



**PALGRAVE STUDIES IN CLASSICAL LIBERALISM**

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# Reclaiming Liberalism

*Edited by*

David F. Hardwick · Leslie Marsh

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# Palgrave Studies in Classical Liberalism

## **Series Editors**

David F. Hardwick

Department of Pathology and Laboratory Medicine  
The University of British Columbia  
Vancouver, BC, Canada

Leslie Marsh

Department of Pathology and Laboratory Medicine  
The University of British Columbia  
Vancouver, BC, Canada

This series offers a forum to writers concerned that the central presuppositions of the liberal tradition have been severely corroded, neglected, or misappropriated by overly rationalistic and constructivist approaches.

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Editors

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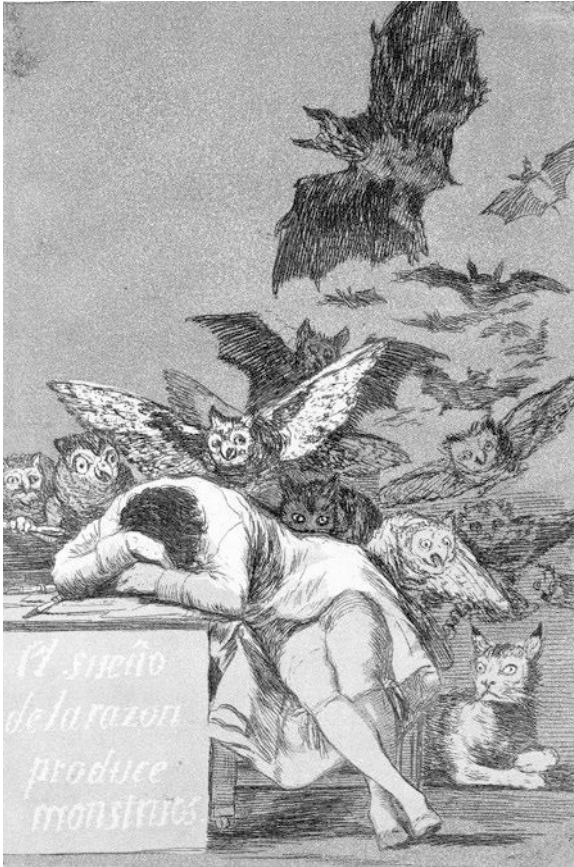
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**Francisco Goya: Plate 43 from 'Los Caprichos': The sleep of reason produces monsters (El sueño de la razón produce monstruos), 1799**

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*To Virginia Baldwin: in appreciation of decades of interest  
and support (DH)*

*In memory of my grandparents, Sara and Samuel Fine, whose families the  
Bolsheviks wanted to banish and the Nazis wanted to snuff out (LM)*

# Preface

Each passing decade of the twentieth and twenty-first centuries has been accompanied by proclamations of liberalism's decline. Despite this, it is not at all clear whether the Owl of Minerva can be said to have taken flight. The "reclaiming" of the title of this collection is perhaps more a timely *re-excavation* of classical liberalism from the accumulated conceptual hubris and downright illiteracy that has come to obscure its central presupposition, which is, the wresting of epistemic independence from overwhelming concentrations of power, monopolies, and capricious zealotries, whether they be of a state, religious, or corporate in character. Unfortunately, much of what goes by the label of "liberal" is overly rationalistic and constructivist and, as such, stirs an authoritarian impulse in its implementation.

This collection offers a variety of disciplinary perspectives on liberalism, from a contemporary focus and some with a distinctly historical hue. Collectively these chapters will, in all probability, be deemed contentious. Classical liberals are a fractious lot, and though there will be internecine squabbles, no one viewpoint seeks to inhibit another's perspective.

Hayek's profound and paradoxical insight that knowledge becomes less incomplete only if it becomes more dispersed has informed our institutional design and operational management within the International Academy of Pathology and The University of British Columbia



Department of Pathology and Laboratory Medicine. Since we subscribe to Hayek's adage that "exclusive concentration on a specialty has a peculiarly baneful effect: it will not merely prevent us from being attractive company or good citizens but may impair our competence in our proper field", we make no apology for not staying within our academic silos.

Epistemic humility and open inquiry are central virtues for the classical liberal and this has proved the most successful way to approach the truth for the greater good. We thus thought that Aldous Huxley's comment<sup>1</sup> on Goya's caption "El sueño de la razon produce monstrous", as per the frontispiece, resonates deeply with the spirit of this project:

It is a caption that admits of more than one interpretation. When reason sleeps, the absurd and loathsome creatures of superstition wake and are active, goading their victim to an ignoble frenzy. But this is not all. Reason may also dream without sleeping, may intoxicate itself, as it did during the French Revolution, with the daydreams of inevitable progress, of liberty, equality, and fraternity imposed by violence, of human self-sufficiency and the ending of sorrow ... by political rearrangements and a better technology.

