warm up. Unfortunately, the house on Elizabeth Street was a bordello. Once inside the room at the top of the stairs, Heberton locked the door, and, according to Sarah's testimony at her brother's trial, raped her at gunpoint when she resisted his advances. They remained in the room together for about an hour; then he walked her back home after warning her that he would tell her family and friends that she had seduced him if she told anyone what had happened. Whether cowed by his threats or interested in playing with fire, Sarah agreed to remain silent and arranged to meet with him again. Over the next several days, they had more assignations in the house at Elizabeth Street and in other houses that may also have been brothels (Heberton Tragedy 1849).

Throughout this period, several of Sarah's acquaintances saw her with Heberton or heard her boasts that she planned to elope with a man to New Orleans, but none challenged her conduct or told her parents what she was doing until Monday, February 6 (ST, Mar. 31, 1843, p. 1). That afternoon, Heberton walked Sarah to a visit she was paying at the Palmer home, but refused to come inside with her, choosing instead to loiter on the street outside while she completed her call (PPL, Feb. 13, 1843, p. 2). Upon seeing Heberton, a man he considered a libertine, Robert Palmer told Sarah he was not a suitable escort. When she defiantly left in Heberton's company, Palmer sent a note to Thomas Mercer apprising him of what he had seen and said. Worried about the conversation with Palmer, and fearful that if she went home that evening her father would try to prevent her from seeing Heberton again, Sarah went to spend the night with her sister Eliza. The next morning, Tuesday, when a family servant arrived at her sister's house to tell Sarah that her father wanted her to come home at once, she fled again, this time to stay with a Mrs. Pider, whose house she had visited previously with Heberton. She remained there all day, desperately sending word to Heberton that she had to see him. That evening, after an extended silence suggested that Heberton had abandoned Sarah, Pider sent word to the Mercers that their daughter was with her (PPL, Mar. 31, 1843, pp. 1–2; ST, Mar. 31, 1843, p. 1). Shortly thereafter, several young men, all of them acquaintances of the

[3] On the First Troop, see http://www.ftpcc.com.

Mercer family, arrived to escort Sarah back to her parents' home. Upon her return, Sarah confessed to her mother what had occurred (PPL, Feb. 13, 1843, p. 2).

Her story was not completely unexpected. In the evening of Monday, February 6, after Thomas Mercer received Robert Palmer's message, the Mercers began frantic efforts to determine the scope of the disaster they faced. Sarah's mother went to the home of Heberton's mother to ask her where her son was, while Singleton went looking for Heberton. After both Hebertons denied knowing where Sarah Mercer was, Singleton and two others appeared before Alderman Joshua Mitchell seeking a warrant for Heberton's arrest on the ground that he had or intended to abduct Sarah. Although he was unwilling to issue a warrant, Mitchell agreed to bind Heberton over to keep the peace. Early Tuesday morning, Heberton was arrested and brought before Mitchell, who ordered him bound over to appear the next day.[4] There Heberton again denied any knowledge of her or her whereabouts. At a second meeting at Mitchell's office on Wednesday morning, Thomas Mercer advised Mitchell that Sarah had returned home the previous night and revealed to her mother that Heberton had sexual relations with her. But because Sarah, at the age of fifteen, was over the age of consent, Mitchell ordered that Heberton be released without being charged (PPL, Feb. 13, 1843, p. 2; PPL, Apr. 3, 1843, p. 1; PPL, Apr. 5, 1843, p. 1).[5]

Singleton Mercer was not at the hearing at Mitchell's office Wednesday. Instead, he learned what had happened to his sister that morning when his mother called him into the room she had shared with Sarah the night before. After his father and brother-in-law returned from making a last unsuccessful appeal to Alderman Mitchell and the law, Singleton tried to convince them they should kill Heberton. When they refused he bitterly reviled them. Then he escaped from the family home and went after Heberton himself (PPL, Feb. 13, 1843, p. 2; PPL, Mar. 29, 1843, p. 2; PPL, Apr. 1, 1843, p. 1).

The hunt lasted 36 hours. In the afternoon of Friday, February 10, Singleton Mercer followed a carriage containing Heberton and his lawyer, James C. Vandyke, onto the John Fitch, a ferry docked at the Philadelphia wharf. After a half-hour trip, the ferry pulled into the Camden dock. The bump of the boat against the dock made the horses Heberton's carriage antsy, so Vandyke got out to quiet them. As he walked to the front of the carriage, Mercer walked to the window on the opposite side. Pulling aside the curtain he thrust a six-shooter in through the window and fired off four shots. The shots and a moan alerted Vandyke. Turning back, he jerked open the carriage door to find Heberton slumped over, blood pouring from wounds on his arm and side. At that moment Singleton Mercer took Vandyke's arm and said "Here I am, I did it." Vandyke seized Mercer and bundled him into the box at the top of the carriage, then he ordered the driver to take them into town. The carriage raced to Cake's Hotel near the docks, but that was not enough. Heberton died shortly after he was taken into the hotel (ST, Feb. 11, 1843, p. 2).

[4] The court system in antebellum Philadelphia is described in Binns 1852; Steinberg 1989.

[5] At the time, the age of consent in Pennsylvania was 10. Odem 1995, Table 1.

That night Mercer was confined to one parlor in the hotel, where he consulted with an attorney, while the Gloucester County Coroner, Caleb Roberts, impaneled a coroner's jury that met in another. After a brief deliberation, the jurors returned a verdict declaring that Mercer had willfully caused Heberton's death. Mercer was taken into custody and removed to the Woodbury County Jail (ST, Feb. 13, 1843, p. 2).

The Spectrum of Antebellum Extralegal Justice

Mercer's assassination of Heberton was the most extreme extralegal act in the case, but it was not the only one proposed. In an editorial written shortly after Heberton's funeral, the Philadelphia Public Ledger argued he should have been subject to a postmortem punishment. Condemning the crowds of sightseers that gathered at Heberton's funeral, the paper particularly objected to the sympathy for Heberton the onlookers seemed to display. "What single claim had he to their sympathies, especially those of women? Every woman, not called there by duty, should have staid [sic] away, and so far expressed her horror, her loathing of such a character. Every man also, excepting those who were bound to aid in the last rites of humanity, should have staid [sic] away likewise, in deep indignation at the detestable crime imputed to the deceased" (PPL, Feb. 13, 1843, p. 2).[6] The notion that people should have shunned Heberton's funeral to punish his conduct was not unprecedented. When William Graves, Representative from Kentucky, killed Jonathan Cilley, Representative from Maine, in a duel in 1838, the members of the Supreme Court refused to attend Cilley's funeral to protest the practice of dueling (Hone 1927, vol. 1, pp. 310–311). These protests were exercises in extralegal deterrence, and rested on the hope that popular expressions of "deep indignation" might prevent future misconduct.

And that was not the only instance of nonviolent sanction in the case. When Palmer remonstrated with Sarah Mercer about her acquaintance with Heberton and then advised her father about her conduct, he was engaged in the type of behavior associated with the "brotherly watch" (Ireland 1989; Shuffleton 1986). That sort of monitoring by members of a community was a well-established extralegal process in antebellum Philadelphia. Protestant and Quaker congregations watched congregants for errors that extended from adultery to financial malfeasance to failure to provide scriptural lessons at home (Cope 1978, pp. 417, 435, 486; Laurie 1989, 44–46; Rice n.d., p. 12). And the practice was not confined to Philadelphia. North and south church congregations in several denominations monitored their members to make sure none transgressed their norms. Churches from Virginia to Vermont practiced church discipline into the 1850s and 1860s, sanctioning those who drank, cheated, stole, or engaged in other violations of church practices (Roth 1987; Waldrep 1990; Willis 1997).

[6] See also *PPL*, Feb. 20, 1843, p. 2.

Less formal networks of communities and neighbors also watched one another and sanctioned conduct they deplored. Working class women in New York disciplined their neighbors for domestic violence and other misconduct (Stansell 1987, pp. 57–59, 69, 82). Elites in Boston condemned one of their own, Ellery Channing, when he spoke out against slavery (Curtis 2000, p. 243). At the start of the 1830s, neighbors in Virginia monitored one another, watching for those who violated the law making it illegal to teach slaves to read, and using gossip networks to report violators (Varon 1998, p. 29). In the 1840s, people in Charleston and Columbia, South Carolina used gossip as a way to monitor and punish those who cheated at cards, were involved in extramarital affairs, or otherwise acted immorally (Dale 2003). James Henry Hammond praised one antebellum manifestation of this practice when he wrote, in a defense of slavery, that white men who had notorious affairs with enslaved women lost their social positions and were shunned (Hammond 1852).[7]

As those examples suggest, networks typically enforced their norms through shaming or shunning: When charges were made that the records of the National Bank revealed extensive corruption, fraud and bribery, Philadelphia's elite society shunned Nicholas Biddle, the bank's former president. As one diarist put it, Biddle "was avoided in society, his name was mentioned with contempt and execration, and many cut him and refused to speak to him in the street." Ultimately, he was "the object to which every eye was turned, [and] met nothing but altered looks, angry glances, muttered execrations and sometimes actual insult" (Fisher 1967, 155–156). When Edward Middleton's wife's adulterous relationship with another man became common knowledge, his family in South Carolina urged him to challenge his cuckold to a duel and his friends in Philadelphia tried to shame him into doing so (Fisher 1967, 294). New York diarist George Templeton Strong suggested that a local man be "ostracized from the company of decent men" in 1850, after the man backed out of a marriage on the eve of his wedding (Strong 1988, p. 23). In 1856, in the aftermath of Preston Brooks' caning of Charles Sumner, New York society debated ostracizing southerners who visited the city (Strong 1988, p. 277).

Other means of protest and punishment were available as well. Communities used mockery to punish conduct they disapproved of. In the 1830s, working class women in New York City ridiculed women whose conduct they opposed (Stansell 1987, pp. 60–61). In the 1840s, a community in New York expressed its disapproval of the marriage of a minister accused of adultery by gathering outside his home during his wedding to make loud noises and create a spectacle (Stansell 1987, p. 58). Antiabolitionists in Springfield, Massachusetts stood outside the hotel room of George Thompson, a British abolitionist, set off firecrackers and threw mud and rotten eggs to protest his presence and drive him out of their city (Harrison 1976). In the 1850s, when people in Louisville, Kentucky objected to a jury verdict that acquitted Matt Ward for killing a local school teacher, they held a protest meeting in

[7] Ironically, Hammond himself was subject to precisely this sort of censure. Bleser 1988, pp. 93, 96, 169, 179, 180.

the town square and then marched to the Ward house where they burned effigies in protest (Ireland 1986).

The Ward case reveals another popular sanction: Ward was forced to move away from Louisville and died several years later in a farm in Arkansas. Exile, temporary or permanent was not uncommon. In 1840, German Lutherans in Philadelphia County mobbed a minister who was reputed to have seduced the wife of a member of his congregation and drove him out of town (PPL, Mar. 2, 1843, p. 2; PPL, Mar. 3, 1843, p. 2). In the early 1840s, rumors swirled around the capital of South Carolina, that the governor, James Henry Hammond, was intimately involved with his unmarried teenage nieces. These rumors, which Hammond admitted in his diary were true, forced him to leave Columbia to spend several years of political exile at his plantation (Bleser 1988, pp. 126–128, 169, 180, 193). The practice was not confined to the South. When residents of Wheeling, Illinois learned that William Hopps would be returning to their community after being found not guilty of murdering his wife, they met and voted to have no dealings with him. They also demanded he move out of town. Their efforts worked; Hopps was shunned by family and friends and had to move into the Cook County Poor House (Chicago Tribune, May 9, 1866, p. 2; Chicago Tribune, Jul. 29, 1873, p. 5).

Withdrawal from contact combined with economic sanctions, what we would now describe as a boycott or a strike, was another way to enforce community standards and discipline those who did not conform to them. Quakers and abolitionists on both sides of the Atlantic urged people not to buy goods made by slaves in the 1840s and 1850s (Glickman 2004). In the 1830s, free blacks withdrew their children from local schools in New York City as part of an effort to force them to integrate and disciplined those blacks who resisted (Rury 1983). A decade later free blacks in Boston employed a similar strategy in that city (Mabee 1968). Others used variations on this theme, employing threats of economic or physical harm to deter and punish conduct of which they did not approve: In 1839, the hint of a boycott by middle class women prompted Philadelphia's theater owners to promise they would bar prostitutes from theater pits (Carlisle 1982). In 1840, residents in New York City were encouraged to withdraw their patronage from the New York Herald to protest its scandalous reporting (Hone 1927, vol. 2, p. 29). Two years later, when Charles Dickens' Notes on America was published, polite society in New York (which felt aggrieved by his treatment of them) refused to buy or read his book (Hone 1927, vol. 2, pp. 158–159). Others organized boycotts of the works of the abolitionist writer Lydia Maria Childs (Karcher 1986). And in the years just before the Civil War, women in Virginia organized an effort to boycott northern goods to protest antislavery campaigns (Varon 1989, pp. 142–144).

Community sanctions went beyond the relatively passive forms of shaming, shunning, and boycotts. People throughout the country gathered to silence speakers they disapproved of and disrupt meetings called to advance causes they opposed. Proponents of nullification silenced opponents at political gatherings in South Carolina in 1831–1832 (Freehling 1965, p. 235). A mob of "tariff men" broke up an antitariff meeting in New York City in 1832, a crowd of antiabolitionists disrupted an abolition meeting in that city a year later, and hecklers disrupted speeches by

their political opponents in the 1830s and 1840s (Curtis 2000, pp. 227–228; Hone 1927, vol. 1, pp. 64–65; vol. 2, p. 20). Antiabolitionists used the same techniques to silence abolitionist speakers in churches and public meetings around the country in the 1840s and 1850s (Fisher 1967, p. 341; Robinson 1997).

The heckler's veto was not confined to political issues: A mob of outraged men, angered by the announcement that Sylvester Graham planned to offer a lecture on women's health in Boston in 1837, broke up that meeting by making animal noises. After they silenced Graham and chased him away they shouted down the women who protested their actions (Pease and Pease 1990, p. 26). Theater audiences hissed actors whose morals or conduct they disapproved in an effort to drive them off the stage or close down the performances they were in (Hone 1927, vol. 1, pp. 48, 134, 180–181, 210; vol. 2, p. 399). In the 1850s, lawyers in New York City shouted down a speech at a bar association meeting because they disapproved of its sentiments (Strong 1988, p. 77). Sometimes people went further, and interfered with policing or disrupted trials to express their disapproval of the laws at issue in the case. When the state of New York passed temperance legislation in 1857, Germans and Irish in New York City rioted to protest efforts to enforce the law (Weinbaum 1975). Opponents of slavery tried to disrupt the arrests of suspected fugitives, struggled to remove suspects from the custody of the police, or attempted to disrupt trials in order to prevent prosecution (Frost 2007; Von Franck 1998).

Some of these actions were legal, some clearly were not. But disparate as they were, these activities had in common that the groups undertaking them were trying enforce their vision of justice and punish those who threatened or failed to live up to those standards. They were, as a result, not just expressions of moral or political outrage; they also were assertions of popular sovereign power.

Of course, not all extralegal assertions of sovereign power were pacific. Some groups turned violent in the course of seeking to impose sanctions. Property was a favored target during economic disputes: During labor struggles in Philadelphia's weaving industry in the 1840s, handloom weavers destroyed the looms of men who broke ranks to work (PPL, Aug. 29, 1842, p. 2; Montgomery 1972). In 1835, a mob of journeymen carpenters in New York City attacked some French-made furniture to protest the economic harm the imports posed to their business (Hone 1927, vol. 1, p. 157). In 1829, when trackmen working on the Baltimore & Ohio Railroad decided that they had been wrongfully fired they attacked the home of the contractor who fired them. Two years later, other B & O trackmen walked off the job and then tore up the streets in Sykesville, Maryland to protest the fact that they had not been paid. Three years later, another group of B & O trackmen, working on the Washington Branch, attacked several shops in Waterloo, Maryland during a dispute over wages (Mason 1998).

These destructive practices were not confined to labor disputes. In 1837, during a food riot prompted by a financial crisis in New York City a crowd attacked the stores of flour merchants and carted away sacks of flour from the ruined buildings (Burrows and Wallace 1999, pp. 609–611). Other groups destroyed property in defense of economic interests and property. In 1831, a man in New York filed a complaint against a brothel owner in his neighborhood. In response, the brothel

owner's daughter organized a mob to attack him for threatening her mother's livelihood. The mob broke into his home, made noise, and destroyed his furniture to punish him (Gilfoyle 1992, p. 53).

In addition, buildings associated with wrongdoing or immorality, often loosely defined, were popular targets of community justice: Neighborhood groups destroyed brothels in New York City in the 1820s and 1830s (Gilfoyle 1992). In 1831, another New York mob attacked the Park Theater, breaking windows and damaging the building, in order to shut down a show (Hone 1927, vol. 1, pp. 49–51). In 1838, Pennsylvania Hall, a meeting place for abolitionists and free blacks in Philadelphia, was burned down by a mob of whites that contended the interracial gatherings at the building were immoral (Cope 1978, pp. 437–438). In 1849, another crowd in Philadelphia destroyed California House, a tavern owned by a black man married to a white woman (Cope 1978, p. 581). After a day of drinking in the late 1850s, a group of firemen visiting Manchester, New Hampshire for a muster decided that the owners of a local gambling room had cheated one of their colleagues. They ruined the contents of that establishment and then moved on to other saloons nearby, destroying property whenever they found gambling taking place (Haebler 1991). During the 1850s, temperance mobs around the country, often led by women, attacked taverns, destroying liquor and often damaging stores and taverns (Daily Morning News [DMN], Feb. 5, 1853; Daily Chronicle & Sentinel [DC&S], June 7, 1855; Haebler 1991). Other sorts of institutions believed to encourage corruption also became targets for mob violence. In the early 1830s, a mob destroyed buildings that housed the New Haven Negro College, to protest abolitionism and prevent the dangers posed by having a college that taught blacks (Steward 2003). In the middle of the 1830s, another mob in Charleston, Massachusetts attacked and destroyed a convent, purportedly in the belief that the nuns inside were corrupting young women (Cohen 2004). And religious institutions might be attacked by groups as well. In 1844, during the so-called Bible wars in Philadelphia, a protestant mob destroyed several Roman Catholic churches in Philadelphia County (Cope 1978, pp. 437–438). In 1854, a nativist mob in Manchester, New Hampshire attacked a Catholic church to protest its teachings (Haebler 1984).

As these examples suggest, mobs were willing to destroy property throughout the country: When the Bank of Maryland failed, mobs in Baltimore rioted for days, attacking the houses of bank officers to show their displeasure (Hone 1927, vol. 1, pp. 168–169). That same year, a mob of South Carolinians, angered by abolitionist tracts that had been mailed into the state, broke into the post office in Charleston, seized the pamphlets, and burned them (Curtis 2000, p. 129). Toward the end of the 1830s, a group blew up the Baptist meeting house in Reading, Connecticut to protest the fact that an abolitionist had spoken there the night before (Hone 1927, vol. 1, pp. 369). In the 1830s, antiabolition mobs in New York City attacked the Episcopal African Church and destroyed the houses of blacks and their white allies (Hone 1927, vol. 1, pp. 134–135; Whitby 1990). Similar assaults marred the last decades of the antebellum era. Although the 1830s are famously described as the decade of mob rule, and 1834 as the "great riot year" (Prince 1985), destructive riots hardly came to an end with the turn of the decade. There were notable mob actions in

Philadelphia in the 1840s (Feldberg 1975), and mobs damaged property in New York, Maine, New Jersey, Massachusetts, Kentucky, Wisconsin, and Ohio in the 1850s (DC&S, Feb. 22, 1857, p. 1; DMN, Apr. 4, 1850, p. 2; DMN, Apr. 22, 1851 p. 2; Nash 1961).

These collective actions could turn into skirmishes that resulted in serious injury to people. In the 1830s, there were over 40 instances of physical attacks on prostitutes in New York City, some at the hands of groups of angry neighbors intent on destroying the brothels at which they worked (Gilfoyle 1992, p. 78). Bands of working class women threw stones at woman they had quarrels with in New York (Stansell 1987, p. 60). Men physically attacked abolitionist speakers in the 1830s and 1840s, even in antislavery states like Ohio and Massachusetts (Robinson 1997). In 1832, a group of men from the Carolinas squared off against another group of men from Georgia in a dispute over a prospecting site in the Cherokee Nation. The Georgians prevailed, but not before at least one man was mortally wounded and others were seriously injured (Augusta Chronicle, May 5, 1830, p. 1). Two years later, laborers working on the Washington Branch of the B & O Railroad mobbed and killed two employees of a contracting firm that had failed to pay them (Mason 1998). In 1834, a race riot in Philadelphia resulted in the destruction of $4,000 worth of property owned by blacks, including some church buildings, left several blacks wounded, and at least one man dead (Runcie 1972). In 1837, when Elijah Lovejoy tried to stop a mob that planned to burn down the building that held his printing press, he was shot to death by the mob in Alton, Illinois (Curtis 2000, pp. 216–241). Seven years later, a mob in Nauvoo, Illinois, on the other side of the state from Alton broke into a local jail, seized the Mormon leader Joseph Smith, and killed him. Ironically, Smith was in jail at the time for leading another mob against an editor who had published attacks on the Mormons (Grimsted 1972, p. 363). The 1840s were notable for a string of violent religious riots in Philadelphia county that destroyed property, wounded scores of people, and left several dead (Feldberg 1980), while a religious riot in Brooklyn in 1854 left at least two dead (DMN, Jun. 8, 1854, p. 1). The weavers involved in Philadelphia's labor disputes in the 1840s often beat men who broke ranks to work (PPL, Aug. 29, 1842, p. 2). Striking tailors attacked men who crossed picket lines in New York in 1850 (DMN, Aug. 12, 1850, p. 3). Black and white workers mobbed and injured one another as they fought to determine claims to jobs in Baltimore in the 1850s (Fuke 1997; Towers 2000).

Some of these actions were spontaneous, some carefully orchestrated; others were the work of semipermanent vigilance committees. Although the vigilante movements of San Francisco and New Orleans in the 1850s are the most famous examples from the antebellum era, there were vigilance committees in the 1830s centered in Mississippi and Alabama (Brown 1975, pp. 99–100). There were vigilantes in Iowa, Illinois, Missouri, Texas, and South Carolina in the 1840s. And in the 1850s, vigilante groups formed in Iowa, Indiana, Texas, Louisiana, South Carolina, New York, and Massachusetts (Brown 1975; Kantrowitz 2000, pp. 27–29; Lucke 2002; Nolan 1971; Von Franck 1998, pp. 19–21).

Mobbing, heckling, shunning, and destruction were collective expressions of sanction and popular acts of sovereignty. But extralegal justice in the antebellum

era also included individual acts of violence. At least one friend of the family advised Singleton Mercer to whip Heberton and offered him a cowhide to use (PPL, Apr. 1, 1843, p. 1). In doing so she was advocating an approach that was popular among outraged subjects of newspaper stories, who cowhided editors whose papers offended (Schmeller 2002).[8] New York diarist Philip Hone memorably reported several hidings: One day in 1831, as he was shaving, Hone glanced out the window and saw William C. Bryant, the editor of the Evening Post, engaged in an affray with William L. Stone, editor of the Commercial Advertiser. Bryant began by taking a cowhide to Stone, until the latter managed to seize the weapon and run away with it (1927, vol. 1, p. 40). Just the year before, Hone reported that another local editor, James Watson Webb, decided to hide Duff Green, the editor of the Washington Telegraph, but was unable to do so, in part because Green began to carry a pistol in self-defense (1927, vol. 1, p. 24). In 1850, Hone noted that critics of editors were at it again, reporting that the editor of the New York Herald was cowhided by an unsuccessful local politician, in broad daylight on Broadway (1927, vol. 2, pp. 395–396).

