

# Chapter 2

## Consent or Coercion? A Critical Analysis of the Constitutional Contract

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### 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.<sup>1</sup> But while people in Buchanan's anarchy lose any privileges given by institutions and social status, they retain their own personal identities.

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<sup>1</sup>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.<sup>2</sup> 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

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<sup>2</sup>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.<sup>3</sup> 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

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<sup>3</sup>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.<sup>4</sup> 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.

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<sup>4</sup>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 Constitution 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.<sup>5</sup>

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

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<sup>5</sup>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.<sup>6</sup>

## 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

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<sup>6</sup>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.<sup>7</sup>

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

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<sup>7</sup>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.<sup>8</sup>

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<sup>8</sup>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.<sup>9</sup> 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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<sup>9</sup>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.