Vancouver, BC, Canada

David F. Hardwick  
Leslie Marsh

## Note

1. Aldous Huxley, "Variations on Goya," *On Art and Artists*, Morris Philipson, ed. (London: Chatto and Windus, 1960), pp. 218–19.

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# Reclaiming Democratic Classical Liberalism

David P. Ellerman

## Helping Others Versus Self-Help: Implications of Classical Liberalism

Classical liberalism expresses a skepticism about governmental organizations being able to “do good” for people. Instead an important role of government is to set up and maintain the conditions for people to be empowered and enabled to do good for themselves, for example, in establishing and enforcing the private property prerequisites for the functioning of a market economy as emphasized in the economic way of thinking (e.g., Heyne et al. 2006, pp. 36–38).

The reasons for the general ineffectiveness of the government to directly do good for people are not unique to government; the reasons apply as well to other external organizations that are also tasked to “do good” such

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D. P. Ellerman (✉)

University of California, Riverside, Riverside, CA, USA

University of Ljubljana, Ljubljana, Slovenia

e-mail: [david@ellerman.org](mailto:david@ellerman.org)

as philanthropic, development aid, or other helping organizations in general.<sup>1</sup> As John Dewey (1859–1952) put it:

The best kind of help to others, whenever possible, is indirect, and consists in such modifications of the conditions of life, of the general level of subsistence, as enables them independently to help themselves (Dewey and Tufts 1908, p. 390).

The aim of a helping organization (including government) should not be to “do good” in any direct sense. The goal should be to increase people’s autonomy, organizational efficacy, and effective social agency so they can do good for themselves—individually or, more likely, jointly in their *own organizations*. That is how the virtues of individual self-regarding activity in the marketplace generalize to the virtues of collective activity by people in their own organizations.

The classical liberal normative framework that emphasizes this autonomy and self-efficacy is perhaps best stated by James M. Buchanan (1919–2013):

The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals (Buchanan 1999, p. 288).

It should be particularly noted that Buchanan goes beyond the common image of the sovereign individual acting in the marketplace to the individual acting in an organization which allows “for delegation of decision-making authority.” Then the legitimacy of the “social-organizational arrangements” depends on the individuals being principals in their organizations.

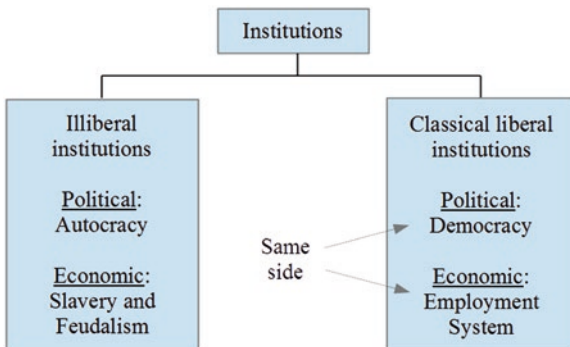
# What Is Denied Legitimacy in the Classical Liberal Social Order?

## Coercive Institutions

The first broad category of institutions ruled out in the liberal social order are those that are involuntarily imposed without “the voluntary agreement of those who are to live” under the arrangements. The examples are standard fare in liberal thought such as (involuntary) slavery or (involuntary) non-democratic government (Fig. 1).

Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion—the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals—the technique of the market place (Friedman 1962, p. 13).

But Buchanan’s strictures go beyond these war-horse examples to rule out the legitimacy of voluntary arrangements where the individuals do not remain principals. Since that institutional territory is little explored, if not little known, I will explore the intellectual history of such arrangements in some detail. The voluntary contractual arrangements where individuals do not remain principals are those that alienate (rather than



**Fig. 1** The conventional framing of coercion versus consent

delegate) decision-making authority. The contractually established decision-making ruler or ruling body rules in its own name and is not empowered only as a delegate or representative of the individuals under its authority. These alienation contracts can be divided into the individual and the collective cases.

## Individual Alienation Contracts: The Voluntary Slavery Contract

Today “slavery” is usually discussed as if it were intrinsically involuntary so that “[v]oluntary slavery” is impossible, much as a spherical cube or a living corpse is impossible” (Palmer 2009, p. 457). But in fact from Antiquity onward, the sophisticated defense of slavery have always been based on implicit or explicit voluntary contracts. For western jurisprudence, the story starts with Roman law as codified in the *Institutes* of Justinian:

Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him (*Institutes* Lib. I, Tit. III, sec. 4).