Whippings and beatings were popular extralegal punishments for a variety of other offenses: when Gear, "one of the gang of rowdies in the habit of assembling in the vicinity of Wood and Eighth Streets" in Philadelphia, made vulgar remarks to a woman walking to church with her husband, her outraged spouse "visited upon the offender a chastisement the remembrance of which he will carry until the day of his death" (PPL, Jun. 30, 1841, p. 2). The Philadelphia Public Ledger expressed regret that Gear had not been taken before a magistrate to receive additional punishment, but did not even hint that the outraged husband should have been prosecuted for taking the law into his own hands. When a black woman, Esther Fells, argued with her white neighbor in Petersburg, Virginia in 1856, he beat her with a cowhide to punish her insolence (Lebsock 1984, p. 93). In 1844, James Henry Hammond worried that he would be beaten by one of Wade Hampton's allies in Columbia, South Carolina (Bleser 1988, p. 109). Two years earlier, Hammond considered whipping his neighbor, Ramsey, with whom he had a dispute over some land (Bleser 1988, p. 134). In 1831, after a duel between two Virginia lawyers, Marshall Jones and Edward Sayre, the winner, having been acquitted in a subsequent trial, was caned and run out of town (Shepard 1982).

At the other end of the spectrum lay the punishment actually imposed on Heberton – death, often, but not always, in an affair of honor. Shortly after word of Sarah Mercer's seduction, several people in Philadelphia reflected that while duels were illegal a duel was probably the proper response in that case (Heberton Tragedy 1849, p. 5). Newspapers speculated about why there had been no duel in the Heberton case (and insinuated that a duel would have been the best response to the situation) (PPL, Feb. 11, 1843, p. 2; ST, Feb. 13, 1843, p. 2). When rumors swirled that Heberton had been too craven to meet one of the Mercers some of

[8] On cowhiding in Philadelphia, see *ST*, Feb. 10, 1843, 2; *ST*, Nov 8, 1844, 1; *PPL*, June 6, 1854, 1; *PPL*, June 17, 1854, 2; *PPL*, June 30, 1841, 2; *PPL*, Apr. 10, 1843, 2.

Heberton's friends promptly denounced that charge, claiming that Heberton had welcomed a duel but had never been challenged (PPL, Feb. 14, 1843, p. 2; PPL, Feb. 15, 1843, p. 2). But one local paper, the Spirit of the Times, reported that Singleton Mercer had challenged Heberton and that Heberton had been unable to accept because he could find no one willing to stand as his second (ST, Feb. 11, 1843, p. 2). That paper published a letter written by R. Butler Pierce, one of Heberton's friends, who admitted that he had initially refused to stand second for Heberton until he knew more about the reason for the duel, and that the issue of whether he would serve as a second became moot when Heberton was arrested (ST, Feb. 13, 1843, p. 3).

The conventional wisdom is that by the end of the first decades of the nineteenth century duels were no longer acceptable in the North and were fading in popularity in the South. That shift is explained, variously, as reactions to the death of Alexander Hamilton in his duel with Aaron Burr, in 1804, or as a result of the Cilley-Graves duel in 1838. In either case, so the argument goes, a combination of laws and social norms brought dueling to an end (Wells 2001). The reality was quite different, and Philadelphia was a case in point. Duels were illegal in Philadelphia (Binns 1852, vol. 1, pp. 208–209), but hardly unusual. Sidney George Fisher, writing about the seduction of a friend's wife in 1849, asserted unequivocally that in the North, "except perhaps for Boston, a duel would be quite necessary" under the circumstances (1967, p. 203). In that instance, Fisher's friend refused to make a challenge and was shunned as a result (Fisher 1967, pp. 294–295). Others were far less restrained; Fisher considered dueling a legitimate form of social sanction and alluded to several duels in his diary (Fisher 1967, pp. 161–162, 230, 323–324, 495). The Quaker Thomas Cope, who opposed dueling, noted others in his own journal (Cope 1978, p. 467). At times the editor of one local paper, the Spirit of the Times, seemed to be as tolerant of duels as Fisher (ST, Feb. 15, 1843, p. 2). And in a speech he gave in 1842, Pennsylvania's attorney general defended dueling as the perfect sanction for defamation (Mickle 1977, vol. 2, pp. 328–329).

Patterns were similar around the country. There were duels and attempts at duels in from Illinois to Florida from the 1830s to 1850s (Caldwell 1981; Dearinger 2004; Denham 1990; McClandess 1999; Wainwright 1988). In 1832, the future Reconstruction era governor of South Carolina, Benjamin Perry, fought a duel with Turner Bynum, a duel prompted by Perry's claim that Bynum had "scurrilously" attacked him in print. Perry killed his man, but suffered no prosecution. In fact Perry noted in his diary that Bynum's brother assured him that the family understood his actions and believed him to be in the right (Perry, n.d., Aug. 23, 1832). A decade later, James Henry Hammond spent weeks struggling to prevent a duel between Louis Wigfall and Milledge Bonham in South Carolina. He noted, in passing, that Wigfall had already fought one duel in which he killed his man (Bleser 1988, pp. 31, 60). Hammond also contemplated the possibility that he would be challenged to a duel by Wade Hampton in 1846 (Bleser 1988, pp. 165, 176–178). Duelists fought in California in the 1850s (Gill 1981; McGrath 2003), and when Mississipian Alexander Keith McClurg died in 1855, he was renowned for having fought in 14 duels and having killed his man in 10 (Darkins 1978).

It becomes clearer that duels persisted on both sides of the Mason–Dixon Line throughout the antebellum era if we recall that not every affair of honor was fought by well-to-do young men on a misty field at dawn. Equally concerned with avenging attacks on their honor, working class men pummeled, knifed and beat one another to death in alleys and on street corners in the nation's cities, while others killed one another in disputes over honor at crossroads and near the courthouse square in towns (Adler 2006; Lane 1997, 1999; Roth 2009, pp. 211–213, 218–219). Nor were duels of equally armed combatants the only way individuals exacted vengeance for assaults on their honor or sense of justice. Some, like Singleton Mercer, stalked and killed those who seduced their sisters, wives, or daughters (Hartog 1997; Ireland 1989). Others killed family members they believed brought dishonor to the family name, or acquaintances that did not treat them with respect (Roth 2009, pp. 262–266).

Salus Populi and the Sovereign People

Not all antebellum era fist fights or killings were an attempt to punish a wrong and not every mob that burned down a building was bent on exacting justice. Yet there was a general sense that sometimes a beating was intended to punish or dissuade, and that some people acted in concert to enforce norms and punish wrongdoing. This led some antebellum speakers to criticize all forms of extralegal activities on social grounds, worrying that they invariably led to violent crime (Mickle 1977, vol. 2, pp. 369). Others framed their criticisms in Constitutional terms: The Reverend Hubbard Winslow blamed the Constitutional order itself, deploring mob action as the unfortunate, but inevitable result of a "republican government where power resides with the people" (Curtis 2000, p. 229). In contrast, Daniel Webster argued that those who deliberately decided not to follow the laws passed by the legislature acted outside the Constitutional order. In his view, they engaged in treason that threatened Constitutional government (Curtis 2000, p. 235; Von Franck 1998, p. 21). But there were antebellum apologists for extralegal justice, who struggled to find a way to distinguish between legitimate and illegitimate extralegal conduct. Sidney George Fisher approved of duels, but not of revenge killings (Fisher 1967, pp. 230, 323–324). Philip Hone had no objection when editors of scandal mongering newspapers were cowhided (1927, vol. 2: pp. 395–396), but was outraged when South Carolinians broke into the post office and destroyed antislavery pamphlets sent through the mail (1927, vol. 1, p. 171). In fact, Hone characterized a defense of the South Carolina protest as a justification of lynch law (1927, vol. 1, p. 171). South Carolinian James Henry Hammond returned the compliment, criticizing the riots and bloodshed that marked northern cities as mindless violence, while praising the disciplined conduct of the vigilante groups in the South that chastised abolitionists (Kantrowitz 2000, pp. 28–29). Hammond may have seen the issue in regional terms, but the Postmaster General of the United States, Amos Kendall, excused the South Carolinians who destroyed the antislavery pamphlets in police power terms:

"We owe an obligation to the laws, but a higher one to the community in which we live, and if the former be perverted to destroy the latter, it is patriotic to disregard them" (Hone 1927, vol. 1, p. 171). Others echoed his Constitutional analysis in other contexts. At a public meeting in Boston on the subject of mob violence and freedom of speech, the Attorney General of Massachusetts justified those in Alton, Illinois who helped kill the abolitionist editor Elijah Lovejoy: "satisfy a people that their lives are in danger … by the instrumentality of the press, injudiciously and intemperately operating on the minds of slaves, give them reason to fear the breaking out of a servile war" and there will be mob violence (Curtis 2000, p. 246).

North and South, these apologists were using the language of nuisance law and police power to justify the resort to extralegal action, even when those actions were violent or deadly (Curtis 2000, p. 129; Kielbowicz 2006). Those were powerful legal doctrines. Blackstone had declared them sovereign powers on the theory that offenses against "the public police and economy," which threatened "the due regulation and domestic order of the kingdom," were problems that "the king in his public capacity of supreme governor or pater-familias of the kingdom" was obliged to act upon through public prosecutions (Blackstone 1768, vol. 3, pp. 162, 220; Blackstone 1769, vol. 4, pp. 167–169).

In the antebellum United States, the king, of course, no longer stood as sovereign governor over the people and the recent past had further muddied Blackstone's straightforward assertion of the king's police power in two ways. As Christopher Tomlins has noted, the American understanding of police power in the late eighteenth century owed as much to European concepts of the police as it did to Blackstone (Tomlins 1993, pp. 45–47). In this new view, police power became a collective, popular way to provide for public order and a check on the power of the state. At the same time, this new vision of police power intersected with another, distinctively English idea of protection, the tradition of the moral economy (Thompson 1971). In its classic English form the idea was that the people, in the form of a crowd or mob, had the right to act to defend "traditional rights and customs," especially those that protected life and livelihood (Thompson 1971; Maier 1970). But consistent with Blackstone's patriarchal theory of the police, this popular right was limited to a sort of failsafe, it was a reserved power that arose when the government failed its paternal duty to protect people, or took actions that harmed the people or their customary rights (Maier 1970, p. 4).

During the American Revolution that traditional understanding of the mob was transformed, replaced by an alternative theory that asserted mob action was not merely a residual right that existed when the sovereign failed to act, but was a fundamental right held by the people because they were sovereign (Maier 1970, p. 26; Smith 1994). Nowhere was this point made more clearly than in the Pennsylvania Constitution of 1776, which asserted unequivocally that "the people of this state have the sole, exclusive, and inherent right of governing and regulating the internal police of the same." The idea was no sooner articulated then it was attacked as giving too much power to the people. In 1790, Pennsylvania ratified a second Constitution. While that document continued to recognize that "all power is inherent in the people," it delegated much of that power to the branches of the local government

and no longer recognized the people retained the right to govern or regulate the internal police of the state (Dubber 2004).

But the people of Pennsylvania were not so willing to give up those powers. The Bible riots that tore that city apart in 1843–1844 reflected the belief, on both sides, that their opponents' views represented a threat to community morals (Laurie 1980, pp. 128–130). The committee convened to investigate yet another riot in Philadelphia in 1834 observed that the rioters defended their attacks as an effort to stop "the disorderly and noisy manner in which some of the colored congregations indulge, to the annoyance and disturbance of the neighborhood in which such meeting houses are located" (Runcie 1972, p. 210). In 1838 and 1849 the rioters that destroyed California House and Pennsylvania Hall explicitly claimed that they tore the buildings down in order to protect themselves and the community from the harm the structures caused (Fisher 1967, p. 49; Feldberg 1980, 156–157). In the 1840s, after repeated attempts to use the courts to block the Trenton and Philadelphia Rail Company's effort to build a rail line down the middle of a street in their neighborhood had failed, the rich and poor residents of Kensington District in Philadelphia County took to the streets to protest (PPL, Mar. 4, 1840, p. 2; PPL, Mar. 5, 1840, p. 2; PPL, Mar. 10, 1840, p. 2; PPL, Mar. 11, 1840, p. 2; PPL, Mar. 12, 1840, p. 2; PPL, Mar. 14, 1840, p. 2). They argued that the line threatened their lives and livelihood. After two years of mob action, during which they attacked the men sent to build the line and destroyed the track itself, the people of Kensington forced the railroad to admit defeat (Feldberg 1980).

William Novak has noted that the idea of the people's welfare, the salus populi, was the suprema lex of the antebellum era (Novak 1996, pp. 9–10). And as Novak (1996) has shown, protection of the people often was a matter for ordinances, acts, or decisions at law. But there were moments in the antebellum era when some people in Pennsylvania decided that they needed to protect their welfare themselves, acting outside the courts and institutions of the state. As Michael Feldberg put it a "populist logic" led some Philadelphians to "apply collective force in situations where the absence of government action led to 'injustice' or some perceived violation of community norms or majority rights" (1975, 69).

But if the people of Pennsylvania had a unique historical reason to assume that the police power was vested in their hands, they had no monopoly in the exercise of sovereign violence. Mobs that attacked newspapers in Illinois, Kentucky, Massachusetts, Ohio, Washington, and New York often explicitly ground their actions on the law of nuisance, and implicitly assumed that they had a right to take the law into their own hands (Kielbowicz 2006). When a group from northern Indiana formed a vigilante committee in 1859, they put their intentions in stark Constitutional terms:

> We are believers in the doctrine of popular sovereignty; that the people in this country are the real sovereigns, and that whenever the laws made by those to whom they have delegated their authority, are found to be inadequate to their protection, it is the right of the people to take the protection of their property into their own hands, and deal with those villains according to their just deserts….
>
> Brown 1975, p. 95

Competing Narratives of Sovereignty at Mercer's Trial

As the Resolution of the Indiana Vigilante reminds us, popular sovereignty rested in the people, not the individual. An individual's decision to take the law into his own hands was not Constitutional in and of itself. Rather, the power to approve it, to give it Constitutional sanction, had to come from the community. Sometimes, that approval came from community leaders, other times it was indicated when the community endorsed the conduct. But often the approval came in a more formal manner, as it did when Mercer appeared in court, to be judged by the jury of his peers. At that moment the claims of sovereign power shifted to the jury as it sat in judgment of a fellow citizen and the law.

But of course, there was another claim to sovereign power in that courtroom. Thomas P. Carpenter, attorney for Gloucester County, spoke for that other sovereign when he gave the opening statement for the State of New Jersey in Mercer's trial. He emphasized the long-standing principle of law that declared killing a crime, quoting liberally from the seventeenth-century English jurist Lord Coke, a former justice of the New Jersey Supreme Court, and from a state statute as he defined the crime of murder. He reminded the jurors that under the laws of both New Jersey and Pennsylvania "willful, deliberate, and premeditated killing" was first-degree murder. This was a fairly standard opening statement in criminal trials, in antebellum New Jersey a prosecutor made almost exactly the same argument in New Jersey v. Zellers, a murder case tried in 1824. But in the context of the Mercer trial, it allowed the State to draw a sharp contrast between the rule of law set down by the sovereign state and the lawless, individualized desire for vengeance that drove Mercer to cast himself as prosecutor, judge, and jury. It was also a reminder that the jurors, like Mercer, were citizens who were subject to the law, rather than sovereigns granted the power to take the law into their own hands (PPL, Mar. 29, 1843, p. 2).

The evidence put on by the State was designed to reinforce those points by establishing that Mercer killed Heberton and had no lawful defense for his actions. James Vandyke testified about the events on board the John Fitch and Mercer's subsequent arrest. He told the jurors of Mercer's confession, made within minutes of the shooting, and offered a description of Mercer's behavior that presented him as resolved and calm throughout the scene on board the boat. Several other men who had also been on the steamboat corroborated Vandyke's account of the killing, though one witness, John Carter, complicated matters by explaining that immediately after he heard a shot fired he saw a man leap off the boat and disappear into the streets of Camden. Having offered testimony that for the most part demonstrated that Mercer shot Heberton without any appearance of madness, the State closed its case by calling the doctors who conducted the postmortem. They matter-of-factly described the nature of Heberton's wounds, and explained how they led to his death. With that, the State rested (PPL, Mar. 29, 1843, p. 2; PPL, Mar. 30, 1843, p. 1).

In contrast to the State's spare presentation, the defense began its case on a complex note. The opening statement by Peter A. Browne, Mercer's lead attorney, offered the jury an elaborate interpretation of the case that began by respecting the

authority of the state and ended by asserting the sovereignty of the people (PPL, Mar. 30, 1843, pp. 1–2; PPL, Mar. 31, 1843, p. 1). Beginning inside the confines of law, he told the jurors that Mercer's desire to protect his sister drove him to temporary insanity that excused his murderous act. But then, moving beyond the law he appealed to the jurors' common sense, arguing that Mercer's reaction reflected the legitimate shock of an honest, middle class worker at the misconduct of a rich, dissolute young man. Then he pushed the jurors to behave like sovereigns, telling them that they had the power to mitigate the commands of law with mercy.

In contrast to the complexity of Browne's opening statement, the case the defense put on was straightforward (PPL, Mar. 31, 1843, p. 2; PPL, Apr. 1, 1843, p. 1; PPL, Apr. 3, 1843, p. 1; PPL, Apr. 4, 1843, p. 1). Witnesses outlined the events from Sarah's seduction to Singleton's hunt for Heberton. Others provided details of Singleton's odd behavior in the days before the murder, testimony that was then bolstered by a series of medical witnesses who speculated about Mercer's mental state. When the defense closed its case, the prosecution offered a brief rebuttal, putting on a series of eyewitnesses and medical experts who testified that Mercer did not appear insane after he killed Heberton.

The debate over the locus of sovereignty returned with the closing arguments (PPL, Apr. 4, 1843, pp. 1–2; PPL, Apr. 5, 1843, pp. 1–2; PPL, Apr. 6, 1843, 1). Carpenter gave the first closing argument for the state. Once again, he emphasized that the law did not excuse deliberate, premeditated killing, no matter how strong the urge for revenge. He also rejected the defense suggestion that Mercer had killed Heberton in a heat passion, noting that a 3-day period was long enough to allow even the most extreme passion to cool. And he was equally dismissive of the notion that Mercer had been insane at the time of the murder, characterizing the testimony with respect to that claim as too muddled to be credible. But even as he tried to reduce the case to a matter of black letter law, he conceded the jurors' had the power to interpret the law when he offered them a string of legal precedents to support his claim that Mercer should be punished.

The defense followed with two closing arguments. In the first, Peter Vroom followed the path Carpenter laid down (PPL, Apr. 6, 1843, pp. 1–2). He peppered his argument with discussions of cases and legal principles. Step by step, he refuted the State's legal arguments, weaving case law and evidence together to show jurors that they could follow the law and still find for his client. He argued that Carter's claim that he saw a man leap from the John Fitch seconds after the shots killing Heberton were fired was enough to raise a reasonable doubt about whether Mercer was the killer. He demonstrated that, contrary to Carpenter's analysis, case law recognized that a cooling period that was "sufficient" for one person, might not be long enough for another, and contended that meant the jurors should examine Singleton Mercer's particular situation. Finally, he asserted that those who saw Mercer in the days leading up to the killing had provided convincing evidence that he was insane.

Vroom was followed by Garrett D. Wall (PPL, Apr. 7, 1843, p. 1). While Vroom and Carpenter had been content to invite jurors to adopt legal precedents that supported their theories of the case, Wall gave them justifications of Mercer's action derived from classical and biblical tales. Thus, he reminded them of the story of

David's son, Absalom, who killed his half-brother after learning that he had raped their half-sister, Tamar. After he killed his brother, Absalom fled the kingdom and the king, his father's, wrath. He remained away for several years; when he finally returned, he continued to avoid his father. Finally, several years later, Absalom sought an audience with his father. When they met, instead of punishing his son, David kissed him.[9] Wall argued that this scriptural passage taught that young men who killed their sisters' rapists should be forgiven, not punished. For those jurors who might hesitate to substitute the Old Testament for the commands of the New Jersey criminal code, Wall offered another religious argument. Insanity, he argued, was divinely ordained; it occurred because God had "wisely framed the human mind in such a way that, when all that we love and cherish has been destroyed by a brute in human guise, we shall run wild with our sense of wrong and our insanity should work out the ways of Him who has declared 'Vengeance is mine.'" Thus, in his moment of madness Mercer had carried out divine will. The proof of that provenance was in the result: Mercer succeeded in killing Heberton with a bullet he fired blindly into a darkened carriage, evidence that his act had been sanctioned by Providence.

When Vroom shifted the argument from the commands of the rule of law, he denied the sovereignty of the State. In rebuttal, George Molleson, the Attorney General for the State of New Jersey, returned the command of law, and the power of the State, to center stage. He argued that no matter how sympathetic Mercer's motives were, the law remained clear that any killing carried out with this degree of premeditation was murder. Judge Daniel Elmer then made the State's point even more directly during his instructions to the jury, explicitly reminding the jurors that they were "bound to follow the law" and rejecting the insanity defense offered by the defense out of hand. At 5:00 PM the jurors went out to deliberate; barely half an hour later they were back in court with a verdict. When the foreman of the jury announced that it found Singleton Mercer not guilty, and failed to qualify that statement with the phrase "by reason of insanity," the courtroom resounded with cheers. An exultant mob then marched Mercer back to the prison, where he picked up his belongings (PPL, Apr. 7, 1843, pp. 1–2).

Juries as Judges of the Law

Although the State and the trial judge had tried to argue that the jurors had to follow the law they were given, antebellum jurors who wished to decide the law for themselves had law and custom in their favor. In English law, the tradition that jurors were to return a general verdict of guilt or innocence, rather than a verdict that outlined specific findings of guilt or innocence, meant that they could ignore or reinterpret legal rules as they applied the law to the facts of a case (Green 1985). In colonial

[9] The story of Absalom is from two *Samuel* Chaps. 13 and 14.

America, this practice was expanded. Colonial courts recognized that jurors had the power to determine the facts and the law in civil and criminal cases (Conrad 2000; Harrington 1999; Howe 1938; Ostrowski 2001). Few judges instructed jurors on the law prior to the American Revolution, when they did so, most agreed that the instructions were just advisory (Harrington 1999). In 1771, John Adams noted that it was not only a juror's "right but his duty in [a] case to find the verdict according to his conscience, tho' in direct opposition to the direction of the court" (Adams 1965, p. 230). Fisher Ames, normally no friend of popular power, endorsed the idea that jurors could decide the law, noting that the role of the jury was "like a sort of human providence, [its function] is to warn, enlighten and protect." (Ames 1809, p. 431). James Wilson recognized that jurors had the power to decide the law in his Lectures on Law, published in 1804 (Wilson 1804).

Those rules began to change during the antebellum era. The market increasingly demanded uniformity of law relating to commercial transactions and courts responded by sharply limiting the jury's power to decide the law in civil cases (Horwitz 1977, pp. 28–29, 84–85, 141–145; Nelson 1975, pp. 168–171). By the 1830s, the rule in most states was that jurors in civil cases had to follow the instructions given to them by the trial judge (Harrington 1999, p. 427). But the older practice continued in criminal law. In 1843, the Philadelphia Public Ledger noted that with "regard to the subject matter of a criminal charge, the jury are the judges of the law as well as the fact" (PPL, Mar. 11, 1843, p. 2). And the courts of that State agreed (Kane v. Pennsylvania 1879).