In addition to the third means of outright contractual slavery, the other two means were also seen as having aspects of contract. A person born of a slave mother and raised using the master’s food, clothing, and shelter was considered as being in a perpetual servitude contract to trade a lifetime of labor for these and future provisions. In the alienable natural rights tradition, Samuel Pufendorf (1632–94) gave that contractual interpretation:

Whereas, therefore, the Master afforded such Infant Nourishment, long before his Service could be of any Use to him; and whereas all the following Services of his Life could not much exceed the Value of his Maintenance, he is not to leave his Master’s Service without his Consent. But ‘tis manifest, That since these Bondmen came into a State of Servitude not by any



Fault of their own, there can be no Pretence that they should be otherwise dealt withal, than as if they were in the Condition of perpetual hired Servants. (Pufendorf 2003 (1673), pp. 186–87).

Manumission was an early repayment or cancellation of that debt. And Thomas Hobbes (1588–1679), for example, clearly saw a “covenant” in the ancient practice of enslaving prisoners of war:

And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. . . . It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant (Hobbes 1958 (1651), Bk. II, chapter 20).

Thus *all* of the three legal means of becoming a slave in Roman law had explicit or implicit contractual interpretations.

John Locke’s (1632–1704) *Two Treatises of Government* (1690) is one of the classics of liberal thought. Locke would not condone a contract which gave the master the power of life or death over the slave:

For a Man, not having the Power of his own Life, *cannot*, by Compact or his own Consent, *enslave* himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases (Second Treatise, §23).

This is the fount and source of what is sometimes taken as a “liberal doctrine of inalienable rights” (Tomasi 2012, p. 51). But after taking this edifying stand, Locke pirouettes in the next section and accepts a slavery contract that has some rights on both sides. Locke is only ruling out a voluntary version of the old Roman slavery where the master could take the life of the slave with impunity. But once the contract was put on a more civilized footing, Locke accepted the contract and renamed it “drudgery”:

For, if once *Compact* enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of

War and *Slavery* ceases, as long as the Compact endures.... I confess, we find among the *Jews*, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to *Drudgery*, not to *Slavery*. For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power (Second Treatise, §24).

Locke is here setting an intellectual pattern, repeated many times later, of taking a high moral stand against an extreme form of contractual slavery, but then turning around and accepting a civilized form on contractual slavery (e.g., rights on both sides at least in the law books) usually with some more palatable linguistic designation such as drudgery, perpetual servitude, or perpetual hired servant.

Moreover, Locke agreed with Hobbes on the practice of enslaving the war captives as a quid pro quo plea-bargained exchange of slavery instead of death and based on the ongoing consent of the captive:

Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his Power) delay to take it, and make use of him to his own Service, and he does him no injury by it. For, whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires (Second Treatise, §23).

In Locke's constitution for the Carolinas, he seemed to have justified slavery by interpreting the slaves purchased by the slave traders on the African coast as the captives in internal wars who had accepted the plea bargain of a lifetime of slavery instead of death.<sup>2</sup> Thereafter, the title was transferred by commercial contracts. If the slave later decides to renege on the plea-bargain contract and to take the other option, then "by resisting the Will of his Master, (he may) draw on himself the Death he desires."

Another basis for liberal jurisprudence is English common law. William Blackstone (1723–1780), in his codification of English common law, stuck to Locke's choreography. Blackstone rules out a slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in

England.” After such an edifying stand on high moral ground, Blackstone pirouettes and adds:

Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term (Blackstone 1959, section on “Master and Servant”).

Another source of liberal thought is Montesquieu (1689–1755). On the question of voluntary slavery, he employed the same Lockean choreography in his treatment of inalienability and that treatment was paraphrased in modern times by the dean of high liberalism, John Rawls (1921–2002). Montesquieu begins with the usual repudiation of the self-sale contract in an extreme form:

To sell one’s freedom is so repugnant to all reason as can scarcely be supposed in any man. If liberty may be rated with respect to the buyer, it is beyond all price to the seller (Montesquieu 1912 (1748), Vol. I, Bk. XV, Chap. II).

Rawls paraphrases this argument from Montesquieu to argue that in the original position, the

grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived. (Rawls 1996, p. 366)

After the “beyond all price” passage paraphrased by Rawls, Montesquieu goes on to note: “I mean slavery in a strict sense, as it formerly existed among the Romans, and exists at present in our colonies” (Montesquieu 1912 (1748), Vol. I, Bk. XV, Chap. II). Then Montesquieu performs his *volte-face* by noting that this would not exclude a civilized or “mild” form of the contract.

This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties (Montesquieu 1912 (1748), Vol. I, Bk. XV, Chap. V).