In some states this power was never officially articulated, it was just assumed; in others it was recognized by judicial decision (Harrington 1999). In several states the power was codified: Illinois passed a law that declared the right of jurors to determine the law in criminal cases in 1827, Georgia passed a similar statute not long after (Act of 1837). The power was established in Pennsylvania's Constitution of 1790, and Maryland and Indiana added similar provisions to their Constitutions in 1851. Some courts began to move away from the practice by the 1840s and in other states the courts that continued to recognize the principle disagreed about its scope (Hardy v. Missouri 1842; Maine v. Wright 1865; Massachusetts v. Anthes 1855; U.S. v. Batiste 1835), but practice in the criminal courts through the Civil War continued to support the principle (Harrington 1999). Lawyers read the law to jurors during closing argument, inviting them to determine for themselves what those rules meant or if they applied (Harrington 1999, p. 402; Parker 1830). And jurors, whether they were sitting on a coroner's inquest, empanelled as part of a grand jury, or serving as part of a jury on a criminal trial, exercised that authority, refusing to charge, indict, or convict as often as not (Lane 1999; Monkkonen 2000).

Most famously, some juries refused to enforce the fugitive slave laws, acquitting those who resisted the law (Cover 1975). But jurors around the country took the law into their own hands, denying application of laws that they disapproved of, including cases involving theft, battery, riots, duels, political violence, strikes, charges of illegal boxing and domestic violence Bodenhamer (1979; Lambert 2005, pp. 21–22; Moore 2002).

The tendency was particularly marked in murder trials (Lane 1999; Monkkonen 2000). In the 1830s, a lawyer in Alabama told Alexis de Tocqueville that jurors acquitted defendants charged with murder (Roth 2009, pp. 219–220); at the end of that decade Philip Hone made the same point about jurors in New York City (1927, vol. 2, pp. 47–48). Data from the antebellum era suggests the practice was widespread and persistent. Roger Lane determined that in Philadelphia conviction rates for murder, already low, declined between 1839 and 1859 (Lane 1999). Between 1839 and 1846, 59% of the 68 people indicted for murder in Philadelphia were brought to trial, but only 25 of those tried (not quite two-thirds of all people brought to trial, and just 37% of those who had been indicted) were found guilty. From 1846–1852, the percent of those tried for murder who were convicted dropped to just under 58%. And from 1853 and 1859, although almost three-fourths of all those indicted for murder were brought to trial, well under half those tried (about 44%), were found guilty. Startling as those numbers are, the phenomenon was not confined to Philadelphia: conviction rates in homicide cases were low across the antebellum United States, from New York (Monkkonen 2000) to South Carolina (Williams 1959).

What did these jurors think they were doing? In 1771 John Adams had argued that a jury's power to decide the law gave "the Common People … complete control in every judgment of the Court of Judicature" (Adams 1965, p. 230). Adams' construction, written when the American colonies were still under the control of Great Britain, gave the jury a power that was equivalent to a formal branch of government. Not quite a hundred years later, Lysander Spooner, in An Essay on the Trial by Jury, framed his explanation in terms of the American Constitutional order. He argued that jurors were exercising their sovereign power. He asserted that the power to judge the law in criminal cases derived from Magna Carta and the notion that a trial was "a trial by the country – that is, by the people – as distinguished from a trial by the government" (Spooner 1852, pp. 9–10). In one sense, the people exercising that role served as a check on the excesses of government and that was why they were chosen for the position at random – so that government could not control who was on the jury (Spooner 1852, pp. 6–7). But, he added, the jurors also had the right to decide the law for themselves, rather than accept the law given to them by judges and legislators, because "all the departments of the government, are merely the servants and agents of the people. …" (Spooner 1852, p. 12). Thus, jurors could, and should, decide the law because the people were the ultimate sovereigns.

Spooner made another point as well. When jurors acted as judges of the law, they sometimes gave protection to those who had violated the law by determining that the law, as applied in that case at least, was unjust (Spooner 1852, p. 15). That power served two purposes: On one hand, it protected the right of all people to take the law into their own hands, by allowing those who did so to argue to the jury that their action was right or just, regardless of the law on the books. On the other, it checked that right by holding the decisions of individuals or groups to act outside the law up to the review of their peers and the community's sense of justice.

Since they never explained their decision we cannot, of course, know what actually motivated the jurors in the Mercer trial. But one of the arguments that the

defense laid before the jury in the Mercer case – that it held the sovereign power to judge Mercer's act, not against some preexisting legal standard, but against its own sense of what justice (and mercy) required – was consistent with Spooner's strong notion of the jury's sovereign role.

Conclusion

Singleton Mercer shot Mahlon Heberton because Heberton ravished Mercer's younger sister, Sarah. Fifteen years later, John Graham, the attorney for William Sickles, who was on trial for murdering his wife's lover, announced that the second fact explained the first. Graham argued that the jury in the Mercer case was a prototype, one of the first to recognize the principle that "natural justice" excused husbands, fathers, and brothers who killed the seducers of their nearest female relatives (Lawson 1934, pp. 615–619). Some contemporary accounts put the Mercer case within that narrow constellation of trials, but others viewed it as part of a larger universe. One anonymous essayist, writing about the case in the New England Journal in June 1843, reacted to the verdict "with alarm," complaining that it "sanctioned an act of private revenge." ("Trial of Singleton Mercer 1843"). He charged that those who celebrated it "proclaimed to the world that false sentiments of honor and justice are still prevalent north of Mason and Dixon's line." Similarly, newspaper editor and aspiring lawyer Isaac Mickle fulminated that the verdict was "an outrage on law and justice" that would only encourage others to believe they could get away with murder (1977, vol. 2, pp. 365–366). A few weeks later, when he recorded in his diary the killing of an entire farm family during a botched robbery, Mickle triumphantly concluded that that murder was the "legitimate result" of the Mercer verdict (1977, vol. 2, p. 369). The Philadelphia Public Ledger made the same point in a slightly different way: for that paper, a crime was justified because the jury concluded it was (PPL, Mar. 21, 1843, p. 2).

Mickle's hyperbolic claim that Mercer's acquittal caused subsequent turns to lawlessness aside, his intuition that the Mercer verdict reflected a general attitude, rather than its particular facts, is confirmed by a number of recent studies that have examined acquittals in the antebellum era. Those studies, in turn, need to be read in light of the large, and growing, body of historical work that has traced the way American society shaped law by rationalizing or excusing the killings of some relying on theories of hierarchy, class-, or race-based notions of the worth of human life, and social or religious ideologies (Ayers 1984; Brundage 1993; Cohen 1998; Jacoby 1984; Waldrep 2002). This chapter argues that we need to explore the Constitutional implications of those practices, to see them as part of a larger battle over the locus of sovereignty. To do so, we need to understand that when some individuals or groups took the law into their own hands, whether out on the streets or inside the jury box, they were asserting a sovereign power over the law. As Justice Holmes recognized more than half a century after the end of the Civil War "the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified" (Southern Pacific Co. v. Jensen 1917, p. 222).

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Chapter 8
Direct Democracy and the Constitution

Bruno S. Frey, Alois Stutzer, and Susanne Neckerman

Introduction

This chapter applies a comparative view to evaluate initiatives and referendums in the context of Constitutional change. Instruments of direct democratic decision making are compared to those of a purely representative democratic system in which members of parliament decide Constitutional issues like basic rights, the scope of democratic decision making and market exchange, the organization of government and the judiciary, and the federal structure of the country. Section 2 briefly describes aspects of direct democratic decision making that we deem critical from a Constitutional economics perspective. In particular, we hint to changes in the political process if citizens are directly involved through initiatives and referendums. We also list where these instruments have been applied. Empirical evidence on the consequences of direct democracy is presented in Sect. 3. Section 4 discusses arguments for and against direct democratic elements in a Constitution. Important issues for designing a Constitution that includes direct participation rights for the citizens are taken up in Sect. 5. Section 6 offers concluding remarks.

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Direct Democratic Decision Making and Its Diffusion

There are many different conceptions of "direct democracy," which have resulted in a number of misunderstandings. In the following, we list two aspects that are central to our understanding and definition of direct democratic decision making.[1]

Controlling Politicians

Direct democracy (or, more precisely, semi-direct democracy) shifts the right of final approval of policy matters to the citizens. This, however, does not substitute for parliament, government, courts, and other authorities important in representative democracies. Referendums and initiatives rather complement citizens' Constitutional rights in the control of their representatives in the democratic process beyond elections.

A referendum that is open to the entire electorate of a country gives decision-making power to people *outside* the legislator and the government. The typical voter making the decision is not integrated into the *classe politique* and cannot be directly influenced by the politician. Accordingly, optional and mandatory referendums can serve as an effective control of government because, if successful, they overrule the decisions taken by the executive and the legislative bodies. Initiatives allow citizens to put issues on the political agenda that members of parliament would prefer not to discuss.

To be effective, politicians must not be able to block popular referendums. In many countries, the Supreme Court or, even more controversial, the parliament, has the power to decide whether a referendum is admissible. The criteria appear to be purely formal but, in fact, the members of the classe politique have a considerable number of possibilities to impede referendums threatening their position.

Empirical evidence shows that referendums are indeed able to put through Constitutional provisions and laws that are totally against the interests of politicians as a group with at least some common interests (see Blankart 1992).

Politicians are well aware that the institutions of direct democracy severely restrict their leeway and also their possibility to "exploit" the citizens/taxpayers. Therefore, they mostly oppose introducing elements of direct democratic decision making.

Referendums as a Process

A referendum is not just a vote. Two important stages before and after the vote need to be considered.

[1] For different conceptions of direct democracy, see, for example, the work by Magleby (1984), Cronin (1989), Butler and Ranney (1994), Frey (1994), Dubois and Feeney (1998), Kirchgässner et al. (1999), and Frey et al. (2001).

The Pre-referendum Process

Referendums stimulate the *discussion process* among the citizens, and between politicians and citizens.[2] Pre-referendum discussions may be interpreted as an exchange of arguments among equal persons taking place under well-defined rules. This institutionalized discussion meets various conditions of the "ideal discourse process," as envisaged by Habermas (1983). Some referendums motivate intense and far-reaching discussions. Those that are considered to be of little importance to the voters engender little discussion and low participation rates. This variability in the intensity of discussion and participation overrides the predictions of many models that were developed in reaction to the "paradox of voting" (Tullock 1967; Riker and Ordeshook 1973).

Post-referendum Adjustments

In a referendum, a political decision is formally made. However, which side gets a majority is not the only thing that matters. A referendum also clearly reveals how the population feels about the issue, whether there are distinct minorities and how large these are. Hence, groups dissenting from the majority and their preferences are identified and become part of the political process (see Gerber 1997).

The Diffusion of Direct Democracy

The extent of direct participation rights varies between different countries and states. Still, they usually include the issue of Constitutional change, which typically requires a mandatory referendum. Optional referendums and initiatives (allowing citizens to put issues on the political agenda) require a predetermined number of signatures by citizens to be launched.

Over the period 1991 to 2000, no less than 385 referendums on the *national level* were recorded (Kaufmann et al. 2008). About two-thirds (235) of them took place in Europe, 76 in America, 35 in Africa, 24 in Asia, and 15 in Oceania. In the decade before (1981 to 1990), there were only 200 national referendums. Up until August 2002, issues of European integration led to no less than 30 national referendums. There are a large number of popular referendums at lower levels of government. In the German state of Bavaria there were as many as 500 since its adoption in 1946. In Switzerland, there are thousands of referendums at all three levels of government: local, cantonal, and federal. In the USA, the initiative and referendum process is available to citizens in 24 states. Since 1904 when the first statewide initiative appeared on Oregon's ballot, approximately 2021 measures have been decided directly by voters (Waters 2003).

[2]The essential role of discussion in direct democracy is more fully discussed in the works by Frey and Kirchgässner (1993) and Bohnet and Frey (1994). Its role for democracy in general is addressed in the work by Dryzek (1990).

Empirical Evidence on the Consequences of Direct Democracy

Direct democracy changes the political process in three important ways, compared to a purely representative democracy:

- Due to restricting established politicians' power, the *outcome* of the political process is closer to the citizens' preferences.
- The participatory character of direct democratic decision making provides incentives to voters to inform themselves about political issues, and changes their relationship with authorities and fellow citizens. Moreover, the referendum *process* is a source of procedural utility.
- Direct democracy affects *institutional* change, and protects rules that favor the citizens. In particular, it is a safeguard against overcentralization.

In order to substantiate these hypotheses, the following paragraphs discuss systematic empirical evidence from a number of studies that cover both Switzerland and the USA (for surveys see, e.g., Bowler and Donovan 1998; Eichenberger 1999; Kirchgässner et al. 1999; Gerber and Hug 2001 or Matsusaka 2004).

Effects on Policy Outcomes

Public Expenditures and Revenues

In a study covering the 26 Swiss cantons and the years between 1986 and 1997, Feld and Kirchgässner (2001) measure the effects of mandatory fiscal referendums. As compared to those without, cantons with fiscal referendums exhibit lower expenditures and revenues (about 7 and 11%, respectively). In a sample of 132 Swiss towns, the same authors replicate their test for the mandatory referendum on budget deficits for 1990. In cities where a budget deficit has to be approved by the citizenry, expenditures and revenues are, on average, about 20% lower and public debt is reduced by about 30%. With an extended panel data set from 1980 to 1998, the effect of the mandatory expenditure referendum is analyzed, taking the spending threshold into account and controlling for many factors such income level in the canton, federal aid, age structure of the population, population size, population density, unemployment rate, as well as whether people are German-speaking or not (Feld and Matsusaka 2003). At the median threshold of 2.5 million Swiss francs (SFR), spending per capita is reduced by 1,314 SFR, that is, by 18% for an average expenditure level of 7,232 SFR (compared to cantons that either have an optional financial referendum or no referendum on new public expenditures). Moreover, the authors find that mandatory financial referendums have a smaller effect when it is easier for citizens to launch initiatives for new laws or to change an existing law (measured by the signature requirement). Thus, there is a substitutive relationship between the two institutions with regard to their consequences on cantonal fiscal outcomes.

Very similar results are found across US States (Matsusaka 1995, 2004). In a panel from 1970 to 1999, including all states except Alaska and controlling for many factors, initiative states on average have lower expenditures as well as lower revenues than noninitiative states. Both effect sizes are about 4%. These effects are, however, significantly different when the signature requirements to launch an initiative are taken into consideration. States with a 2% requirement are estimated to levy $342 less taxes and fees per capita than noninitiative states (Matsusaka 2004, Chap. 3). These effects can be assigned to the referendum process and not, for example, to the ideology of a state's electorate.

The results provide evidence against the simple median voter model approach that is popular in economics. According to this model, politicians implement the expenditure and revenue level that is preferred by the median voter. In that world, referendums and initiatives should have no effect. However, it could well be that the observed low expenditure and revenue levels reflect some well-organized interests (e.g., rich people) that rely less on public services rather than more effective government control to refrain from unnecessary spending. Therefore, the efficiency of the provision of public goods has to be analyzed.

The cost-efficient use of public money under different institutional settings can be directly studied for single publicly provided goods. In a careful study on waste collection, Pommerehne (1983, 1990) finds that this service is provided at the lowest cost in Swiss towns that have extended direct democratic participation rights and choose a private contractor. The average cost of waste collection is the highest in towns that rely on representative democratic decision making only, as well as on publicly organized collection (about 30% higher than in the most efficient case).

The efficiency of public services is also reflected in a study relating fiscal referendums to economic performance in Swiss cantons (Feld and Savioz 1997). For the years 1984 to 1993, a neoclassical production function is estimated that includes the number of employees in all sectors, cantonal government expenditure for education including grants, as well as a proxy for capital based on investments in building and construction. The production function is extended by a dummy variable that identifies cantons with extended direct democratic participation rights in financial issues at the local level. Total productivity – as measured by the cantonal GDP per capita – is estimated to be 5% higher in cantons with extended direct democratic rights, compared to cantons where these instruments are either weak or not available.

Based on an aggregate growth equation, Blomberg et al. (2004) analyze the degree of efficiency with which US states provide public capital (utilities, roads, education, etc.). Based on data for 48 US states between 1969 and 1986, they assess whether there is a difference between initiative and noninitiative states. They find that noninitiative states are only about 82% as effective as states with the initiative right in providing productive capital services, that is, approximately 20% more government expenditure is wasted where citizens have no possibility to launch initiatives.

Citizens' Happiness

Individuals do not only have preferences for material affluence, but also with regard to freedom, equal opportunities, social justice, and solidarity. Whether individuals' preferences are better served in direct democracies than in representative democracies can be conjectured, but not deduced, from the evidence described so far. In contrast, the analysis of people's reported subjective well-being or happiness (for surveys see Frey and Stutzer 2002a; b; Frey 2008) can offer important insights into whether people in direct democracies are happier. In a study for Switzerland in the early 1990s, the effect of direct democratic participation rights on people's reported satisfaction with life is empirically analyzed (Frey and Stutzer 2000) based on survey data from more than 6,000 people. The proxy measure for individual utility is based on the following question: "How satisfied are you with your life as a whole these days?" People answered on a scale from one (=completely dissatisfied) to ten (=completely satisfied). The institutionalized rights of individual political participation are measured at the cantonal level, where there is considerable variation. A broad index is used that measures the different barriers preventing citizens from entering the political process via initiatives and referenda across cantons. There is a sizeable positive correlation between the extent of direct democratic rights and people's reported subjective well-being (after taking important socio-demographic and socio-economic variables into account). This effect is more than a third as large as the difference in life satisfaction between the lowest income category and the one reporting the highest life satisfaction. As the improvement affects everybody, the institutional factor capturing direct democracy is important in an aggregate sense.

Effects on the Process of Political Decision Making

Direct democracy fundamentally changes the *process* of political decision making. The direct involvement of the people changes their motivation when they act as voters, taxpayers, or fellow citizens (Frey 1997). It is widely believed that well-informed citizens are an essential prerequisite for a well-functioning and stable democracy. However, collecting information in order to make an informed decision at the poll is a public good that citizens are only willing to make to a limited extent. On the one hand, it can be debated whether a direct democratic decision on a particular issue demands more or less information than the choice of a candidate, given the institutions that lower citizens' information costs. On the other hand, it can be asked whether the level of voters' information itself is dependent on the political system in which citizens live. A political system giving citizens more political participation possibilities changes the demand for political information, as well as the supply of it. Benz and Stutzer (2004) provide systematic empirical evidence. The data shows that political participation possibilities are positively correlated with voters' level of political information.

People's satisfaction with the provision of public services in direct democracies is likely to influence their behavior as voters collecting information or as taxpayers. In addition, the process of decision making may also change people's trust in

authorities (this can be seen as a psychological contract, Feld and Frey 2002) and their motivation to obey the law. It has, for example, been shown that people's tax morale increases and tax evasion decreases with more extensive democratic participation rights. Based on survey data from the World Values Study, Torgler (2003) finds that in more direct democratic Swiss cantons, citizens are more likely to agree with the statement that "cheating on taxes if you have a chance" is never justifiable. Pommerehne and Weck-Hannemann (1996) directly study tax evasion in Swiss cantons and find that it is substantially lower where citizens have a direct say in budgetary policy.

Citizens also benefit from the *process* of direct democracy beyond its political outcomes (for a general account on procedural utility, see Frey et al. (2004)). In order to disentangle the effect of direct democracy on policy outcomes from its direct (procedural) effect on reported subjective well-being, Frey and Stutzer (2005) use foreigners as a control group. Foreigners benefit from the favorable outcomes, but are excluded from the procedural benefits of direct democratic rights. The authors find that the positive effect of direct democratic participation rights is about three times larger for citizens than for foreigners, which hints to the importance of procedural concerns.

Arguments Against and Counter-Arguments for Referendums

Systematic evidence has been accumulated documenting that, as compared to a purely representative democratic system, direct democracy leads to policy outcomes that are more in line with citizens' preferences. Nevertheless, referendums can hardly be considered a prevalent institution in democracies, let alone in authoritarian systems. Not surprisingly, members of the *classe politique* are quick to raise many objections against increasing citizens' participation rights. They realize that referendums constitute a threat to their position by limiting their rent-seeking potential. Many intellectuals – even those who do not share the spoils of the politicians' cartel and those opposing the political establishment – put forward a variety of arguments against referendums. The basic reason is that they consider themselves to be better judges of what is good for the people than the citizens themselves. They tend to see themselves in the role of "philosopher-king", determining what constitutes social welfare. Consequently, they prefer decision-making systems where they have a larger say. Thus, they oppose referendums for the same reasons as they oppose the market.

The following arguments are often raised against the institution of referendum.

The issues are too complex for the citizens to understand.

This view can be refuted for various reasons: First of all, it is inconsistent to trust citizens to be able to choose between parties and politicians in elections, but not between issues in referendums. If anything, the former choice is more difficult, as one must form expectations on how politicians will decide on future issues. Second, the voters need not have detailed knowledge about the issues at stake. Rather, they only need to grasp the main questions involved. These main questions are not of a

technical nature, but involve decisions of principle, which a voter is as qualified to make as a politician. Third, the general intelligence and qualifications of politicians should not be overrated. Fourth, a number of institutions have emerged in direct democracies, helping citizens to reach reasoned decisions. The parties and interest groups give their recommendations concerning decision making, which the citizens may take into consideration. Even more importantly, the discourse in the pre-referendum stage brings out the main aspects and puts them in perspective. Finally, direct democracy provides incentives for the citizens to privately collect information, and for the political actors and the media to provide it.

Citizens have little interest in participating.

Participation in initiatives and referendums is often relatively low and varies with the size of the jurisdiction (see, e.g., Hansen et al. 1987). Sometimes, only a few eligible voters go to the polls. It is concluded that citizens are not interested in the issues to be decided on.

This is, however, a wrong conclusion for three reasons: First, participation is not always low. When the citizens feel that an issue is important, voting participation rises considerably. Second, high voting participation is not necessarily a good thing. Citizens are perfectly rational not to participate when they find the issue unimportant, when they are not affected or when they are undecided. Voting participation reflects citizens' preference intensities, which adds to the information on people's preferences elicited with the vote. Third, it would be naive to think that the voting participation of politicians in parliaments, which is also *freely chosen*, differs widely from that of citizens in popular referendums. This is reflected in the often extremely low participation in parliamentary sessions. The Members of Parliament sometimes have to be herded together from the lobby or their offices to cast the vote.

Interest groups set the agenda and manipulate the citizens.

Financially strong parties and pressure groups are better able to start initiatives and to engage in referendum propaganda than are financially poor and nonorganized interests. This cannot be denied. However, using this as an argument against referendums is misleading because it takes an absolute stance: it is *always* true that rich and well-organized groups wield more power. The crucial question is whether they have *more* or *less* power in a direct than in a representative democracy. It is well known that well-organized and financed pressure groups exert considerable power over the politicians sitting in parliament and in government. It may even be argued that it is cheaper and less transparent to influence the small number of legislators and government politicians than the total electorate.

Citizens decide emotionally.

Again, this charge must be considered in a comparative perspective. There is little reason to believe that politicians are less subject to emotions. After September 11, many politicians agreed in the heat of the moment to far-reaching decisions with regard to the restrictions of personal freedom. Moreover, parliaments are known to have highly emotional debates, sometimes even erupting into fist fighting.

Direct democracy is not capable to reach unpopular, but foresighted decisions.

Politicians are sometimes supposed to make unpopular decisions. An example would be a restrictive fiscal policy, when the budget deficit is getting too high or when inflation soars. Such policy pays off only in the medium or even long run. It is argued that such unpopular policies would be impossible in a direct democracy.

This conclusion, however, does not necessarily hold. In a direct democracy, the politicians are forced to explain their policies to the citizens. If they can give good reasons why they propose to undertake such a seemingly unpopular policy, the citizens will not oppose it.

Referendums are inadequate for major issues.

As the voters are taken to be poorly educated and ill informed, subject to manipulation and to emotional decisions, it is often argued that referendums should only be used for small and unimportant issues. In contrast, issues of great consequence – such as changes in the Constitution – should be left to the professional politicians.

The opposite makes more sense. Major issues can be reduced to the essential content. Evaluation is then not a matter of (scientific) expertise but of value judgments. Following the idea of citizen sovereignty, only the citizens may be the final judges when it comes to preferences, and a substitution by representatives is, at most, a second best solution.

Small and unimportant issues, on the other hand, may well be delegated to professional politicians because the transaction cost of a popular vote would probably outweigh the benefits.

Referendums hinder progress.

Critiques argue that the populace often rejects decisions because they do not like changes, and prevents the adoption of "bold, new ideas."

It may well be true that many new propositions are rejected in referendums, but this does not mean that this constitutes a disadvantage. The fact that proposals contain new ideas is no proof of their quality. Indeed, the citizens are right in rejecting them when they are in favor of the *classe politique.* The concept of "bold, new" solutions is not rarely the result of technocratic thinking and of a planning mentality. They strengthen the politicians' and bureaucrats' position, but need not necessarily be in the voters' interests.

There are too many referendums.

When the citizens have to simultaneously decide on a large number of issues (in California, for instance, the voters often have to deal with 20 or even more propositions at the same time), they gather information about and focus on a few clear issues. The decisions on all other issues are then haphazard.

This is indeed a situation to be avoided. However, the number of referendums put to the vote can be steered via the number of weekends with ballots over the year and via the number of signatures required for an initiative or optional referendum. If the number of issues to be decided on gets too large, the number of signatures

required can be raised. However, such a decision should be made via a Constitutional referendum to prevent the *classe politique* from fixing such a high number of signatures that referendums become infeasible.

Preconditions for Introducing Referenda and Constitutional Design

There are many obstacles to introducing political institutions that restrict the competence and influence of established interests. However, in a societal crisis or after a revolution (like in the former communist countries in Europe), there is a window of opportunity for institutional change and new basic rules for society. In order to successfully introduce direct democracy during these periods of time, a civic culture is necessary that facilitates the use of referendums and initiatives. It is impossible to successfully run directly democratic institutions where there is no adequate basis in society. One condition under which direct democracy works well is when there are strong cross-cutting cleavages (e.g., with respect to per capita income, religion, and culture or language). This guarantees that it is not always the same group of persons that finds itself in the minority and therefore feels exploited. As has also been emphasized, the citizens must have sufficient trust in the politicians that they actualize the referendum decision, and the politicians must trust that the citizens take reasonable decisions when voting on issues. This trust must develop over time and cannot simply be instilled from outside. Therefore, the "grand" solution of jumping from a representative democracy straight into a fully developed direct democracy is both unrealistic and undesirable. Rather, direct participation rights for the citizens should be gradually introduced, so that a *learning process* can take place between the citizens, parliament, and government. The use of initiatives and referendums by the citizens is, however, also a major factor in raising civic culture, especially in the form of the trust citizens have in their government. Direct democracy thus helps to create the necessary conditions for its own smooth functioning.

The crucial question is *who governs* the step-by-step introduction of direct democratic instruments. Ideally, it would be a Constitutional assembly. Its members are not directly involved in current politics, so they can take a more objective stance. They do not have to fear a reduction in their own power if direct democracy is introduced in the future. In reality, however, a considerable number of the members are likely to belong to the *classe politique.* They either served in parliament in the past, currently do so, or hope to do so in the future. In all cases, they tend to oppose popular participation in political decision making.

For these reasons, the active involvement of the citizens in amending the Constitution, as well as in more general political decision making, cannot be substituted by resorting to representation.

Concluding Remarks

Reasons for giving citizens the rights to directly participate in political decision making stem from two main strands of argumentation. The first strand takes such political rights as a *value as such*, which must not be legitimized any further. Direct democracy is then taken as the next logical major step from the introduction of democracy in the classical Athenian city-state and its broadening over whole nations in the wake of the French revolution.

The second type of reasoning considers the favorable consequences of giving the citizens the right to directly participate in political decision making. This paper identifies two sources of benefits: (a) *Procedural Utility.* Direct participation rights raise citizens' utility, quite independent of the outcomes reached. Empirical evidence suggests that citizens' subjective reported well-being (ceteris paribus) is the higher, the more extensive their participation rights are. (b) *Outcome Utility.* When the citizens are allowed to directly participate in political decisions, the policies undertaken yield more favorable results for them. Extensive empirical evidence for Switzerland and the USA (the leaders in direct democracy) suggests that more extensive participation rights via popular initiatives and referenda lead to a lower tax burden and lower public expenditures; to higher efficiency and productivity in the provision of public goods and services; and to higher overall satisfaction (happiness) of the population.

The following arguments are often raised against direct democratic institutions: the citizens fail to understand the complex issues; they have little interest in participating; they are easy to manipulate; they tend to decide emotionally; the large number of referenda lead to confusion; leadership is made impossible; direct democracy is inadequate for major issues, hinders progress, destroys civil rights and is very expensive. This paper argues that these arguments should be rejected, in particular if a comparative stance is taken, that is, if decision making in direct democracies is contrasted with that in representative democracies.

Elements of direct democracy should be introduced gradually. There are many design variables that allow a flexible introduction. Examples are the required majority, the issue domain, the time, the extent of codetermination of citizens and parliament, as well as whether referendums concern the local, national or supranational level.

We conclude that increasing the direct democratic political participation rights of the citizens is an important step for any democracy and the evolution of its Constitution.

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Chapter 9
Parallelisms and Paralogisms in the European Court of Justice*

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> Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Community law in its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.
>
> Lord Reid, "The Judge as Law Maker,"
> Journal of the Public Society of Teachers of Law, Vol. 12, 22 (1972)

Introduction

Of all ideas that scholars of institutional matters cherish most, none has spawned more interest than judges' impartiality. The demonstration that the judges' behavior cannot be fully insulated from political influence is a household item for several books and articles. Yet, conventional analysis gives almost exclusive attention to custodianship per se. Also, one of us has already provided theoretical analyses on the guardian's guardian problem (Eusepi 2006). However, works on how a guardian

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behaves in a supranational setting without a Constitution are rather scant. In the enlarged EU, sorting out the link between the member states' courts and the European Court of Justice (henceforth ECJ) is becoming challenging. A study of the judges' behavior in that sorting is critical for understanding what is unfolding within the EU legal system.

In the logic of the civil law, the ECJ is an unprecedented institution. While it is new in its structure, its task of pulling member states' old issues together by an appeal to the superiority of the Community law does not entail creating a new mission. "The system of 'references', established by Article 177 of the EC Treaty, was modelled on the arrangement in Germany and Italy where any court in the country, faced with a problem of Constitutional law, can 'refer' the case to the Constitutional Court and ask it to state what the law is. The court making the reference remains responsible for determining the facts and applying the law to those facts. The function of the Constitutional Court is only to deal with the question of Constitutional law" (Judge David Edward 1996/1997, p. 64).

Contrary to this view, during the past 50 years the ECJ has acted in ways that it has been charged with pursuing political goals rather than super partes reviewing. Despite the links with member states' Constitutional Courts, Stone Sweet's (2002) assertion that the weakness of Constitutional Courts of nation states has to be found in their Kelsenian foundation cannot be extended to a supranational court such as the ECJ. Rather, the broad argument of this chapter leads us to see whether the ECJ differs from the US Supreme Court. What emerges from this comparison is that the ECJ is at once a very weak guardian and a robust political body as evidenced by its centralizing policy.

Our initial hypothesis was that the ECJ's propensity to centralization had been fuelled by the absence of a European Constitution. In this respect, we were somewhat optimistic. The approval of the Treaty establishing a Constitution for Europe in 2004[1] did not, alas, have any discernible impact on the ECJ's conduct and simply Constitutionalized 50 years of ECJ's discretionary judgments. The wording of the Constitutional Treaty is so ambiguous that it ends up by assigning the ECJ a wider rather than a narrower discretionary power.

Much of Sect. 2 is devoted to analyzing the peculiar institutional setting in which the ECJ operates. Section 3 revolves around the contradiction arising from the assignment of shared competences and the theory of occupied field. Section 4 focuses on the ECJ's discrimination between EU enterprises and member states' governments on matter of competition. Section 5 deals with parallel imports. Section 6 presents a model showing how results on matters of competition and/or liberalization largely depend on the political aims that the ECJ pursues. Section 7 offers some concluding remarks.

[1] The approval of the Lisbon Treaty that has just come into force does not change things much.

An ECJ Without a Constitution

The need for an impartial judge is tightly linked to the advent of democracies. As noted by Buchanan and Congleton (1998), the majoritarian principle as a decision-making criterion entails, in fact, the implicit discrimination against the minority. Although democracies are able to limit the majority's potential discriminatory power through voting – for voting makes majorities rotate – the tyranny of the majority cannot be excluded unless a Constitution is introduced to prevent the majority from changing the rules. Constitutional Courts guarantee that Constitutions are majority-rule resistant. Because of its peculiar institutional–Constitutional setting, a supranational body in continuous evolution due to the enlargement policy, the ECJ is unable to follow this rule.

If the ECJ had borrowed the weak-control model of the Constitutional Courts of the European member states, it would hardly have survived. In a supranational context bereft of a Constitution, any Constitutional court would be an institution without "mission" unless it arrogated it to itself as the ECJ has done. Since its inception, the ECJ's mission has been that of guaranteeing that the provisions contained in the EEC Treaty first and in the EU Treaty then were enforced. Even if the ECJ structure – one judge for each country – ensures a reasonable political equilibrium, there is genuine concern as to its diffuse power, it being an institution able to enlarge its sphere of action through the reinterpretation formula.

Since the first half of the 1960s, the ECJ has interpreted the Treaty of Rome as a "new legal order" that is supreme over the laws of the member states and as such can be applied directly to both citizens and member states. So consistently with this philosophy, the Constitutional Treaty states that competences transferred by member states to the EU are permanent with the result that member states surrender part of their sovereignty to the EU. Central to our discourse is the fact that member states' accommodation with permanent hand over of sovereignty has paved the way to centralization with potential dangers for freedom of exchanges.

There is, thus, no basis for claiming that the ECJ is a weak institution. Of special significance is the ECJ's interpretation of the community law as overriding national Constitutional laws:

> The validity of measures adopted by the institutions of the community can only be judged in the light of community law. The law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of its Constitutional structure.[2]

[2] Judgment of 15 July 1964, case 6/64 (1964) e . c. r. p . 594.

This is, thus, an outstanding example of how the ECJ's pendulum swings toward the interpretation of the Treaties rather than guardianship. In fact, in the absence of a formal Constitution, the ECJ no longer plays the role of guardian and turns out to be a political body with judicial glosses.

There is one respect in which the ECJ is not much different from the US Supreme Court: creative interpretation. But there is one large and sufficing difference between the two. Through a creative interpretation of the Bill of Rights at the time of the New Deal the US Supreme Court consistently limited the political power, while the ECJ indirectly supports it. The majority-rule procedure makes the ECJ's judicial review easier than that of the Commission and the Council law-making procedures, since the latter operates under the unanimity or qualified majority principle. As a consequence, the ECJ has an easier access to rule changing than the legislative, and its power overrides even that of the founding Treaties for its exclusive faculty of re-interpreting them.

The ECJ's decision to build up its power on this strategic weapon is not without its problems. The most troublesome issue relates to the erosion of member states' share of sovereignty, which is surrendered in favor of a supranational government supposedly acting as a superguardian. The rationale for this might be summed up in the idea that bigger is better than smaller for dealing with the complex supranational game, especially in the face of decisions taken under less than unanimity rule. In a superstate in flux as the EU is, a control agency would protect the losing states. Possibly, the risks run by losing countries could be avoided equally well by the enactment of the unanimity principle. This procedure, however, is likely to result too costly for ordinary decisions.

It should be apparent even from this preliminary sketch that our analysis reflects a Constitutional–political–economy orientation, which is a far cry from the logic followed by the EU based on an intergovernmental approach.

The Occupied-Field Quibble

The so-called intergovernmental approach is grounded on the assumption that the EU is the result of enumerated competences transferred from member states to the European institutions. Thus the ECJ is assigned a role of guardian acting on behalf of the member states. As the highest authority in the EU's judicial structure, the ECJ has the mission of monitoring that the European legislative operates within the limits of enumerated competences. Conceiving of the ECJ as a guardian acting in the interests of member states would provide arguments for considering its review activity as a principle–agent relation. Through the years, sadly, the ECJ has been moving in exactly the opposite direction by changing the EU Treaties through interpretation. Much of its review activity may be seen as catering to the reinforcement of the EU's centralized political power.

Thus far, the reader might easily fall into thinking that our aim was to show that the ECJ's interventionist behaviors toward centralization and its discretionality in

typology of interventions were due to the absence of a European Constitution or a Constitutional Treaty. There is some truth in this reading. However, this franchise of framing the problem is belied by facts. The Constitutional Treaty for Europe – approved in Rome with great pump, but blocked by the French and Danish referenda and that it is a far cry from a contractarian type of Constitution – has authoritatively assigned the ECJ even more power in adjudicating disputes and interpreting the Treaties (see Art. I-29 of Constitutional Treaty). A much-explored issue concerns the ECJ's peculiar interpretation of shared competences (see Art. I-12 and Art. I-13). When interpreted in light of its doctrine of "occupied field," shared competences become a smoky notion giving rise to a systematic general conflict between member states' and EU's competences.

The inevitable consequence of the ECJ's interpretive method is that the EU is favored by the theory of "occupied field" because any transfer of enumerated competences to the EU as a way to limit centralization is circumvented. Moreover, via this theory the ECJ is able to enlarge enumerated competences because the Constitutional Treaty upheld past ECJ's judicial reviews. Hence, new competences will simply sum up with the enumerated ones.

Article I-12 (2) delineates procedures for the Union to exercise exclusive competences. These competences involve that each external action producing domestic effects within the EU's member countries should be preceded by an agreement with the EU. This provision espouses and compounds the ECJ's position. Therefore, it is hard to believe that the approved Lisbon Treaty, signed by the EU member states on December 13, 2007 and entered into force on December 1, 2009 will imply dramatic changes in the ECJ's interpretive role. In more than one occasion, EU countries have been forced to breach their obligations, and examples such as the Bermuda Agreement (Bermuda Agreement II, 1992), which was deemed to violate the EU's Common Aviation Act, will be surely replicated. The ECJ's role, in fact, will evolve from one of interpreter of several Treaties to one of interpreter of a single Treaty. It is not unlikely that the Constitutional coverage entrenched in the Constitutional Treaty will favor the ECJ's centralist tendencies. In the name of the "occupied-field" formula – a concept that for its vagueness is fit for an extensive use – the ECJ will be able to restrict member states' residual competences rather than limiting those of the EU.[3]

More tellingly, what is pivotal in the explanation of the ECJ's discretionary behavior is the kind of Constitutional bedrock, or what one of us defined it elsewhere (Eusepi 2008), the "notional locus of the law." To clarify this argument, it is instructive to compare the "notional locus" of the European Constitutional Treaty

[3] It is worth evaluating the role played by the ECJ in the light of the so-called principle of subsidiarity as stated by Paragraph 2 of Article 3b of the EC Treaty. De Burca (1998) questions whether the ECJ should be influenced, in exercising its power, by some of the subsidiarity requirements which constrain the other institutions. On the one hand, it is argued that the Amsterdam protocol on subsidiarity requires that each European Institution has to operate in full observance of the principle of subsidiarity. On the other hand, the protocol itself seems to release the ECJ from the application of subsidiarity as far as the role of interpreting the community law is concerned.

with that of the US Constitution. The "notional locus" of the European Constitutional Treaty can be found in the creation or attribution of rights without corresponding obligations (basically fiscal obligations). Conversely, the "notional locus of the law" in the US Constitution has to be found in the prevailing limitation provisions.

In reality, as we have already mentioned, also the EU Constitutional Treaty contains provisions regarding enumerated transfers of competences from member states to the EU. But in the EU case the ECJ has ended up by divesting that principle of any practical contents. Through the occupied-field formula, each member state's competence is precluded once that competence has been occupied by the European legislation. As a practical matter, that means that the ECJ performs a quasi-political role or, better, it moulds its judicial reviews according to the will of the Commission, the Council and the Parliament. But this is only part of the story. A careful examination reveals that the ECJ is not that deferential to the legislative power. Through its activist treaty-interpreting role, the ECJ ends up by overriding also the EU legislative branch. One might argue that in principle political institutions could change the Treaties legally. However, the amendment procedures of Community laws are markedly complex and thus involve very high costs.

In a setting of the sort, the ECJ has put itself in a position that surrogates the legislative branch. Initially, the ECJ's interventionism has been thought of as favorable to the free market. Obviously, there is some distance between this portrayal and reality. The ECJ, in fact, is not so fond of the market per se, its support was only instrumental to pursue the wider political aim of creating a centralized system, a superstate.[4]

Free Competition on Probation

The function of the ECJ, according to the Treaties, is "to ensure that in the interpretation and application of this treaty the law is observed" (Article 220 EC). As underlined in Sect. 3, ECJ's sentences so widely and so profoundly have affected the legislative activity that the ECJ has ended up by being a substitute for the legislative.[5] In fact, the increased number of cases submitted by the Commission to the ECJ has witnessed a constantly heavier role of the latter. It is hardly surprising therefore that the ECJ operates as a centralized structure that has arrogated itself the right to solve also issues that have a national character, as if they were supranational. Of course, such an environment breeds the proliferation of conflicts rather than

[4] The provisions of the Rome Treaty on free movement and competition, far from being an end in themselves, are only a means for obtaining those objectives.

[5] "From former Prime Minister John Major to former Austrian Chancellor Wolfgang Schüssel there has been no shortage of political critics of the ECJ throughout its years of judicial activism. Schüssel in particular has suggested that in recent years the ECJ has acted beyond the scope of the treaties," Walsh (2007), p. 1160.

solving them. A glaring example of this is provided by the power to tax, which is a substantial vested claim of national sovereignty. This explains why member states have ceded negotiating authority over the trade area to the European Commission, but have strenuously fought to retain sovereignty over their national tax policies.

The conclusion to which member countries' revenue authorities point is that the ECJ's sentences have produced an asymmetry that has ended up biasing the tax system.[6]

In the same vein is the ECJ's policy toward corporate taxes. When the ECJ eventually arrogated itself the power of determining the EU corporate tax policy, it sought to prove incompatibility between member states' tax law and the EC Treaty so as to extend common tax rules throughout the EU. More strikingly is still the fact that ECJ's decisions have retroactive effects, so massive costs are involved. According to a Morgan Stanley report, the German Ministry of Finance, Hans Eichel, estimated that only the Marks & Spencer case (II),[7] which opened the way to a number of requests by other multinationals, would cost the British Treasure around £760 million, or 50 billion or 1.5% of GDP (MoneyWeek, December 12, 2005). Retroactivity is the rule, except for two conditions: good faith and serious difficulties (numerosity of parties and socio-economic impact) (Vording and Lubbers 2005, p. 11). Under these circumstances, member states start a learning process to avoid any reduction in tax bases, giving rise to an environment of legal uncertainty. However, the ECJ itself has rejected any proposal involving revenue protection. Thus, sentences have proved to be a means for a negative fiscal integration, a new tool used by the Commission to sponsor cooperation among member countries after the failures of the preceding attempts.

Unlike indirect taxes, for which coordination has already been reached, direct taxes follow the rules set out in articles 90–93, which provide a protective guarantee for no discrimination and no barriers to the four liberties. This vague provision, which prima facie seems a legislative vacuum that requires a unanimous decision by the Council to be filled, has a meta-political function. What might appear as a normative silence, in reality it would be better described as a claim of the EU member states to keep their fiscal sovereignty.

This state of affairs invites a reflection on the contrasting interests of the actors operating in the fiscal field: the Commission, member states, and firms. For our purposes, what matters is that the ECJ sides with the Commission. This collusive strategy achieved formal status starting from 1991, when the Commission, in pursuing fiscal harmonization, eroded away fiscal national powers by applying the ECJ's

[6] "Lawyers working for National revenue authorities have complained that the ECJ cannot pursue the implementation of abstract principles by drilling holes in the tax systems in a random fashion." Radaelli and Kraemer (2006a), p. 4.

[7] Case C-446/03 The ECJ found that the UK's law that did not allow a UK parent to set off the losses of its foreign EU subsidiaries against the UK parent's profits infringed the freedom of establishment.

provisions on the member states' exclusive competence as indicated in the EU Treaty. The long-standing objective of harmonization dates back to the 1960s[8] when the Neumark Committee, in line with the logic of the single market (Radaelli 1999, p. 667), tried to give first a political veneer, and later an economic color, to the harmonization of direct taxation with the introduction of the direct-taxation neutrality principle.

The harmonization-competition alternative remained a hunting ground for both the ECJ and the Commission and their strategy evolved in the concept of harmful competition in the 1990s. The idea of harmful competition has its historical background in a 1998 OECD report (OECD 1998, Box I, p. 23). Our goal here is to tease out the most important inconsistencies embodied in the concept.

A key point that provides the entry for a further contradiction is the transfer of tax bases, which comes to be viewed as a harmful effect grown out of fiscal competition. Why is it that under the pressure of the Commission, the ECJ is at once an advocate of harmonization and a strenuous opponent of competition for its alleged negative effects? The reason for this contradictory orientation has to be found in an implied bias against any disciplining role played by competition. Since competition is seen as the source of all evils, it is ipso facto viewed as harmful with the potential to originate losses for somebody somewhere (be they loss of tax bases or fewer clients). One can see clearly enough that this misconception of tax competition leaves no room for any tax framework. Doubtless, the concept of harmful competition derives in some way from the Pigovian idea of optimal government. Viewing competition among governments as an unfortunate detour veering away from the optimum state, it inevitably leads to the conclusion that tax competition can be but harmful. The ambiguities surrounding the concept of harmful competition and the losses coming from it may be cleared away referring to the Schumpeterian view of competition. In our view, competing is a dynamic concept in itself and the Schumpeterian creative destruction dispels the misconception that competition produces externalities or losses. To depict an externality as harmful is a sloppy characterization. It can be so only if it grows out of an outlaw act, which, of course, competition is not. For sure, competition among tax authorities cannot pass off as an externality. A quick look at the public finances of a large group of countries proves the hypothesis of the benevolent government to be extremely weak. In fact, if we consider the existence of individuals and the government à la Brennan and Buchanan (1980), the idea of competition as a harmful process is no more acceptable. Conversely, fiscal competition within Constitutional constraints would reduce any form of inefficiency stemming from rent seeking, lobbying, and excess fiscal burden. In this connection, the idea of Teather (2005) of considering harmonization as a fruit of a cartel aimed at avoiding any loss is fully appropriate.

By opposing competition, the ECJ strives to avoid a Delaware effect, characterized by an increased fiscal weight on less mobile factors, especially labor, and the consequent reduction in wellness and global richness due to a suboptimal public expenditure and social policy. Some figured out an extreme scenario where all countries abandon

[8] For a survey, see Radaelli (1999); Radaelli and Kraemer (2006a, b).

capital income taxation and rely exclusively on labor income and consumption as a source of revenues (See Zodrow 2003, p. 651), thus coordination among countries seems to be the only possible solution.

Underlying these issues we detect an inclination of national states toward discriminatory taxation (Vording and Lubbers 2005, p. 2) in order to protect their tax bases.[9]

To Allow or Not to Allow: The Paradox of Parallel Imports

As we come now to examine the ECJ interventionist policy in response to competition coming from abroad, a further paradox emerges. The centerpiece of the legislation on competition is the provision named "parallel imports." This provision embodies the ECJ's attitude to protect internal producers at the expense of consumers' welfare. The ECJ behaves the way it does largely because of the dual role that it comes to play: a guarantor of internal freedom and a strenuous opponent of free competition coming from third countries.

The ECJ reached the target through a series of rulings and opinions[10] in the name of Art. 28,[11] 30[12] and the restrictive interpretation of Art. 36 of the Treaty, a view codified in Article 7(1)[13] of the Trade Marks Harmonization Directive and amplified by the political support of the ECJ[14] through the application of the regional exhaustion of intellectual property right inside the EU.[15] According to this regime, the exhaustion

[9] A general view hinges on the idea that harmonization or coordination can work only if it is possible "to form a coalition that is large enough to benefit from cooperation even if everybody else defects, but small enough to keep interest heterogeneity within manageable limits (Genschel and Plümper 1996; Keohane 1990)." At the European level it is hardly possible to recreate this status "the number of cooperators grows in a hypothetical instance of tax coordination, the incentive for outsiders to join will decrease" Genschel and Plümper (1997).

[10] See Kanavos and Costa Font (2005), p. 753; Hann (1998a, b) e INTA (2005).

[11] Article 28 (Import and Transit).Quantitative restrictions on imports and measures having equivalent effect are to be prohibited between Member States.

[12] Article 30 (ex Article 36). The provision[s] of Article[s] 28 … shall not preclude prohibitions or restrictions on imports, … justified on grounds of … the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.

[13] "The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent."

[14] "For trademarks the initial case was Consten and Grundig v Commission (C-56/64), for patents it was Merck v Stephar (C-187/80) and for copyrights it was Deutsche Grammophon v Metro (C-78/70)," Maskus (2000), p. 1274 and for impeding parallel imports from outside EEA Silhouette International Schmied GmbH & CoKG v. Hartlauer Handelsgesgesellschaft GmbH(Case C – 355/96).

[15] Other forms of exhaustion regime are: national regime (USA) – where rights end upon first sale within a country but parallel imports from other countries may be excluded – and international regime (Japan) – where rights are exhausted upon first sale anywhere and parallel imports cannot be excluded.

ends upon first sale with the consequence that parallel trade is possible among the member countries, but forbidden if it originates from outside.

Such a regime endows the intellectual property owners with the right to forbid parallel imports originating from outside the EU on goods produced genuinely under protection of a trademark, patent, or copyright, placed into circulation in one market, and then imported into a second market without the authorization of the local owner of the intellectual property right (see Maskus 2000).

The principle of "community exhaustion" was made clear in Silhouette International Schmied GmbH & CoKG v. Hartlauer Handelsgesgesellschaft GmbH (Case C – 355/96.). On that case the ECJ specifically prohibited Member States from embracing the principle of international exhaustion.[16]

It is hard to believe that the provision interdicting parallel imports was directed at promoting the free market. It is more plausible that the motives of that provision embody a protectionist philosophy as clarified in footnote below. In perspective, if the future of European growth were to be based on goods with high technological content, then it is necessary to defend the intellectual property owners and envision an international extension of the exhaustion regime. The ECJ's claim that regional exhaustion should be preferred to international exhaustion as a way to prevent domestic markets from being hampered by cheaper imported goods shows the protectionist role of the ECJ.[17]

Against this background, we suggest that the primary motive for creating this provision was the safeguard of economic special interests. An example is offered by the conditions of accession of low-price members such as Spain and Portugal in 1986 and the big EU enlargement on 1 May 2004, when transitional provisions derogating from the principle of exhaustion of rights were introduced for a certain period.[18]

Most tellingly, the decision to discriminate between internal and external market was not broadly welcomed even inside the EU. Indeed the contention was between

[16] In the words of Advocate General Jacobs, "Article 7(1) of the Directive precludes Member States from adopting the principle of international exhaustion" (Opinion of Advocate General Jacobs, 29/01/98, Case C-355/96, paragraph 62). The ECJ says in the Silhouette case: "national rules providing for exhaustion of trade-mark rights in respect of products put on the market outside the EEA under that mark by the proprietor or with its consent are contrary to Article 7(1) of the (Trade Mark Directive)."

[17] "The EU comprises the most significant block of countries in the world where an established system of regional exhaustion applies. Because a number of its 27 member states are also among the wealthiest in the world, and have relatively high price structures for consumer and healthcare goods, the EU is a particularly attractive target for parallel importers." (International Trademark Association 2007, p. 5).

"With unilateral exhaustion the main source of parallel imports would tend to be from the countries of South East Asia and from the USA,….the scope of parallel exports is generally likely to be small whatever regimes are in place in other countries; parallel exports to South East Asia or the US are unlikely since prices there tend to be lower; there is in principle potential of parallel exports to Japan, but other factors are likely to mitigate against this…international exhaustion would tend to approximate to Scenario 1-unilateral exhaustion-in its broad economic impact," (NERA, S.J. Berwin and Co and IFF Research 1999, p. 123).

[18] For more details, see Stoate (2003); Uexküll (2004).

two blocks: Northern countries, supporting a policy of international exhaustion and so the imports of lower-priced goods from grey markets and Southern countries – in particular Italy and France with their large luxury-good industries – supporting a regional exhaustion policy and so trademark holders.

A Strategic Interaction Model

To highlight the incoherence of the ECJ's awkward concept of competition, we have developed a simple theoretical model of strategic interactions among different players. Consider a world of three countries where A and B enjoy a regional trade agreement and C is an outside country, and an ECJ having the power to regulate and decide over parallel imports. Let us assume that a semihomogeneous good is then sold with a discrimination of price in the three countries. The decision of whether to allow or not to allow parallel imports can be expressed as the following optimization problem:

$$W = a\left(\sum_{i}^{n_C^A} S_A + \sum_{i}^{n_C^B} S_B\right) + b\left(\sum_{i}^{n_P^A} \pi_A + \sum_{i}^{n_P^B} \pi_B\right) + c\left(G_A + G_B\right), \tag{9.1}$$

where W denotes EU's utility, as perceived by the ECJ, s_j is the consumers' surplus, π_j is the authorized distributors' profit and G_j represents governments' revenues, a, b and c are the weights assigned by the ECJ to the actors' payoffs and j = A or B.

Let us then imagine two scenarios helping us understand the role played by the origin of parallel imports: Parallel imports come from a country of the EU; Parallel imports come from a country outside the EU.

Let us start by focusing now on the first scenario where parallel imports come from lower-priced country A. In this case, parallel imports are apt to increase the consumer's surplus, while the overall effect on authorized distributors and governments' payoffs is uncertain: positive for firms and government of country A and negative for those of country B.

$$W = a\left(\sum_{i}^{\overset{+}{n_C^A}} s_A + \sum_{i}^{\overset{+}{n_C^B}} s_B\right) + b\left(\sum_{i}^{\overset{+}{n_P^A}} \pi_A + \sum_{i}^{\overset{-}{n_P^B}} \pi_B\right) + c\left(\overset{+}{G_A} + \overset{-}{G_B}\right).$$

The condition $a\sum_{i}^{n_C^B} s_B + b\sum_{i}^{n_P^A} \pi_A + cG_A > b\sum_{i}^{n_P^B} \pi_B + c\,G_B$ implies an increase of the total EU's utility and so consequently the ECJ will opt for parallel imports. Should the opposite condition hold $a\sum_{i}^{n_C^B} s_B + b\sum_{i}^{n_P^A} \pi_A + c\,G_A < b\sum_{i}^{n_P^B} \pi_B + cG_B$, the ECJ will be likely to postpone the liberalization of domestic parallel imports.

When moving to the second scenario, we observe that only consumers will be better off:

$$W = a\left(\sum_{i}^{\overset{+}{n_C^A}} s_A + \sum_{i}^{\overset{+}{n_C^B}} s_B\right) + b\left(\sum_{i}^{\overline{n_P^A}} \pi_A + \sum_{i}^{\overline{n_P^B}} \pi_B\right) + c\left(\overline{G}_A + \overline{G}_B\right).$$

So the overall effect on the EU's utility will depend on the weights assigned by the ECJ to the actors' payoffs. If $a=b=c$, the result will depend on two factors: numerosity of the two groups (consumers and producers) and magnitude of losses and rewards. If, instead, $a \neq b \neq c$, the result will reflect the relative powers of the three different groups as a result of the ECJ's lobbying actions. It is quite likely that producers and governments will be in a better position so as to affect the outcome of the game: the prohibition of parallel imports.

The model suggests that the ECJ is willing to promote competition as long as liberalization does not harm producers in the member countries. If, instead, the ECJ promoted consumers' welfare, parallel imports would be allowed no matter the country of origin. Therefore, our attention is not focused on the desirability of competition per se but rather on the ultimate positive effects of it such as success of the best producers, free access of new competitors and consumers' welfare, who satisfy all their needs at the minimum price, in a global allocative efficiency. It does need to be emphasized that once market solutions are allowed all effects brought about by competition have to be accepted too, so any discrimination between single market and global market is illegitimate.

More specifically, two points have to be noted: (1) promoting parallel imports would enhance competition among firms producing the same good because the lower-price producer is apt to win; (2) liberalization of parallel imports would involve competition on a distributional level. Thus, any ban of parallel imports cannot but generate a monopoly position of the authorized distributor.

In a nutshell, banning parallel imports means impeding competition at a postproductive stage. The aim of this kind of competition is efficiency in distribution and not in production since several brand owners have already delocalized their productions in low-cost countries.

What is not clear is why the ECJ has crafted rules that favor productive competition and prohibit distributive competition. This discrimination against distributive competition is in reality a brand protection. The ban does not, alas, consider the spreading of global competition in the electronic market where, due to lower prices, single parallel imports are realized for all the products sold in worldwide markets. Considering the evolution of this kind of market, where the location of firms is increasingly unimportant, discussions over the type of regime to be applied are merely speculative. What matters is that the ban on imports is a distortion of competition, and not simply a tariff barrier.

Conclusions

This paper sought to show that the ECJ is in the awkward position of operating in a context of institutional uncertainty, one that produces a sort of ambiguity in the decision-making process. Our challenge was to uncover these ambiguities by exploring the four fields where these ambiguities seem to us more evident. We fixated particularly on the ECJ's binary view of competition to illustrate the point. The ECJ's key distinction is between internal and external competition. In the first case, competition is allowed on condition that it is limited to the domestic market. Global competition, by contrast, is inflexibly opposed. The ECJ's strategy based on "closeness" is yet more evident when competition concerns the relationships among member countries.

In so far as the important cases here examined – allocation of competences, internal competition, and external competition – the ECJ has created ample room for behaving in support, and often on behalf of centralized political institutions. On this front, the paper has shown how the ECJ, under the blanket of law interpretation, has been able to override the legislative power. We have tried to elucidate how this peculiar state of affairs came about and how the ECJ's discretionality is at odds with the mission usually associated with its role of guarantor.

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Chapter 10
The Dual Rationale of Judicial Independence*

Fabien Gélinas

Introduction

The idea that democracy and human rights are best safeguarded by judicial review of legislation under Constitutional instruments has now become dominant in Constitutional discourse.[1] The number of countries in which the Constitution provides for judicial review of legislation went from a mere handful in the 1930s[2] to roughly half of the countries in existence today.[3] More recently, there has been a distinct growth in the number and importance of international courts and tribunals,[4] whose role and normative output is now often viewed through the lens of Constitutionalization.[5]

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[1] For a description and criticism of this idea, see Richard Bellamy, *Political Constitutionalism: A Defence of the Constitutionality of Democracy* (Cambridge, CUP, 2007).

[2] Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judge: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), p. 135.

[3] Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), at p. 1. In this comparison, one should bear in mind that the numbers are affected by the post-war de-colonization movement and concentrate on the formal powers of courts.

[4] On the proliferation of international tribunals, see Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," (1999) 31 N.Y.U. J. Int'l L. & Pol. 709, 710, 711–23.

[5] See, for example, Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: OUP, 2009).

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While the importance of courts and tribunals in the governance of human affairs seems unprecedented, judicial independence remains surprisingly under-theorized. Judicial independence scholarship has been mostly local in scope and outlook; comparative and transnational approaches are relatively recent. This state of affairs has created much confusion in the way we understand and invoke the reasons why judicial independence should be fostered as a matter of political and legal principle.

This paper briefly considers the rationales of judicial independence as they appear in legal and Constitutional discourse and sheds light on the distinction between, on one side, the requirement conveyed by the maxim that one ought not to be a judge in one's own cause, which enjoys near-universal recognition as an essential pre-requisite of adjudication, and, on the other side, the separation of powers requirement of a judiciary with "a will of its own," which is widely viewed as an effective check on the abuse of power by the political branches. Recognizing this distinction has become pressing in the current context where adjudication is often entrusted to tribunals, often arbitral tribunals, whose members are not part of an institutionalized judiciary[6] and where, more generally, the role of the state in the governance of human affairs may be decreasing.

A Global Perspective on Judicial Independence

Both the Universal Declaration of Human Rights[7] and the International Covenant on Civil and Political Rights[8] guarantee the right to an "independent and impartial tribunal." These documents represent a general international consensus on a principle that is expected to be recognized and implemented in all domestic legal systems. Before I turn to the possible content of a guarantee of judicial independence, a few remarks on sources and terminology are in order.

Sources and Terminology

There are obviously many ways of approaching the subject of judicial independence. It would be well beyond the modest scope of this paper to offer even a superficial account of judicial independence from the perspective of any particular legal

[6] On the relative dearth of scholarly attention dedicated to the independence and impartiality of international tribunals, see Ruth Mackenzie and Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge," (2003) 44 Harvard International Law Journal 271.

[7] *Universal Declaration of Human Rights* (Paris: 1948). See article 10. [hereinafter Universal Declaration]

[8] *International Covenant on Civil and Political Rights* (New York: Adopted: 1966 – Effective: 1976) See article 14. [hereinafter International Convenant]

or political system. At the same time, it is not my intention entirely to detach my analysis from the decisions human societies have reflectively made and continue to make in respect of independence. In other words, this paper is the result of an exercise in the kind of analysis which builds on past and existing normative practices. The paper adopts a high-level global perspective that relies partly on secondary scholarly sources within the disciplines of comparative law and comparative politics. Much of the scholarship is relatively recent, but it does offer a satisfactory starting point.[9]

This scholarship can be said to have tracked a parallel and sometimes overlapping international movement which, beginning in the early 1980s, produced an impressive series of international soft-law instruments on judicial independence. These instruments represent useful resources for analysis as they may be said to reflect the accumulated wisdom of domestic laws developed over the years and across borders in a reflective, normative mode that takes into account both aspirations and realities. Among the organizations involved in the preparation of these instruments were the International Association of Penal Law, the International Commission of Jurists, the LAWASIA Human Rights Standing Committee, the International Bar Association, the Conference of Chief Justices of Asia and the Pacific Region, the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Council of Europe, the Arab Center for the Independence of the Judiciary and the Legal Profession, the Center for the Independence of Judges and Lawyers, the United Nations High Commissioner for Human Rights, the United Nations Development Program and the United Nations General Assembly.[10]

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[9] The most comprehensive survey of judicial independence remains, Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Dodrecht/Boston/ Lancaster: Martinus Nijhoff Publishers, 1985). See also András Sajó (ed.), *Judicial Integrity* (The Hague, Martinus Nijhoff Publishers, 2004). A number of national reports on judicial independence were presented at the congress of the International Academy of Comparative Law in July 2006 but these have not been the object of systematic publication. For a recent collection of essays focusing on accountability *vis-à-vis* independence, see Guy Canivet, Mads Andenas & Duncan Fairgrieve (eds), *Independence, Accountability, and the Judiciary* (London: British Institute of International and Comparative Law, 2006). For an interdisciplinary collection of essays from a US American perspective, see Stephen B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, CA: Sage Publications, 2002). A survey of judicial independence was recently conducted under the aegis of the Organization for Security and Cooperation in Europe and will be published in 2011: Anja Seibert-Fohr, ed., *Judicial Independence in Transition* (New York: Springer, 2010).

[10] The following is a list of instruments that were considered in the preparation of this paper: the *Syracuse Draft Principles on the Independence of the Judiciary, 1981* (International Association of Penal Law and International Commission of Jurists); the *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region, 1982* (LAWASIA Human Rights Standing Committee); the *International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982* (International Bar Association) [*IBA Code*]; the *Montreal Universal Declaration on the Independence of Justice, 1983* (World Conference on the Independence of Justice); the *UN Basic*

As concerns terminology, beyond the right to an "independent and impartial tribunal" mentioned in the United Nations human rights instruments, there is no uniform terminological framework for independence and impartiality recognized on a global plane. Two of the most common difficulties in this respect are briefly addressed here.

The first difficulty relates to the distinction between independence and impartiality. Independence is often taken to refer to the external or ascertainable characteristics of an adjudicator or tribunal while impartiality is understood as referring to a state of mind or disposition. This distinction is not universally shared.[11] The European Court of Human Rights, for example, has tended to treat both notions together, finding it difficult to dissociate them and wishing to avoid complications viewed as unnecessary.[12] The Court, however, makes use of the distinction between "subjective" and "objective" impartiality.[13] Similarly, the comment under Principle 1 of the ALI/Unidroit Principles of Transnational Civil Procedure links the two notions as follows: "Independence can be considered a more objective characteristic and impartiality a more subjective one, but these attributes are closely connected."[14] Even though, in specific adjudicative contexts, independence essentially works to ensure impartiality, it is important to bear in mind that it is possible for an adjudicator to be impartial without being independent, and vice versa. Indeed, this is an important issue for international tribunals because the question of the extent to which independence may be waived or overlooked where impartiality is affirmed will often arise in practice. The distinction was discussed in 1945 at the San Francisco Conference with respect to the International Court of Justice, where the following conclusion carried the day: "it is important that the judges of the court should be not only impartial but also independent of control by their own countries

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Principles on the Independence of the Judiciary, 1985 (General Assembly endorsement) [*UN Basic Principles*], the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995* (Conference of Chief Justices of Asia and the Pacific Region) [*Beijing Statement*], the *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, 1998* (Commonwealth Parliamentary Association, Commonwealth Magistrates' and Judges' Association, Commonwealth Lawyers' Association and Commonwealth Legal Education Association) [*Latimer House Guidelines*]; the *European Charter on the statute for judges, 1998* (Council of Europe) [*European Charter*]; the *Beirut Declaration 1999* (First Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the Center for the Independence of Judges and Lawyers) [*Beirut Declaration*]; and the *Cairo Declaration on Judicial Independence 2003* (Second Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the United Nations High Commissioner for Human Rights and the United Nations Development Program).

[11] See, generally, Leon Trakman, "The Impartiality and Independence of Arbitrators Reconsidered" (2007) 10 International Arbitration Law Review 999.

[12] See, for example, *Langborger v. Sweden,* 22 June 1989, § 32, Series A no. 155.

[13] See, for example, Morel v. France, 6 June 2000, no. 34130/96, ECHR 2000-VI. Objective impartiality overlaps with the concept of institutional independence introduced below.

[14] American Law Institute/Unidroit Principles of Transnational Civil Procedure, P-1A.

or the United Nations Organization."[15] Unless otherwise indicated, I shall use the term independence to cover requirements of both impartiality and independence.

The second difficulty refers to the distinction between "personal," or "individual," independence and "institutional" independence. This distinction is useful in understanding the appropriate target of the legal requirements associated with the principle of judicial independence. These requirements are generally applied to adjudicators serving in a public capacity, taken individually. This is the personal, or individual, dimension of independence. There is also, in many settings, an "institutional" dimension to these requirements. To give an example, a legal guarantee of administrative autonomy may refer not only to the power of judges to control the proceedings before them and to impose the necessary decorum in the courtroom, but also to the power of courts or tribunals to manage caseloads and control their staff.

It may well be that the idea of institutional independence is modeled after that of personal independence. However, widespread reliance upon a criterion of appearance has made the two ideas difficult to disentangle: the lack of independence of a court will automatically affect the appearance of every one of its judges' impartiality.

Requirements of Judicial Independence

A careful review of the existing literature and normative materials that examine independence and impartiality from a comparative or global perspective enables one to sketch, in broad strokes, an outline of the substantive requirements of independence for domestic courts.

When formulated at a sufficiently high level of abstraction, the following requirements can be said to capture the principle of judicial independence as we know it in the domestic context: neutral appointment, security of tenure, financial independence and administrative autonomy.[16] These requirements have both a personal and an institutional mode or dimension. They are not universally imposed by domestic legal systems, let alone guaranteed by written or unwritten Constitutional norms, and they are probably not fully met in any legal system. Indeed, "[t]here are remarkable differences in the components or elements of judicial independence that liberal

[15] Summary Report of the 7th meeting of Committee IV/1, UNCIO XIII, p. 174. A more recent internationally influential statement of the distinction can be found in United Nations Sub-Commission of the Human Rights Commission focusing on judicial administrations, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, U.N. ESCOR, 38th Sess., Agenda Item 9(c), U.N. Doc. E/CN.4/Sub.2/1985/18 & Add.1-6 (1985), §§ 76–79.

[16] See, for example, Andrew T. Guzman, "International Tribunals: A Rational Choice Analysis," *U. Penn. L. R.*, (forthcoming), available on SSRN, abstract 1117613, text accompanying notes 100–02 ("All commentators agree that rules governing selection and tenure, financial and human resources, and perhaps even the trappings of the institution and the judicial role are relevant").

democracies find most important and in the arrangements they put in place for securing its various components."[17] Nevertheless, each of the requirements I outline here is instantiated in many legal systems and each is recognized to some degree in the international soft law instruments on judicial independence. Taking account of the two dimensions of independence, the requirements are as follows:

- *Neutral appointment* in its personal dimension calls for a nomination and appointment process focused on competence and integrity that is detached from expectations as to adjudicative outcomes.[18] The institutional dimension of the requirement calls for participation, or at least consultation, of judges in the nomination or the appointment process.[19]
- *Security of tenure* in its personal dimension demands a sufficiently lengthy term of appointment,[20] as well as safeguards against the consideration of past adjudicative outcomes or adjudicative orientation in any renewal process. The institutional dimension of this requirement refers to the institutional protection of established tribunals.[21] It calls for safeguards against inappropriate institutional tampering by the political branches.[22]
- *Financial security* means the assurance of a minimum salary for judges fixed at a level that is compatible with the dignity of their function and safeguards against salary determination exercises that take adjudicative orientation into account.[23] The requirement of financial security sometimes includes the institutional assurance of a depoliticized salary and benefits determination process with input from the judiciary.[24]

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[17] See Peter H. Russell, "Toward a General Theory of Judicial Independence" in Russell & David M. O'Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville/London: University Press of Georgia, 2001) 1, 2–3.

[18] See *UN Basic Principles*, art. 10; *Beijing Statement*, art. 12; *Beirut Declaration*, art. 11; *European Charter*, art. 2.1; *Latimer House Guidelines*, art. II.1.

[19] See *Beijing Statement*, art. 15; *European Charter*, art. 1.3; *IBA Code*, art. 3(a). Note that this requirement is particularly recent, if at all recognized in systems which share British heritage.

[20] See *UN Basic Principles*, arts 12 and 18; *Beijing Statement*, arts 18, 21, and 22; IBA Code, art. 22.

[21] See *UN Basic Principles*, art. 5 (providing that "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals"); *Beijing Statement*, art. 29; *IBA Code*, arts 18(b), 21.

[22] Roosevelt's well-known court-packing plan of 1937, whereby he threatened to increase the number of Supreme Court judges to secure the majority he thought was needed to get his reform plan through Constitutional review, is probably the best example of the kind of vulnerability that this addresses. The story and its consequences are related in Henry J. Abraham, "The Pillars and Politics of Judicial Independence in the United States" in Peter H. Russell & David M. O'Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville/London: University Press of Georgia, 2001) 25, 32–33; see also *Beijing Statement*, arts 38–40; *Beirut Declaration*, art. 3; *IBA Code*, arts 2, 16, and 24 (providing that "The number of the members of the highest court should be rigid and should not be subject to change except by legislation").

[23] See *UN Basic Principles*, art. 11; *European Charter*, art. 6.1; *IBA Code*, art. 15; *Latimer House Guidelines*, art. II.2.

[24] See *Beijing Statement*, art. 31; *Beirut Declaration*, art. 2; *IBA Code*, art. 14; *Latimer House Guidelines*, art. II.2.

- *Administrative autonomy* refers to control of the proceedings by the judge, including matters of access and decorum. At the institutional level,[25] it often calls for consultation or participation of the judiciary in the relevant processes of envelope and budget determination[26] and requires that the main responsibility for court administration, including the management of caseloads, communications, outreach, and human resources, rest with judges.[27]

As will become clear, these requirements are understood differently depending on the extent to which independence focuses on the litigants in a particular setting or depends upon broader considerations.

Rationales for Judicial Independence

Judicial independence has been associated with a surprising variety of normative purposes in the many contexts in which it has been invoked. To name but a few, judicial independence has been described as a means to "fairness embedded in due process";[28] it has been listed as a requirement of the rule of law by the World Bank[29] as well as by legal theorists;[30] it has been described as an essential ingredient of adjudication in dispute resolution theory;[31] it has often been conflated with the separation of powers;[32] it has even been described as a means to "a just and prosperous

[25] The institutional dimension of administrative autonomy writ large is an evolving concept. A recent report commissioned by the Canadian Judicial Council defines administrative autonomy, after a review of case law, as a Constitutional requirement: Carl Baar, Karim Benyekhlef, Fabien Gélinas, Robert Hann & Lorne Sossin, *Alternative Models of Court Administration*, Ottawa: Canadian Judicial Council, 2006, available at: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Alternative_en.pdf>. One of the oldest cases dealing with administrative autonomy is *Bridgman v. Holt* (1693), Shower P.C. 111, where the question at issue was whether the right to appoint to the office of chief clerk belonged to the Crown or to the Chief Justice. Chief Justice Holt is said to have sat as one of the litigants in his own court and to have refused to participate in the decision. See Paul Jackson, *Natural Justice* (London: Sweet & Maxwell, 1979), at p. 27–28.

[26] See *Beijing Statement*, art. 37.

[27] See also *UN Basic* Principles, art. 14; *Beijing Statement*, arts. 35 and 36; *Beirut Declaration*, art. 9; *IBA Code*, arts. 9, 11.

[28] Edward L. Rubin, "Independence as a governance machine" *in* Stephen B. Burbank; Barry Friedman (eds.), *Judicial Independence at the Crossroads: an Interdisciplinary Approach* (Thousand Oaks, CA: Sage Productions, 2002) 69, at p. 77.

[29] Matthew Stephenson, Brief: "Judicial Independence: What It is, How It Can Be Measured, Why It Occurs", online: World Bank <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf>.

[30] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), at p. 217.

[31] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353, at p. 365. [hereinafter Fuller, Forms and Limits]

[32] Eli M. Salzberger, "A Positive Analysis of the Doctrine of the Separation of Powers, or: Why Do We Have an Independent Judiciary?" (1993) 13 International Review of Law and Economics 349, at p. 349.

society."[33] Having taken the measure of this extraordinary confusion, we may well be tempted to discard the concept as, at best, useless. However, looking back on the evolution of the notion through time should help eliminate some of that confusion.

Iudex in Propria Causa: Adjudication Takes Three

The concept of independence in adjudication has ancient roots and can be traced back to documents in the earliest writing systems. One of the first documented expressions of the concept, which goes back to Egypt's First Intermediate Period, can be found in a king's instructions to his son.[34] A later inscription reproduces Pharaoh Thutmosis III's instructions to his vizier, who acted as chief magistrate:

> It is an abomination of the god to show partiality. This is the teaching: thou shalt do the like, shalt regard him who is known to thee like him who is unknown to thee, and him who is near… like him who is far… an official who does like this, then shall he flourish greatly in the place. Do not avoid a petitioner, nor nod thy head when he speaks.[35]

This tradition is also documented in Babylonian inscriptions,[36] and may well have influenced, directly or otherwise, the development of Roman legal conceptions.[37]

The classical statement of impartiality and independence in the Justinian *Codex* focuses on the notion that one cannot be one's own judge: *neminem sibi esse iudicem vel ius sibi dicere debere* (no one shall be his own judge or decide his own case).[38]

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[33] *Monitoring the EU Accession Process: Judicial Independence* (Budapest, Hungary; New York: Central European University Press, 2001), at p. 18.

[34] "Instructions addressed to Merikere" *in* James Henry Breasted, *The Dawn of Conscience* (New York; London: Charles Scribner's Sons, 1934), at p. 155.

[35] James Henry Breasted, *Ancient Records of Egypt*, vol. 2 (London: Histories & Mysteries of Man Ltd., 1988 (Reprinted – 1907)), at p. 269, section 668.

[36] Wilfred G. Lambert, *Babylonian Wisdom Literature* (Oxford: Clarendon Press, 1960). pp. 130–133, verses 92–99.

[37] On the circulation of legal information from Egypt to Europe, see generally Pier Giuseppe Monateri, "Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition" (2000) 51 Hastings L. J. 479.

[38] Justinian *Codex* 3.5,1 imperial decree of year 376. English translation of the Justinian Codex from Fred H. Blume, "Annotated Justinian Code", edited by Timothy Kearley, 2nd edition, online: University of Wyoming <https://uwacadweb.uwyo.edu/blume%26justinian/> [hereinafter Blume]. The title is *ne quis in sua causa judicet vel jus sibi dicat* (no one shall be judge in his own cause). Note that the older *Codex Theodosianus* appears to derive this principle from the rule that no one should be allowed to testify for oneself (II.2.1): *Promiscua generalitate decernimus neminem sibi esse iudicem debere. Cum enim omnibus in re propria dicendi testimonii facultatem iura submoverint, iniquum ammodum est licentiam tribuere sententiae* (We decree as a general law that no one ought to be his own judge. As the law denies everyone the right to testify for oneself, it is very unjust to give one the liberty to give judgment [for oneself]).

The Digest, likewise, states that *iniquum est aliquem suae rei iudicem fieri* (it is unfair to make someone judge in his own affairs).[39] In such cases *recusatio* (recusation) was available, at least in respect of one class of judges[40] but the law otherwise had no term for impartiality.[41] It proceeded, rather, by association from the idea of judging one's own cause to that of *making* the cause one's own: *iudex qui litem suam fecerit*, which was a quasi-delict.[42] Making the cause one's own meant "acting with partiality, deliberately favoring one side."[43] The notion was otherwise rendered by the term *suspicio*: *tamen sine suspicione omnes lites procedere nobis cordi est* (we are anxious that all lawsuits shall be conducted without any suspicion).[44]

This notion of independence made its way into European legal conceptions through the Digest and the developments of canon law, though it also likely took other routes, literary and philosophical, as an independent moral imperative.[45] In France, since medieval times, adjudicative independence has been observed through the lens of recusation, a procedural practice which canon law had embraced,[46] and which can be traced, in France, to jurisdictional decisions of parliaments as far back as 1259.[47] At about the same time in England, Bracton mentions the causes of recusation in his *De Legibus*, apparently relying in so doing on canon law sources, which also

[39] Digest 5.1.17. Unless otherwise indicated, Digest references are from: *The Digest of Justinian,* Latin text edited by Theodor Mommsen with the aid of Paul Krueger; English translation edited by Alan Watson, V.I (Philadelphia, Penn.: University of Pennsylvania Press, 1985), at pp. 166–167. [hereinafter Digest]

[40] In is unclear whether recusation was available in respect of ordinary judges, as opposed to delegated judges. On the controversy opposing Bulgarus and Martinus at the University of Bologna, see Boris Bernabé, *La récusation des juges: étude médiévale, moderne et contemporaine* (Paris: LGDJ – Montchrestien, 2009), at p. 39. [hereinafter Bernabé]

[41] Ibid at p. 14.

[42] Justinian's Institutes, 4.3.

[43] Olivia Robinson, "The '*iudex qui litem suam fecerit*' explained" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (rom. Abt.)*, vol. 116, 195, 197. For a comprehensive analysis of the scope of this quasi-delict, see Eric Descheemaeker, "Obligations *quasi ex delicto* and Strict Liability in Roman Law" (2010) 31 Journal of Legal History 1.

[44] See Justinian *Codex,* 3.1.16. English translation from Blume, *supra* note 138.

[45] The imperative may be said to have formed part of public consciousness before forming part of juridical science: Georges Del Vecchio, *La Justice – La Vérité* (Paris: Dalloz, 1955), at p. 129. For biblical references, see Exodus 23, 3–8; Levit 19, 15; Deuteronomy 16, 19.

[46] The relevant canons in the 1917 codification were 1613 and 1614: *Codex Iuris Canonici*. For the relevant canons in the codification of 1983, see: *Codex Iuris Canonici* (Auctoritatae Ioannis Pauli PP. II Promulgatus Datum Romae: 1983). Book VII – Processes; Part 1 – Trials in general; Title III – The discipline to be observed in tribunals; Chapter 1 – The duty of judges and ministers of the tribunal. Can. 1448–1451.

[47] Bernabé, *supra* note 40, at p. 164. Note that it took another two centuries before royal judges could be challenged. Id., pp. 139–148.

developed the treatment of adjudicative independence around the procedural vehicle of recusation.[48]

Later on in France, the practice of recusation was clarified by edict in 1493, and in 1667, under Louis XIV, came to be incorporated in a broad-ranging edict on procedure known as *Code Louis*.[49] Throughout these and subsequent codifications, the focus was kept on the legal grounds of recusation. In English Law, "at least as early as the fourteenth century, common law judges were held to be incompetent to hear cases in which they were themselves party."[50] However, the common law showed a marked reluctance to recognizing the challenge of judges and with it the canon law sources that Bracton had attempted to import.[51]

This reluctance took attention away from the detailed conditions of recusation present in canon law and facilitated a return to principle. The law turned its attention back to the Digest and developed directly from general principle, independently from canon law. That a judge at common law could not sit in a matter in which, though not formally a party, he had a direct financial interest, was recognized as early as 1563. However, it took a long time before this could be said to rest on firm ground.[52] Edward Coke played a crucial role in establishing the idea that one ought not to be a judge in one's own cause as a fundamental principle. In *Dr Bonham's Case*, considering the power of the College of Physicians to prosecute, to judge and to fine its members, he wrote that the censors of the College could not be ministers, judges, and parties, "*quia aliquis non debet esse judex in propria causa, imo iniquum est aliquem sui rei esse judicem*" (because no one ought to be a judge in his own cause, it is wrong for anyone to be the judge of his own property).[53]

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[48] On Bracton's reproduction of canon law sources, see D. E. C. Yale, "Iudex in propria causa: an historical excursus" (1974) 33 Cambridge Law Journal 80, at p. 81, note 6. [hereinafter Yale]. See also S.A. de Smith, *Judicial Review of Administrative Action*, 3d ed. (London: Stevens & Sons Ltd, 1973) p. 216 [hereinafter de Smith]. For an English translation of Bracton's *De Legibus Et Consuetudinibus Angliae* (written between 1250 and 1258), refer to Henry de Bracton (1210–1268), *Bracton on the laws and costums of England.*, vol. 4 (Cambridge, Mass.: Belknap, in association with the Selden Society, 1968–1977) at p. 281. Also, note that the grounds of recusation in canon law today are the same as in Bracton's days: "Can.1448 §1. A judge is not to undertake the adjudication of a case in which the judge is involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line or by reason of trusteeship, guardianship, close acquaintance, great animosity, the making of a profit, or the avoidance of a loss."

[49] Ordonnance de Louis XIV du mois d'avril 1667, Titre XXIV, *in* Marc-Antoine Rodier, *Questions sur l'Ordonnance de Louis XIV, du mois d'avril 1667, relatives aux usages des cours de Parlement, et principalement de celui de Toulouse* (Paris: Birosse, 1761), p. 475ff.

[50] de Smith, *supra* note 48, at p. 216.

[51] Id., at p. 217. The reluctance may be attributed in part to the medieval system of grants of jurisdictional franchise, wherein the grantee often found himself judge and party. See Yale, *supra* note 48, at p. 84.

[52] *Sir Nicholas Bacon's Case* (1563) 2 Dyer 220b. See also *Earl of Derby's Case* (1613) 12 Co. Rep. 114 and *Day v. Savadge* (1614) Hob. 85.

[53] (1610) 8 Co Rep. 113b, 118.

The charter of the College having been granted under an Act of Parliament, Coke went on famously to write that when such an Act "is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void." Whether Coke had in mind a notion we might now call "reading down," a form of interpretation, or, rather, "striking down,"[54] the conclusion may well have been the same: "if any Act of Parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his mannor … yet he shall have no plea, to which he himself is party; for has hath been said, *iniquum est aliquem suae rei esse judicem*" (it is wrong to be a judge of one's own property).

The second Latin phrase and the second part of the first Latin phrase quoted above from Coke's report can be found, almost word for word, in the Digest.[55] However, it is the first part of the first phrase, *non debet esse judex in propria causa*, that caught on. It was either coined by Coke[56] or, perhaps, borrowed from a medieval gloss on the Digest. In his *Institutes of the Laws of England*, published in 1627 (after *Dr Bonham's Case*), he calls the phrase a "maxim in law."[57] This "maxim" is the form in which the principle of adjudicative independence was eventually taken up by international law.[58]

The ancient roots and widespread recognition of the principle quickly led to its endorsement as a general principle of law by international law tribunals.[59] In 1907, the Second International Peace Conference seemed sure of its bearing when it stated that "It is familiar doctrine that a man should not be judge and advocate in his own cause, and this provision obtains in all systems of national jurisprudence."[60] From there it was natural for the principle eventually to find its way into international legal instruments such as the Universal Declaration of Human Rights[61] and the International Covenant on Civil and Political Rights.[62] The Universal Declaration,

[54] On this issue, see Theodore F. T. Plucknett, "Bonham's Case and Judicial Review" (1926–1927) 40 Harvard Law Review 30.

[55] Digest, *supra* note 39, Digest 5.1.17., at pp. 166–167.

[56] The formulation is attributed to Coke by Yale, *supra* note 48, at p. 80.

[57] Sir Edward Coke, *The First part of the Institutes of the Laws of England: or, A Commentary upon Littleton* (Philadelphia: R.H. Small, 1853 (First published 1628–1644)), 141a [hereinafter Coke's Institutes]

[58] See Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Grotius, 1987), relating the cases in a chapter entitled "*Nemo debet judex in propria sua causa*", pp. 279–289.

[59] Id. See also Bardo Fassbinder, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Martinus Nijhoff Publishers, 1998), at p. 329 (tracing the sources of the principle for the purpose of international law).

[60] Report on the Project concerning the establishment of an international Court of Arbitral Justice, *in* James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Buffalo, New York: William S. Hein & Co., Inc., 2000). Originally published by Oxford University Press, 1899–1907. See Volume I (Plenary Conference), at p. 362.

[61] Universal Declaration, *supra* note 7. See Article 10.

[62] International Covenant, *supra* note 8. See Article 14.

in turn, was the main influence for Article 6.1 of the European Convention of Human Rights,[63] which gave the impetus for a return to general principle in the apprehension of judicial independence in much of Europe.[64]

What does it mean to say that one cannot be a judge in one's own cause? The most obvious common denominator in the adoption of the principle through time was most likely an understanding that adjudication requires a "third" party. It was thus understood as far back as the thirteenth century[65] and is clearly set out by Hobbes among the "laws of nature" in his Leviathan:

> *The seventeenth, no man is his own judge.* And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause; and if he were never so fit; yet equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also; and so the controversy, and the condition of war, remains, against the law of nature.[66]

This may be referred to as an "adjudication theory" understanding of impartiality and independence: adjudication requires a claim, a claimant, a person against whom the claim is made, and a third party who decides. Lon Fuller would have endorsed this and added a rational basis for the decision as a fifth requirement.[67] This fifth requirement characterizes the kind of adjudication upon which this paper focuses.

Refinements about the meaning of "third party" in this context pertain to the same logic: one may be a third party in the formal sense but nevertheless be assimilated to one of the first two parties because of one's interest in the outcome. The Digest had thus extended the basic principle that one cannot be a judge in one's own cause to cover the cause of others who are related to or associated with the judge: *qui iurisdictioni praeest, neque sibi ius dicere debet neque uxori uel liberis suis neque libertis uel ceteris, quos secum habet* (one who administers justice should not

[63] *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No.14* (Rome: 1950). See generally: Zaim M. Nedjati, *Human Rights under the European Convention* (Amsterdam – New York – Oxford: North-Holland Publishing Company, 1978); Council of Europe, *Collected Edition of the "Travaux Préparatoires"*, vol. I (The Hague: Martinus Nijhoff, 1975).

[64] A startling example of this is the decision of the *Première chambre civile* of the *Cour de cassation* of 28 April 1998 (Civ. 1ère, 28 avril 1998, Rapport de la Cour de Cassation, Section Avril, N° 155), which allowed recusation on the sole basis of the Convention even in cases where the ground invoked lies outside the formally exhaustive grounds of recusation provided by the Code of civil procedure (art. 341).

[65] Henry Gerald Richardson and George Osbourne Sayles, *Fleta: Edited with a Translation by H.G. Richardson and G.O. Sayles* (London: Selden Society, 1953). Book I, c.17, at p. 35: "Moreover, a judgment is a threefold act of three persons at least, the plaintiff, the judge, and the defendant, without which it cannot in law exist." Fleta was originally published in London, in Latin, circa 1290.

[66] Thomas Hobbes, Leviathan (New York: Touchstone, 2008 (first published in 1651)), at p. 117. [hereinafter Leviathan]

[67] Fuller, Forms and Limits, pp. 365–66.

do so in cases involving himself or his wife or his children or his freedmen or others whom he has with him).[68] Hobbes phrased it as follows:

> *The eighteenth, no man to be judge, that has in him a natural cause of partiality.* For the same reason no man in any cause ought to be received for arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other; for he hath taken, though an unavoidable bribe; and no man can be obliged to trust him.[69]

This conception of adjudicative impartiality and independence focuses on adjudication as an institution isolated from its broader political and institutional context. It is driven by an understanding of justice that is primarily focused on the litigants. It says little about considerations of justice that go beyond the interests of those litigants.

At the most basic level, therefore, the principle that one cannot be judge in one's own cause reflects a conception of justice in which adjudication is abstracted from its political and institutional context and geared toward the protection of the interests of particular litigants. Thus viewed, adjudicative independence is universally accepted and should be the starting point of any analysis of independence. But the development of state institutions has caused greater emphasis to be laid upon public interest in the administration of justice.

Iudex in Propria Causa: Separating and Strengthening Judicial Power

The notion of a distinct judicial office with responsibility for rendering justice logically predates any notion of the separation of powers considered in respect of three branches. The sense of the dignity and honor of the judicial office has long been associated not only with the importance of its conflict resolution social function, which is timeless, but also with the temporal authority of the emperor, the monarch, and eventually of the state. It is this association which defines the role of public interest in the development of legal concepts such as adjudicative independence. Even though adjudicative independence, at the most basic level, focuses on litigants and their interests, public interest considerations have always played a role in its articulation and implementation.

For example, we may well accept the principle that one cannot be judge of one's own cause and yet defend a rule banning challenges to judges. This is, in fact, exactly what Coke did in his *Institutes*, where, in the same volume, he brings forth his "maxim" that no one ought to be a judge in his own cause, and also asserts that,

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[68] Digest, *supra* note 39, Digest 2.1.10., at p. 41–42.

[69] Leviathan, *supra* note 66, at p. 118. This aspect of Hobbes' treatment is reflected in the celebrated formula put forth by Alexandre Kojève: "C is impartial in respect of A and B if his interaction is not altered and cannot be altered solely by the interchange of A and B" (author's translation), in *Esquisse d'une phénoménologie du droit* (Paris: Éditions Gallimard, 1981), at p. 75.

unlike jurors, judges and justices cannot be challenged.[70] This assertion both reflected and encouraged the common law's reluctance to allow the challenge of judges, which found echo as late as 1765 when Blackstone began publishing his *Commentaries*, wherein Coke's blunt statement is reiterated and explained thus:

> For the law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[71]

The idea, here, is that the recusation of judges can bring the administration of justice as a whole into disrepute and that the value of safeguarding the authority of judges outweighs the interests of specific litigants. Some may well disagree with this, calling to mind the famous medieval dispute between the two great Bologna glossators Bulgarus and Martinus. Bulgarus thought that ordinary judges could not be challenged, and Martinus argued that they could.[72] To simplify greatly, much of the continent, tracking canon law, can be said to have broadly followed Martinus, while the common law sided with Bulgarus, if only for a time. When Blackstone was writing, the courts had, in fact, we may say in hindsight, finally overcome their reluctance towards recusation and were allowing challenges if there was a real likelihood of bias.[73] However, in so doing, they did not give up their concern for justice and its administration beyond the interests of specific litigants.

The common law's reluctance to allow recusation lay in the notion that something of value may be lost through the challenge of a public official, a consideration which may well outweigh the interests of specific litigants in an independent judge. Not surprisingly, when recusation was finally embraced, the common law continued to pay attention to the broader interests of justice. It did so through an increasing emphasis on the importance of "appearances," which eventually carried over to European human rights law[74]: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[75]

The broader interests of justice may well be what Hobbes actually had in mind when he spoke, in his 18th law, of greater profit, or honor, or pleasure *apparently*

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[70] Coke's Institutes, *supra* note 57, at 141a ("'It is against reason, that if wrong be done any man, that he thereof should be his own judge.' For it is a maxime in law, *aliquis non debet esse judex in propriâ causâ*."); 294a ("[…] that the foure knights electors of the grand assise are not to be challenged, for that in law they be judges to that purpose, and judges or justices cannot bee challenged."). See also de Smith at p. 217 ("The reluctance of the common lawyers to recognize the concept of disqualification of judges for interest or bias is illustrated by Coke's bald assertion that judges and justices, unlike jurors, could not be challenged […] And it was Coke himself who had elevated to a fundamental principle of the common law the proposition that no man should be a judge in his own cause").

[71] Sir William Blackstone, *Commentaries on the laws of England*, vol. 3 (Oxford: Clarendon Press, [1765]–1969) at p. 361.

[72] Bernabé, *supra* note 40, at p. 39.

[73] This is said to have been unequivocally established in *R. v. Rand* (1868) L.R. 1 Q.B. 230. See de Smith, *supra* note 48, at p. 216, n. 14.

[74] For example, *Delcourt v. Belgium*, 17 January 1970, §31, Series A no. 11; *Campbell & Fell v. United Kingdom*, 28 June 1984, Series A no. 80.

[75] Lord Hewart C.J. in *R. v. Sussex JJ., ex parte McCarthy* [1924] 1 K.B. 256, 259.

arising out of the victory of one party. However, there are two ways of looking at "appearances" depending on our conception of adjudication. If the emphasis in defining adjudication is put on discovering the "truth," appearances should not matter much to the litigants and can only further the broader interests of justice. If however, adjudication is defined with emphasis laid on the process rather than the outcome, then the appearance of impartiality may be even more important to the litigants than the fact of the matter. This may well explain the surprising enthusiasm at one point shown by common law judges vis-à-vis appearances in statements such as this: "it is as important (*if not more important*) that justice should seem to be done, as that it should be done."[76]

As it happened, the view that it was "more important that justice should appear to be done than that it should in fact be done" was rejected as "an erroneous impression."[77] Nevertheless, the common law's insistence upon the appearance of impartiality or independence did mark a slight shift in emphasis away from the litigants' interests, or "the simple precepts of the law of nature,"[78] to "the more subtle refinements of public policy."[79] The common law's reluctance toward recusation, and then its embrace thereof, may therefore be seen as two means to the very same end: the protection of public confidence in the administration of justice.[80] Considerations akin to this had been present all along in France, where repeated references to the "dignity" and "honor" of the judiciary had been a hallmark of most debates surrounding the successive reforms to the regime of recusation, both before and after the revolution.[81]

This murmur of public interest in the apprehension of adjudicative independence is but a faint echo when compared to the profound transformation that the principle was to undergo with the development of democratic state institutions. The Western struggle to wrestle power away from the monarchy was not easily won. In both the English and the American versions of that struggle, the principle of adjudicative independence was essentially conscripted and used to help build the democratic institutions we now know.

The use of the principle of adjudicative independence in the pursuit of these broader institutional objectives is nowhere more apparent than in Edward Coke's struggle with James I to ensure the independence of the common law courts from the crown's prerogatives and to establish that the king was under the law. In the case of *Prohibitions del Roy*, in 1607, the king's right personally to decide cases in his

[76] *R. v. Byles* (1912) 77 J.P. 40: *per* Avory J; emphasis added.

[77] *R. v. Camborne JJ., ex parte Pearce* [1955] 1 K.B. 41, 52.

[78] De Smith, *supra* note 48, at p. 218.

[79] Ibid.

[80] See notably *Sarjeant v. Dale* (1877) 2 Q.B.D. 558, 567. "One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice, which is so essential to social order and security."

[81] See generally Bernabé, *supra* note 40, for example, 158, 160, 162, 183, 186, 210, 222, 231, 304–305.

courts or to remove cases from those courts was at issue. In Coke's report, the first step in the reasoning is quite clearly the principle of adjudicative independence:[82]

> "the King in his own person cannot adjudge any case, either criminal, as Treason, Felony, &c. or betwixt party and party, *concerning his Inheritance, Chattels, or Goods, &c*. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custome of England, and always judgements are given, Ideo consideratum est per Curiam, so that the Court gives the Judgement. [Emphasis added]

Upon the foundation of this principle, Coke's reasons in that case go on to establish that the king may not personally sit in judgment in any of his courts,[83] *whether or not the case concerns the king's property*. The report concludes with Coke's answer to James I's argument that it would be treason to affirm that the king is under the law. The answer is delivered through a quote from Bracton: "*rex non debet esse sub homine sed sub Deo & Lege*" (the king is under no man, but he is under God and the Law).[84] A very significant step had been taken in advancing the cause of the Rule of Law, in laying the foundation for the separation of powers, and in paving the way for judicial independence.[85]

The common denominator of the British and the continental conceptions of the Rule of Law is said to be the ideal of "a government of laws and not of men."[86] Harrington had spoken of the "empire of laws and not of men";[87] Voltaire had later

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[82] See Yale, *supra* note 48, at p. 83 ("In Coke's hands the principle was used for something more than keeping subordinate judges to the proprieties of judicature. He employed it to tell the king to his face that the sovereign could not personally judge a cause between himself and his subjects."). The common law had been wrestling for some time with a similar problem arising out of grants of jurisdictional franchise, where the grantee, like the king, could find himself in the position of both judge and party. Jurisdiction could then be exercised, depending on the grant, by the grantee's "steward," "judge," or "court": *Day v. Savadge*, (1615) Hob. 85, 87 ("there the steward is Judge himself and not the grantee, as the King's judges are between him and the parties…").

[83] Though it is said that he may sit with his lords in the upper house of Parliament and reverse a court decision with the assent of the Lords.

[84] Henry De Bracton, *De Legibus Et Consuetudinibus Angliae* f. 5 b (c1250) ("*Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem.*"). Coke went on to become Chief Justice of the King's Bench (which was formally a promotion but actually represented a setback in terms of income) but was eventually sacked after refusing to allow for consultation of the king before proceeding in cases affecting the crown or its prerogatives. See Allen D. Boyer, *Coke, Sir Edward (1552–1634)* ((Online edition of) Oxford Dictionary of National Biography: Oxford University Press, 2004) under "King's bench and chancery", paragraphs 1, 5.

[85] Many of Coke's views prevailed with the Petition of Rights of 1628 (which he was instrumental in getting through Parliament), the Bill of Rights of 1688, and the Act of Settlement of 1701.

[86] Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002). See also Rainer Grote, "Rule of Law, Etat de droit and Rechtsstaat – The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments", starting at p. 271 *in* Christian Starck (dir.) *Constitutionalism, Universalism and Democacy* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

[87] James Harrington, *The Commonwealth of Oceana* (first published in 1656) "the art whereby civil society is instituted and preserved upon the foundations of common rights and interest [… is], to follow Aristotle and Livy, the empire of laws and not of men" (p. 35 of the 1771 edition). John Adams famously took this up in *Novanglus Paper No 7* (February 1775), available from the Online Library of Liberty : http://oll.libertyfund.org.

defined freedom as "being dependent only on the law."[88] The promotion of the Rule of Law was accompanied, in both US American and French revolutionary thinking, by an attempt to implement the separation of powers as an institutional means to achieve a government of laws and not of men.[89] Montesquieu had written that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty" and that, "there is no liberty, if the judiciary power be not separated from the legislative and executive."[90] Provided it was divided, power could be used effectively to check power.[91]

Beyond a general agreement that an institutional separation of powers was necessary, the US American and the French models went their separate ways. In the French Constitution of 1791, the separation of powers was expressed most notably in terms of *containing* judicial power.[92] Where James Madison was able to imagine a strong judiciary with a "a will of its own,"[93] revolutionary leaders in France, with the parliaments of the *Ancien Régime* in mind, had little taste for any such notion

[88] Voltaire, *Pensées sur l'administration publique*, 1756, chap. XX (originally published in 1752 as *Pensées sur le gouvernement*). English translation from Voltaire, *Political Writings* (Edited and Translated by David Williams: Cambridge University Press, 1994), at p. 216.

[89] The Constitution of Massachusetts of 1780, art. XXX, provides the best evidence in revolutionary thinking of the link between the Rule of Law and the separation of powers: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men." The separation of powers principle was also spelt out in art. 16 of the 1789 French *Declaration of the Rights of Man and Citizen*: "Every society in which the guarantee of rights is not assured or the separation of powers not determined has no Constitution at all." See Sean C. Goodlett, "The On-Line SourceBook", online: Fitchburg State College <http://sourcebook.fsc.edu/history/declaration.html>.

[90] Baron de Montesquieu, *The Spirit of the Laws,* Translated by Thomas Nugent (New York; London: Hafner Press, 1949 (first published 1748)), Book XI, Chapter 6, Paragraphs 4, 5, at p. 152.

[91] Id., Book XI, Chapter 4, Paragraph 2, at p. 150. "To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."

[92] "Article 3. The courts may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach upon administrative functions, or summon administrators before them for reasons connected with their duties." See English translation of Article 3 of the French *Constitution of 1791* in Sean C. Goodlett, "The On-Line SourceBook", online: Fitchburg State College <http://sourcebook.fsc.edu/history/Constitutionof1791.html>.

[93] James Madison, *The Federalist No. 51*. online: Constitution Society <http://www.Constitution.org/fed/federa51.htm>. See also: *The Federalist* Nos 48 & 49 <http://www.Constitution.org/fed/>. For another reading of the relevant materials, drawing notably on Madison's correspondence, see Larry Kramer, 'The Interest of the Man': James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 Valparaiso University Law Review 697 ("Madison … had essentially nothing to say about the third branch" (p. 705) … "and saw the need for [judicial] independence chiefly through the lens of British and colonial experience, which had no doctrine of judicial review, but which taught that judges needed tenure and salary protection to immunize them from being influenced by the more powerful political branches in ordinary civil and criminal cases" (p. 739). The British colonial experience did, of course, know the practice of judicial review of legislation, a practice which was eventually codified by the *Colonial Laws Validity Act* of 1865 (UK 28 & 29 Vict. C. 63).

and clearly focused their attention on a paramount legislator as the golden key to the Rule of Law. However, the possibility of abuse by the legislative branch was to prove all too real, particularly during the Second World War, and the US American model ended up being the most widely emulated. That is the reason why the position of the judiciary today is often assessed in terms of its ability to check the power of both political branches. Courts operate in a setting which features a powerful executive wielding the sword and a powerful legislature with vast rule-making powers and, generally, significant control over the public purse. The judiciary's effectiveness as a branch capable of checking these powerful political branches has depended on the development of guarantees which it seemed logical to link to the much older tradition of adjudicative independence.

The way in which the ancient tradition of adjudicative independence was harnessed in the pursuit of new power arrangements within the state may at first glance be perceived as a form of highjacking. But the development was likely viewed as a logical extension in a setting where at least one of the political branches appeared as party to court cases. This was the case in Coke's days and became more prevalent with the practice of judicial review of legislation. In order to be impartial when deciding cases involving the political branches, the judiciary required special institutional protections that the separation of powers independently demanded in order to ensure that this least dangerous branch would remain in a position to check the power of the other branches. This is the main reason why adjudicative independence and the separation of powers have become so deeply entangled. The central knot in the entanglement is the notion of judicial independence.

If we take a good look at the institutional dimension of the requirements I outlined in the first part of this paper, we will find that they mostly have to do with the strengthening of the judiciary as one of the three branches of government in the institutional setting of the contemporary democratic state. Thence comes the "neutral appointments" requirement that judges be involved in the appointment process for judges; the "security of tenure" requirement that standing tribunals benefit from institutional protection; the "financial security" requirement that the process of salary determination be depoliticized; and the "administrative autonomy" requirement that judges be involved in processes of envelope and budget determination and be broadly responsible for court administration. Much of the institutional dimension of judicial independence has to do with the requirement of a strong judiciary with "a will of its own," rather than with the need for adjudicative independence. It has to do with the assurance of a judiciary that is capable, not only of rendering justice impartially in ordinary adjudication, but also of keeping the political branches in check while remaining impartial when deciding cases in which those branches are involved.[94]

[94] When performed by the courts ordinarily responsible for private adjudication, public law adjudication may be viewed as using a capital of legitimacy and integrity which it would be difficult for bodies responsible solely for public law adjudication to accumulate.

Conclusion

Much of the confusion concerning judicial independence can be cleared if we consider its two distinct historical and normative rationales. The first rationale is the principle of adjudicative independence, which finds its roots in ancient times and focuses on the litigants, demanding an impartial, non-party, adjudicator. The second rationale finds its considerably more recent pedigree in the enlightenment idea of the separation of powers and the related requirement – widespread but certainly not universal – of a strong judiciary with a "will of its own."

Both rationales can be explained in terms of a broad conception of the Rule of Law. However, the embrace of the requirement of a strong judiciary is the factor that has most clearly marked out the common law and, more particularly, the US American influence in this key area of institutional design. On the continent, resort to Constitutional councils, separate systems for the adjudication of administrative law issues and judicial career paths within the civil service resulted in very different versions of the separation of powers and in the stunted development of judicial independence as a principle distinct from the ancient requirement of adjudicative independence.

The work laid before us, here as elsewhere, and now as before, is one of reconciliation. We have witnessed this labor of reconciliation with the creation and interpretation of international legal instruments, hard and soft, bearing on independence and impartiality. We have witnessed the same labor in the practice of ad hoc adjudication, notably international arbitration, where the issues of independence and impartiality arise outside the context of state institutions. And we will again witness this reconciliation as we struggle with the concepts that will allow us to safeguard the *acquis* of the Rule of Law in a world with more diffuse power arrangements, a world in which state institutions and the norms they produce play a lesser role. As we grapple with and refashion the concepts and understandings that we have inherited, it is useful to bear in mind that adjudicative independence, the principle that one cannot be a judge in one's own cause, is not tied to the nation state or to any variant of its institutional arrangements.

Chapter 11
Comparison of Central Bank and Judicial Independence

George Tridimas

Introduction

Doubts about the ability of elected representatives to resolve public policy issues and disillusion with their record have often led Constitutional framers to delegate decision making authority to independent bodies like central banks and judiciaries. Indeed, the development of the legal and the monetary system are closely interconnected: The successful operation of markets is founded on the rule of law and monetary stability. Both, however, are threatened by opportunistic governments which may violate the rights of citizens and generate inflation to pursue their own objectives. Application of the law and monetary stability require that credible constraints are imposed on the discretionary powers of the government. Adherence to the rule of law, monitored by an independent judiciary, and commitment to price stability, overseen by an independent central bank, provide two such credible mechanisms of constraining the government. On this basis Goodhart (2002) argues that in any given country there is a common thread running through the arrangements underpinning judicial and central bank independence. If this reasoning is correct, then judicial independence (JI) and central bank independence (CBI) must be closely associated, so that countries which grant higher independence to their courts also grant higher independence to their central banks.[1] The purpose of the present study is to investigate the validity of this claim.

[1] See also Goodhart and Meade (2004), Salzberger and Voigt (2002), Feld and Voigt (2003), and Hayo and Voigt (2007).

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The study is structured as follows. Section 2 compares the rationale for judicial and central bank independence and identifies similarities and differences in their foundations with regard to issues of credibility, insurance against political uncertainty and interest group politics. Section 3 examines the institutional arrangements underpinning JI and CBI focusing on organization, policy procedures, control of policy instruments, finality of decisions and accountability. A more nuanced relation between CBI and JI then emerges. Using an international sample, Sect. 4 finds that measures of legal CBI and JI are not correlated, while measures of actual CBI and JI are correlated. Section 5 summarizes.

Objectives, Meaning and Rationale for Central Bank and Judiciary Independence

It bears noting that the rule of law, and therefore JI, is a precondition for CBI. CBI would be meaningless if the legislation which established it could be violated; it is the job of courts to rule on disputes about the authority of the central banks and safeguard their independence.[2] JI may then exist without CBI, but not the other way around. However, the focus here is the complementarity of CBI and JI. The latter is based on the arguments that (a) CBI and JI are both founded on the credibility of government commitments and (b) the commonality of institutional arrangements to make central bankers and judges impervious to intimidation.

CBI and Price Stability

In the standard model of CBI the need for independence arises from the inability of the government to commit to a credible policy of zero inflation. For example, the government may announce a policy of low inflation to influence private sector expectations. However, after the private sector has acted upon the expectation of low inflation, the government has an incentive to generate surprise inflation to exploit short-term output benefits. Realizing that the government may be inconsistent in its policies over time, the private sector will not trust policy announcements of low inflation. Then, discretionary policy results in inflationary bias, a high rate of inflation without any output gain. Formally, this result is obtained upon assuming that the government minimizes a quadratic loss function defined over inflation and the deviations of output from its desired level, subject to a Lucas-type aggregate supply curve, where output rises with unanticipated inflation, inflation expectations

[2] This is illustrated by the case of the central bank of Belarus; although the bank is endowed with a high degree of independence, after inflation increased dramatically, the finance minister whose policies were the cause of inflation had the president of the central bank jailed (reported in Hayo and Hefeker 2002, who quote an earlier study of Hillman).

are formed rationally, and an equation which relates inflation to the money supply, which is controlled by the government. Appointing a central bank which is independent of the political authority, (one which can set policy without political restrictions and interference), and more "conservative" (inflation averse) than the government, results in a lower level of inflation offering a solution to the dynamic inconsistency problem (Rogoff 1985). In general, the econometric evidence suggests that for both developed and developing economies, CBI as actually implemented is negatively related to inflation (see, e.g., Cukierman et al. 1992; Cukierman 1992; Alesina and Summers 1993; Berger et al. 2001; de Haan and Kooi 2000; de Haan et al. 2003).

However, as Hayo and Hefeker (2002) document, CBI is neither necessary nor sufficient for price stability. Fixed exchange rates, explicit inflation targets and inflation contracts for central bankers (which stipulate penalties for missing the targets) are amongst alternative policy arrangements. Nor does the negative correlation between CBI and inflation found in empirical work necessarily indicate causality. They argue that societies first decide whether they wish to pursue price stability and then choose which policy institution to adopt. Some societies may exhibit more inflation aversion than others. Causality then runs from a society's preferences to CBI. In addition, drawing on Posen (1993), they suggest that stronger inflation aversion may originate from the self-interest of the financial sector, which is presumed to benefit more from low inflation,[3] and may be in a position to apply pressure to the government for policy arrangements which promote its interests. In this case, CBI arises endogenously as the outcome of the successful lobbying of the financial sector. They then explain that inflation-avert countries establish CBI to pursue price stability because an independent central bank may enjoy more credibility than the government when withdrawal of independence is politically costly. This is the case in political systems with strong checks and balances, as in countries where passing legislation requires the consent of more than one veto players, or there is a federal structure, or political freedoms are protected.

JI and the Rule of Law

The need for an independent judicial authority arises from the importance of resolving disputes and maintaining the rule of law for a functioning market economy and a free society (see Manne 1997 and Feld and Voigt 2003). Disputes may emerge between citizens and between citizens and the state, while there is always the risk that those in power may abuse the rights of the governed by restricting freedoms and expropriating property. A basic element of the rule of law is that laws apply equally to all citizens

[3] As financial intermediaries borrow short and lend long, they may suffer heavy losses with inflation-induced changes in interest differentials. Moreover, as inflation will eventually be followed by contraction, financial intermediaries may suffer additional losses from failing borrowers.

under the same set of relevant circumstances, so that they are governed by the same rules. Resolution of disputes by enforcing the law and interpreting the law itself is entrusted to an independent judiciary with the power to issue binding rulings. Judicial independence means that the judiciary enforces the law without regard to the power and preferences of the parties appearing before it, including the government which is often a litigant in dispute resolution and always in regulatory and criminal disputes (La Porta et al. 2004). Further, judicial review of policy is the examination of the policy measures passed by the legislature and enacted by the executive branch of government for their compatibility with the Constitution (Stone Sweet 2002). Judges must then be shielded from the threat of coercion by the executive and corruption from private litigants. Analytically, the behavior of the judiciary is studied by applying game theory to the process of policy making, see Tsebelis (2002) and Mueller (2003) and the literature therein. The game pits the judiciary against the executive arm and the legislature, where each strategic player has a quadratic loss function defined over one or more policy variables and policy is decided in a stochastic environment. However, contrary to the macroeconomic model, the arguments of the objective function of the judges are left unspecified.[4] Nor is there an equivalent to the Lucas supply curve to relate the policy issues over which the judiciary deliberates.

On the above account, some important differences between CBI and JI emerge. First, the meaning of the rule of law is more general and vague in comparison to the price stability objective which in practice takes the form of a specific numerical inflation target. Quantification of the rule of law is more problematic. It is a multidimensional concept comprising a range of attributes pertaining to the administration of justice.[5] A related but potentially more serious problem with the concept of the rule of law is that, in contrast to price stability where there is a consensus about its desirability, there is less agreement about what is a "good" law. Application of the rule of law does not necessarily imply that a "good" law is applied. The law may privilege the interests of whomever the lawmakers wish to favor. As put by Shapiro (2002) "The rule of law requires that the state's preferences be achieved by general rules rather than by discretionary –arbitrary – treatment of individuals" (p. 166).

Second, unlike the theoretical macroeconomic model used to explain the benefits of CBI and conservativeness, there is no standard formal model of the credibility function of the judiciary. Contrary to the standard macroeconomic model of a short-run expectations-augmented aggregate supply curve and rational expectations, there is no equivalent algebraic formulation of a causal relation between the rule of law and output or individual freedoms.

[4] This injunction was first made by Mueller (1996): "An explanation of the objectives of the judiciary remains one of the great lacunae in the public choice – rational choice literature. This lacunae hampers greatly the development of incentives to induce the judiciary to pursue *normative* goals like advancing citizens interests" (p. 294, emphasis in the original).

[5] For example, Kaufmann et al. (2005) include indicators of fear, frequency, and violence of crime; trust in the police; the effectiveness and the predictability of the judiciary including fairness of judicial process, its speed and trust of it; and the enforceability of contracts and protection of rights.

Despite the above differences, both CBI and JI share the common characteristic that they offer a mechanism to protect the citizens from the discretionary powers of public officials who may divert resources for their own benefit. Delegation of policy powers then solves an underlying conflict between the government and the citizens. The citizens may increase welfare by delegating authority to a policy agent whose preferences differ from those of the government. This further implies that when two different political parties with different preferences about inflation fight an election for control of the government, they may agree to appoint central bankers with policy preferences different from their own (central bankers who are more averse to inflation than both parties). Analogously, if the credibility motive drives delegation to courts, then competing political parties will agree to appoint judges with policy preferences different from their own.

Conflicts of Interests, Political Insurance, and Independence

That JI may enhance policy credibility was first claimed by Landes and Posner (1975), who in the context of interest group politics argued that an independent judiciary with the responsibility to apply the "original intent" of legislation makes legislative bargains more durable, and thus offers politicians the opportunity to win the support of interest groups. More recently, a number of contributions recognizing that the judiciary is a discretionary actor depart from this credibility interpretation of JI and consider court independence as an insurance mechanism in response to electoral uncertainty. An independent judiciary with the power to rein in the proclivities of the winning majority and annul policy measures incompatible with the Constitution protects the rights of citizens from the "tyranny of the majority." Judicial independence is then valued by citizens and politicians when no party is expected to permanently dominate the electoral game (see Ramseyer 1994; Mueller 1996; Ramseyer and Rasmussen 1997; Ginsburg 2002; Stephenson 2003; Hanssen 2004a; Maskin and Tirole 2004; Tridimas 2005, 2010). Delegation of decision making power to a judiciary offers a mechanism to resolve conflicts between different citizens, rather than between the government and the citizens. In the political insurance framework, each political group is better off when an independent agent decides policy, but prefers to delegate policy making to an agent which has preferences similar to its own (this is the "ally principle" of delegation, see Bendor et al. 2001). As a result, and in contrast to the credibility rationale of delegation, principals may disagree on the preferences of the agent they would like to appoint.

Although it does not view CBI as an insurance mechanism, CBI scholarship is not oblivious to the influence of politics on the decision to endow the monetary authorities with autonomy. Inflation can have diverse distributional consequences, as when borrowers gain from the erosion of the real value of their debts. In this case, the pursuit of price stability may benefit some citizens against others and CBI may be considered as a mechanism which is not independent of specific economic interests (see Posen 1993; McNamara 2002).

Studying CBI from the vantage point of conflicting interests, Cukierman (1994) argues that in a regime where parties alternate in office within the Constitutional order, a government may grant independence to the CB in order to restrict the ability of the opposition after it wins power to pursue its favorite policies. For example, if an incumbent, who supports price stability, worries that the party which supports monetary expansion will gain office, he decides to delegate monetary policy to an independent central bank. However, in an unstable political regime where power changes occur through extra-Constitutional means, like coups, the incumbent may be preoccupied with his own survival and decide to keep all policy instruments, including monetary policy, in his own hands (see Cukierman and Webb 1995; De Haan and Van't Hag 1995; Bagheri and Habibi 1998; Moser 1999; Keefer and Sastavage 2003).

It is worth noting that there is also a "producer" interest group analogy between CBI and JI. That is, in the same way that CBI was considered as supported by the financial sector, JI can at least partly be considered as the outcome of the bidding of a producer interest group. Shapiro (2002) argues that, given the legal knowledge and expertise required in resolving disputes, the legal epistemic community of practicing lawyers, judges, and law academics, forms an effective albeit loose interest group, which benefits both financially and in terms of prestige, from the functioning of an independent judiciary. Thence, it is in the self-interests of the legal community to lobby the government for a judiciary which is independent of partisan controls.

Arrangements for Independence

The independence of central banks and judiciaries depends on the various arrangements which may insulate or expose them to political pressure and intimidation. These arrangements include the organization of central banks and judiciaries, their policy procedures and jurisdiction, control of the policy instruments, and finality of their decisions, and determine the degree to which the independent agencies are accountable for their behavior.

Organization

Organizational arrangements include the power to appoint the members of the monetary policy-making bodies and supreme courts, the procedures for their selection, confirmation and dismissal, and conditions of their service, like length of term, financial autonomy, their number, and the transparency of their deliberations. It is similarities between those arrangements, rather than any other attribute, which underpin the analogy between CBI and JI.

Central bankers and judges are more independent the less the government is involved in the process of their appointment, since government interference

decreases their ability to perform their duties impartially. In practice, central bankers and highest court judges are appointed, but the degree of politicization of the appointment process differs from country to country.[6] When the government nominates judges and central bankers, they are more independent the larger the legislative majorities needed for their confirmation. Their independence increases when they are nominated by the relevant professional body, as, for example, when the judiciary nominates candidates from its ranks for positions in the highest court.

JI and CBI increase with the length of term of service of central bankers and judges, when they can only serve one term (or they are not seeking re-appointment), and when there are effective restrictions on the ability of the government to reduce their budgets. Under those conditions they can take a long-run view of the interests of the citizenry and act independently of the short-run electoral interests of politicians.

Scholarship on JI has also identified the number of judges serving at the highest court as an additional influence, a factor which has been ignored by research on CBI. Feld and Voigt (2003) argue that an increase in the number of judges may decrease the influence of judges with preferences different to those of the executive branch, a motive behind President Roosevelt's threat to "pack" the US Supreme Court and French President d'Estaign's suggestion for each of the "big four" EU countries to appoint additional judges to the European Court of Justice – in the end none of these plans was carried out. However, a small number of judges may restrict the views put forward to resolve a dispute potentially risking the quality of judicial rulings (see Tridimas 2004).

Transparency, the obligation to explain and justify decisions, enhances the independence of both central banks and judiciaries, as it increases publicly available information and obliges non-elected officials to justify their decisions increasing their accountability. Disclosure of the rationale behind a monetary policy measure decreases information asymmetries between the authorities and the public and may influence the expectations of the public, raising the effectiveness of monetary policy.[7] Similarly, disclosure of the reasoning behind court rulings increases available information about the circumstances of each dispute and the interpretation of the law by the judges which influences future courses of action of the public. Moreover, disclosure of judges' reasoning discourages politicians or other interested parties from trying to influence judicial outcomes. However, there is no consensus as to what constitutes the optimal degree of transparency. Should, for example, the central bank publish its forecast about the future state of the economy? The literature on CB transparency has shown that the maximum level of

[6] Popular election of judges for some lower courts takes place in a number of American states, see Hanssen (2004b) for a detailed investigation of judicial selection procedures; there are no cases of popular election of central bankers.

[7] Central bank transparency has motivated an increasingly growing volume of scholarly research. For a recent survey, see Cukierman (2001) and Geraats (2002), while de Haan et al. (2008) introduce a collection of new research on the issue.

information is not necessarily the optimum level for the efficiency of monetary policy. Nor is there agreement on whether the opinions and voting records of the individual members of those collective bodies should be published.[8]

A further issue is whether the drive for transparency is motivated by the requirement of political accountability (see below) or by any economic benefits independent of the former. The literature on JI seems to emphasize the role of transparency in enhancing accountability (Shapiro 2002). However, in her comprehensive survey of central bank transparency, Geraats (2002) concludes that "… central bank transparency … has taken hold… because of its perceived economic benefits" (p. 561).

Jurisdiction

For the judiciary, jurisdiction relates to the terms by which private agents can access the courts to pursue a case and the competence of the courts to rule on cases and review legislation. The range of issues examined includes[9] whether ordinary courts or only specialized Constitutional courts can exercise judicial review of laws; whether judicial review is concrete, where the Constitutionality of a law is checked in a case which is litigated, or abstract, where Constitutionality is checked without litigation involving the particular law; and whether review is carried out before or after the promulgation of a law. In the USA, any court can engage in concrete ex post review, while the French Constitutional Court offers an example of abstract a priori review by a specialized court. Abstract and a priori review is more limited, as it is not based on a real case but on a hypothetical conflict. On the other hand, it has the advantage that it can eliminate unconstitutional legislation before it actually does any harm.

In general, the power of the judiciary as an independent arm of governance rises when individuals are granted more open access to the courts, and ceteris paribus when courts are allowed to review more legislation, since these characteristics weaken the hold of the executive on policy making.

Central bank jurisdictional or policy independence relates to three "clusters" (Cukierman et al. 1992); the policy formulation, which covers the procedures for resolution of conflicts about monetary policy between the government and the CB, and the participation of the CB in the budget process; the objectives of the bank; and the limitations on CB lending to the government. CBs with the authority to formulate monetary policy and to resist the government are more independent than otherwise. The more important is price stability in comparison to other objectives the higher

[8] For example, keeping secret the voting record of judges may have some advantages in supranational judicial bodies like the Court of Justice of the EU. Secrecy protects judges against possible retribution from governments which lost their cases at the Court.

[9] See Epstein et al. (2001) and Ginsburg (2002) for extensive discussions.

the degree of CBI. For example, a CB whose only objective is price stability is more independent than a CB whose objectives are price stability and banking stability. In turn, the latter is more independent than a CB whose objectives also include full employment (which may clash with price stability). Finally, CBI increases with the number of limitations on CB lending to the government; cash limits are more restrictive than limits expressed as percentages of government revenue, which in turn are stricter than limits expressed as percentages of government expenditure. CBI is also higher the closer the interest rate on government debt to the market rate, the shorter the maturity of CB loans to the government, and the fewer public institutions are allowed to borrow from the CB.

Control of Policy Objectives and Policy Instruments

Goal independence refers to how far an agent can choose its own policy objectives. Operational independence refers to an agent's freedom to choose the policy instruments in order to achieve a given policy objective. For CBs goal independence means that they can define their policy objective, like price stability, and how much priority to give to each objective in case of a multitude of objectives. Instrument independence means that they can set the course of interest rates at the level deemed appropriate to achieve price stability. For judiciaries goal independence relates to the extent by which court rulings "make law," while operational independence relates to their freedom to pronounce rulings based on the laws passed by the legislature. Of course, judiciaries do not make laws in the sense that legislatures do. Nevertheless, to the extent that court jurisprudence interprets vague aspects of legislation, serves as a source of law and binds future court rulings, there is more goal independence than otherwise. Equally, to the extent that judiciaries conduct review of policy and may annul those acts and measures that they find incompatible with the Constitution or other "higher law" (like declarations of rights, which take precedence over ordinary legislation), they come close to having some form of law-making power or goal independence (albeit a "negative" one).

There is, nevertheless, an important difference between the freedom of monetary authorities and courts to set the policy instruments. The freedom of courts to pronounce rulings is more complicated, than that of CBs which set the interest rate. In civil disputes regarding damages to be awarded to the injured party, and in criminal trials regarding fines and prison sentences, courts have the freedom to set the sums of money and prison tariffs (within the limits of the law), that is, they have operational independence similar to that of central banks. On the contrary, in cases of judicial review of policy measures, courts are restricted to what is effectively a binary choice of yes or no. That is, courts pronounce whether a policy measure is compatible with the Constitution and can be enforced, or it is incompatible and thus annulled. They cannot directly introduce a different policy measure. Hence, when reviewing policy, courts have considerably less operational independence than central banks.

Finality of Decisions

Finality of the decisions relates to the ability and ease by which the government may overturn judicial rulings and monetary policy decisions it does not like; the more difficult the higher the independence. Decisions can be overturned by introducing new legislation or changing the status and power of agents whose pronouncements go against the interests of the government. The ability of the government to reverse court rulings decreases when courts are bound to follow legal precedent and when the independence of courts is provided in the Constitution which, contrary to ordinary legislation, requires super-majorities to revise. This is contrasted with central bank independence which is typically founded on ordinary legislation (with the exception of some transition economies – see Salzberger and Voigt 2002) and can be repealed by a majority decision of a sitting parliament which may be easier to obtain rather than a Constitutional amendment.

Agency Costs

Delegation of authority to unelected bodies like the judiciary and the CB raises fundamental normative and positive dilemmas about majority rule and political accountability. In the terminology of the principal agent relation, CBI and JI generate agency costs when the delegatee – independent authority implements policies which serve its own interests rather than those of the delegating voters and their elected representatives.

The costs of delegation to unelected bodies vary with the type of independence granted. Goodhart and Meade (2004) argue that when politicians set the inflation target and grant the CB the independence to set the short-run interest rates, as in the case of the Bank of England, lack of democratic control is minimized: If the majority of voters disagree with the inflation target, it can vote against the government and elect another party with an inflation target closer to its preferences. On the other hand, a problem of democratic deficit arises when the CB is given goal independence and sets the inflation target, as in the case of the European Central Bank, or when it can decide on the weight attached to price stability against other policy objectives (like full employment) as in the case of the USA Federal Reserve Bank.

Similarly, JI runs into the problems of democratic accountability. An independent judiciary which is strong enough to block the policy measures enacted by the legislative majority is also strong enough to pronounce rulings which pursue the preferences (ideological or otherwise) of the judges.

It is then important to establish mechanisms to secure judicial and central bank accountability, which requires the office holders to explain their actions and rein on wayward behavior. Accountability in the sense of requiring the office holders to give reasons and justify their actions is hardly controversial. But accountability in the sense of holding the office holders responsible for their decisions and possibly forcing them to bear the costs of their decisions may be more problematic, because

it may infringe their independence. For it cannot be precluded that measures which aim to strengthen the accountability of an agent may be abused and weaken its independence. The organizational structures examined above aim to balance the competing ends of independence and accountability and the arrangements observed in practice comprise the solutions to the trade-off between independence and accountability, which may vary from polity to polity.

Hierarchical Structure and Length of Experience

Another issue relates to the hierarchical structure of central banks and judiciaries. The judiciary is a multitiered structure of first-instance courts and appeal courts headed by a highest court, typically a supreme court and its administrative analogue. Higher courts oversee the decisions of lower courts. Thus, contrary to the monetary authority the judiciary comprises a hierarchy of courts. Sheer volume of workload justifies this division of labor. A case is typically first heard by a court of first instance and depending on the problems it raises it may go all the way to the highest court. In addition, the highest courts monitor the work of lower courts. In contrast, the CB has more of a unitary structure even though in a federal state it may comprise a number of regional offices.

Finally, CBI is an institutional novelty in comparison to JI. For the majority of nations it has been in the statutes for a relatively short period of less than a quarter of a century, even though the Federal Reserve Bank of the USA and the Bundesbank of West Germany had enjoyed significant degrees of independence for considerably longer periods. It was during the 1990s and after the experience of inflation from the previous two decades when CBI was elevated to the top of policy reform agendas. Given this experience, it may be more vulnerable to revision and dilution when economic circumstances change. On the contrary, judicial independence as part of the separation of powers goes back to the US Constitution, while its theoretical antecedents go back to the Enlightenment.

From the above discussion it is clear that only some attributes of independence are directly comparable across central banks and judiciaries. The arrangements for organizational independence, namely, appointment, length and terms of service, transparency and finality of decisions, may be thought as varying along the same dimension from low to high. It is similarities or differences in these arrangements, rather than the rest of the attributes, which can be used to assess whether central banks and supreme courts are characterized by analogous levels of independence.

The Empirical Relation Between CBI and JI

If the same factors determine CBI and JI, then the arrangements for the independence of central banks and highest judicial bodies should be similar within countries but different across countries. One should then expect a positive correlation

between the indices for CBI and JI. Since in practice JI and CBI are a matter of degree than of absolute lack or presence, the empirical validity of the proposition is tested estimating the correlation coefficient, r, between JI and CBI. The test is carried out for an international sample of countries on which CBI and JI indices are available.

CBI is measured by the widely used Cukierman (1992) "LVAW" index. It is the weighted score from aggregating various characteristics of central banks described in the statutes, regarding the appointment, dismissal, and term of office of the governor, the relationship between the central bank and the government, authority for monetary policy and the objectives of the central bank with respect to price stability and its obligation to lend the government. This index of legal independence varies from 0 to 1, with higher values indicating more independence. Recognizing that actual independence may differ from independence as described in legal documents Cukierman et al. (1992) have also constructed an index of CBI based on the actual term of office turnover of the governors of central banks of different countries. This is based on the presumption that, at least above some threshold, a higher frequency of change of the governors of the central bank indicates less CBI. With high turnover, the governor of the central bank serves a short term and is more vulnerable to pressures from the executive. We use the average annual turnover rates for 1950–1989 published by Cukierman et al. (1992)[10] as a measure of actual CBI. The index varies from 0 to 1 with higher values representing higher turnover and therefore a lower level of CBI.

For judicial independence we use the De Jure index published by Feld and Voigt (2003). De Jure judicial independence is based on the arrangements for the judicial functions found in the statutes of a country's highest court. Its numerical value depends on whether the highest court is anchored in the Constitution, how difficult is to amend the Constitution, whether judicial appointments are made by the legal professionals or politicians, the term of service of judges, whether the appointment is renewable, how salaries are decided (general rules, or discretionary decisions of the government), the size of salaries in comparison to those commanded by other highly qualified legal professionals, the accessibility of the court, whether the Constitution provides for judicial review of policy measures and the transparency of the deliberations of the court. Similarly to CBI, the degree of actual JI in practice may differ from the De Jure JI. For this reason Feld and Voigt (2003) also calculate a De Facto index of judicial independence. Its size depends on the effective average term length of the members of the highest court, whether judges have been removed from office before the end of their term, the number of judges serving in the highest court, the adjustment of judicial salaries to inflation, whether provisions of the Constitution regarding the highest court have been changed and whether the imple-

[10] Cukierman et al. (1992) recognize that a low turnover does not necessarily mean that the central bank is more independent, as a governor who tows the government line may stay longer in office. The issue of how likely it is that a CB governor will be replaced after a change in government is further studied in Cukierman and Webb (1995).

Table 11.1 Correlation Coefficient "*r*" between CBI and JI

A. Full Sample					
De Jure JI & Legal CBI			*De Facto JI & Actual CBI*		
0.1195 [73]			–0.3425 [51]		
1.0141			–2.5523		
B. Breakdown by Level of Development and by Legal Origin					
Developed Countries	Less Developed	English	French	German & Scandinavian	Socialist
De Jure JI & Legal CBI					
0.1911 [21]	0.1005 [52]	–0.3405 [21]	0.1705 [25]	0.4394 [11]	0.2289 [16]
0.8486	0.7147	–1.5788	0.8298	1.4677	0.8798
De Facto JI & Actual CBI					
0.0309 [20]	–0.0521 [31]	–0.3825 [18]	–0.3066 [20]	0.1833 [10]	*too few*
0.1315	–0.3264	–1.6561	–1.367	0.5275	*observations*

Second row figures indicate the *t* statistic of *r*.
Figures in square brackets denote the number of countries in the sample.
For definitions of the variables used see the text

mentation of a ruling of the court depends on some action of any other branch of government. Both the De Jure and the De Facto indices vary between zero and unity with higher values indicating more independence. From the above description it is obvious that there is less than one-to-one correspondence between the components of the CBI and JI indices.

The international sample contains 73 countries for the legal CBI and De Jure JI and 51 observations for the actual CBI and De Facto JI (data available from the author on request). The results from estimating the correlation coefficients and their statistical significance are presented in Table 11.1. The results show that the correlation coefficient for the De Jure JI and legal CBI indices is statistically insignificant implying the lack of the presumed positive association between the two. The same rejection is also encountered when the countries in the sample are separated between developed[11] and developing economies. Further, noting that the legal origins of a country may condition the relation between the government and the judiciary (La Porta et al. 1999), the countries in the sample were divided into five subgroups namely, English, French, German and Scandinavian, and Socialist. The judicial oversight of the executive is more pronounced in the English common law tradition, less so in the French tradition of codified laws, stands in between the two in the German and Scandinavian, while in the socialist one the primary concern was the preservation of the power of the state. However, for all subgroups the estimated correlation coefficient is insignificant.

[11] Similarly, using the GMT index of CBI (Grilli et al. 1991) for 17 developed countries yields an insignificant correlation coefficient of 0.0414 with a *t*-statistic of 0.1605.

On the other hand, the correlation coefficient between the De Facto JI and actual CBI has an estimated value of −0.34 and is statistically significant at the 0.01 level, implying that countries characterized by higher de Facto JI are also characterized by low central bank governor turnover. This result is in line with the expected prior that countries with higher JI also have higher CBI. However, the estimates in Table 11.1B show that none of the correlation coefficients is significant when the full sample is divided between developed and developing[12] countries and between countries with different legal origins. The small number of observations for each subgroup may go some way in explaining the lack of statistical significance (especially since the coefficient in the subset of countries with English legal origins has the correct sign and marginally fails to be significant at the 10% level).

All in all, the empirical findings offer only qualified support for the presumed analogy between JI and CBI at the empirical level.

Summary

The analogy between central bank independence and judicial independence is based on the argument that the same set of reasons explains delegation to central banks and courts and that in any given country similar institutional arrangements buttress the independence of central bankers and judges. An independent central bank, which is more inflation averse than the government, and an independent judiciary, provide credible policy arrangements to pursue price stability and apply the rule of law. However, while price stability is itself a policy objective, the rule of law amounts to following due process for pursuing policy objectives. Further, JI plays a political insurance role without a strict analogue in CBI. Arrangements about the appointment, length and terms of service, transparency and finality of decisions of judges and central bankers may be thought as varying along the same scale from low to high and offer the basis for investigating empirically the correlation between CBI and JI. Using an international data set no statistically significant relation between legal JI and CBI was found, but for actual JI and CBI a negative and statistically significant coefficient of correlation was obtained indicating that higher actual JI is associated with higher actual CBI. Although such findings represent a first step toward a better understanding of the relation between CBI and JI, they indicate that both on theoretical and empirical grounds the relation is more nuanced than earlier informal studies in the subject have suggested.

[12] When the exercise was rerun using the Governor Turnover index for 42 developing economies of De Haan and Kooi (2000) the coefficient of correlation was −0.0384 with a *t*-ratio of −0.2431, that is, it has the expected negative sign but is statistically insignificant.

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Chapter 12
Making and Implementing the Rules of the Game: The Political Economy of Constitutional Myths and Rites

Jean-Michel Josselin

When a body of myths is meant to govern the material and even sometimes the spiritual dimensions of our lives, we are entitled to give a sharp look at what is at stake. This is precisely what this book is about: mythology and the founding myths are like legends, but the rites associated with this higher norm are concrete, actual procedures reflected in lower norms, customs, and institutions (Lévi-Strauss 1958). Admittedly, since Plato, written law is conceived as a necessary means of legitimacy for the sovereign. However, written law cannot by itself ensure moral or social standards of conduct and belief (begging the question of how to define such standards). It cannot either ensure that the sovereign will not indulge in power abuse. To use Plato's vocabulary, it is merely a remedy (pharmakon) against lawlessness (anomie). Constitutions as the figureheads of written law of course require the sharpest scrutiny, whether they are Constitutional documents per se or bodies of fundamental charters. In this respect, Constitutional political economy (Buchanan and Tullock 1962; Brennan and Buchanan 1985; Buchanan 1990) offers tools that are both provocative and useful. Provocative because they use rational choice theory to analyze myths, useful because such an analysis provides an original complement to what other social sciences have to say on the subject.

At this stage, one may argue that the book deals with mythologies about Constitutions and not about Constitutions as mythologies or myths. However, the two things are quite entangled, Constitutions indeed being myths themselves. Such myths generate rites and formalized ceremonials like judicial procedures or more generally legal standards and the institutions in charge of implementing them. Most myths and Constitutions tell very nice stories about freedom or unity and friendship

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(although admittedly some of them expose awful conceptions of human relations, including slavery, religious, or gender segregation). However, to build on Randall Holcombe's argument, the usually decent and fine language of the written fundamental law in no way precludes the organization of coercive power: the Constitutional document may exhibit the myth of the social contract but organize the rites of coercion, taxation being the mildest of them. The inverse phenomenon can also be observed. Reified rites become customs progressively embedded in a Constitutional corpus without any trace of an explicit contract. Humean conventions preside to its making (Hume 1992). In this setting, Peter Boettke and Alexander Fink provide evidence of Constitutions or sets of rules emerging as focal points à la Shelling (1960). This does not automatically guarantee safeguards against arbitrariness and coercion, as it was pointed out by Nozick himself (Nozick 1974: Chap. 6).

Whereas Holcombe, Boettke, and Fink focus on rites (derived from the myth or alternatively letting it emerge), Alan Hamlin considers the myth itself as constitutive of a political community. The expressive perspective adopted by Hamlin stresses how political acts contribute to identify individuals in a group and as a group. Constitutions as major political acts are therefore founding myths reflecting the image that the group wants to give to itself and to other groups as well. This interpretation of Constitutions as myths does not preclude the emergence of myths about the Constitution; we shall go back to that shortly.

Rejecting "public interest" as a meaningful and operational concept, the Constitutional political economy approach naturally puts the individual at the center of its investigations. So does apparently the Constitutionalist. "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will" (US Case Cohens v. Virginia, 1821). However, the romantic metaphor of the citizen as a fountain of power does not stand long when confronted with the evidence. Elisabeth Dale provides a thoroughly documented study of the place of American citizens in the Constitutional order. Observers rather than participants, they "receive" the myth and must abide by the ensuing "law rituals" even though a trend toward more control on the power of the state would progressively emerge. Should we then infer that representative systems of government (ranging from parliamentary democracy to somber dictatorships) are structurally flawed principal–agent models where the individuals–principals delegate the most sensitive of rights, namely the power to make law? Can this Constitutional dilemma (Nozick 1974; Witt 1992) be overcome in a system of direct democracy? Bruno Frey, Alois Stutzer, and Susan Neckermann advocate it and they argue that direct democracy allows citizens efficiently to participate in the Constitutional amendment process. Whether the Constitutional dilemma would be resolved remains unclear, though it would certainly be softened.

We have all noticed that myths associated with ancient civilizations often display intricate situations, ambivalent characters as well as quite unreliable gods. For instance, the Greek mythology abounds with such tormented stories. The ensuing power relations offer complexly interrelated patterns. In a way, the same thing happens

with Constitutions (mutatis mutandis). Louis Imbeau and Steve Jacob investigate power relations in Constitutions and show that to disentangle them requires much more than a simple reading of the parchment. This is not reassuring when one thinks of the "publicity of rules" advocated by Hobbes (1966) and Kelsen (1962) as a necessary condition for a Constitutional democracy. Rites and rituals may be explicit, in the form of laws, decrees and administrative agencies, but actual power relations may lay behind an ill-placed and unfortunate (postconstitutional) veil of ignorance. They nevertheless create a "state," Hobbes would call it a sovereign, which state needs to be controlled… through the Constitution. This circularity is another expression of the Nozickean Constitutional dilemma. Means of control do exist, like the Second Amendment in the US Constitution. However, as is shown by Atin Choudhary, Michael Reksulak, and William Shughart, they do not seem to be able to contain the state monopoly over coercive power.

Until now, we hope to have depicted the Constitution as a myth (or as a body of such myths) and the "state," laws and agencies and jurisdictions, as rites or rituals that reify or crystallize all the symbols comprehended in the Constitutional documents. There remains to evoke "a dangerous myth which is widely believed at the present time by Americans" (Tullock 1965, p. 13). This myth, that "the Constitution is what the Supreme Court says it is," amounts to assuming that "no action taken by the Supreme Court can be unconstitutional […] The power of the Supreme Court to declare acts of Congress unconstitutional was first established in the famous case of Marbury v. Madison by chief Justice John Marshall" (Tullock 1965). This power has been constantly reasserted afterwards.

To put it in more general terms, the means of control studied by Choudhary, Reksulak, and Shughart often take the form of agencies, this term to be understood in its microeconomic acceptation (Josselin and Marciano 2007). Constitutional courts, central banks, and other administrations and bureaus are as many agents supposed to serve the interests and objectives of their principals, the citizens. In practice, however, they often follow quite autonomous agendas (Josselin and Marciano 2000; Vaubel 2009). The last three chapters of the book elaborate on that. Giuseppe Eusepi, Alessandra Cepparulo, and Maurizio Intartaglia study the European Court of Justice, while Fabien Gélinas and Georges Tridimas deal with independence in the judiciary (the work of Fabien Gélinas) and the monetary spheres (Georges Tridimas' study).

Individuals mostly build their knowledge of rules when playing postconstitutional games. They play games within rules they mostly learn while playing. Their understanding of the myth (of the rules of the game) inductively derives from their repeated social interactions. There is thus largely a myth that Constitutions are common knowledge to citizens. And even if they were, this would not necessarily be a guarantee against power abuse and coercion. On the one hand, the original veil of ignorance is quite elusive. On the other hand, the intricacies of the process of delegation of power make it so that the agency relation between individuals and the state will probably be riddled through with rent-seeking. Are competitive institutions preventing monopoly power a myth?

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