And then Rawls goes on to follow the same choreography in his treatment of inalienability:

This explanation of why the basic liberties are inalienable does not exclude the possibility that even in a well-ordered society some citizens may want to circumscribe or alienate one or more of their basic liberties. ...

Unless these possibilities affect the agreement of the parties in the original position (and I hold that they do not), they are irrelevant to the inalienability of the basic liberties (Rawls 1996, pp. 366–67 and fn. 82).

Of course, no one thinks that John Rawls would personally endorse a voluntary slavery contract, but the question is his theories, not his personal views. And in his treatment of inalienability, he repeated the pattern and even some of the language (“beyond all price”) of a “liberal doctrine of inalienable rights” descending from Locke, Blackstone, and Montesquieu that *did* explicitly endorse a civilized form of voluntary contractual slavery, drudgery, or perpetual servitude.<sup>3</sup> Below we will outline the *genuine* theory of inalienable rights that descends from the Reformation inalienability of conscience through the Scottish and German Enlightenments and English Dissenters, and that was transferred “from a religious on to a juridical plane” (Lincoln 1971, p. 2) by the abolitionist and democratic movements.<sup>4</sup>

Rawls’ Harvard colleague, Robert Nozick (1938–2002), was notoriously explicit in accepting the (re)validation of the voluntary slavery contract.<sup>5</sup> He accepted that a free society should allow people to jointly alienate their political sovereignty to a “dominant protective association” (Nozick 1974, p. 15):

The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would (Nozick 1974, p. 331).

Nozick is reported to have had second thoughts in his later life precisely on the question of inalienability, but Nozick never developed a *theory* of inalienability that would overturn his earlier position.<sup>6</sup>

The contractual defense of slavery was also used in the debate over slavery in ante-bellum America. The proslavery position is usually presented as being based on illiberal racist or paternalistic arguments. Considerable attention is lavished on illiberal paternalistic writers such as George Fitzhugh,<sup>7</sup> while consent-based contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury (1801–1872) gave a sophisticated liberal-contractarian defense of ante-bellum slavery in the tradition of alienable natural rights theory:

From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a moral nature; founded in right, not in might; . . . Let the origin of the relation have been what it may, yet when once it can plead such prescription of time as to have received a fixed and determinate character, it must be assumed to be founded in the consent of the parties, and to be, to all intents and purposes, a compact or covenant, of the same kind with that which lies at the foundation of all human society (Seabury 1969 (1861), p. 144).

“Contract!” methinks I hear them exclaim; “look at the poor fugitive from his master’s service! He bound by contract! A good joke, truly.” But ask these same men what binds them to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers every sign it? “No; it is a tacit and implied contract.” (Seabury 1969 (1861), p. 153).

Yet this voluntary contractual defense of slavery has largely gone down the memory hole in the liberal intellectual history of the slavery debates. For instance, McKittrick (1963) collects essays of fifteen proslavery writers, Faust (1981) collects seven proslavery essays, and Finkelman (2003) collects seventeen proslavery writers, but *none* of them include a single writer who argues to allow slavery on a contractual basis such as Seabury—not to mention Grotius, Pufendorf, Hobbes, Locke, Blackstone, Molina, Suarez, Montesquieu, and a host of others.<sup>8</sup>

The intellectual history of civilized voluntary slavery contracts concludes with modern economic theory. Often the discussion of slavery is colored with excesses and attributes that were unnecessary to slavery as an economic institution. The economic essence of the contract is the life-time ownership of labor services by the master, not the ownership of persons or souls or the like. Even the Stoic philosopher Chrysippus noted that “a slave should be treated as a ‘laborer hired for life’” (Sabine 1958, p. 150). James Mill explained:

The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man’s labour as he can perform in a day, or any other stipulated time (Mill 1826, Chapter I, section II).

And ante-bellum slavery apologists made a similar point:

Our property in man is a right and title to human labor. And where is it that this right and title does not exist on the part of those who have money to buy it? The only difference in any two cases is the tenure (Bryan 1858, p. 10; quoted in Philmore 1982, p. 43).

One of the most elementary points in the solely economic way of thinking is that the prohibition of a voluntary exchange between a willing buyer and willing seller (in the absence of externalities) precludes allocative efficiency. For instance, efficiency requires full futures markets in all goods and services including human labor. Any attempt to truncate future labor contracts at, say,  $T$  years could violate market efficiency since there might today be willing buyers and sellers of labor to be performed  $T + 1$  years in the future. Hence market efficiency requires full future markets in labor—which allows the perpetual servitude contract. One will not find this point in the textbooks on the economic way of thinking, but the Johns Hopkins University economist Carl Christ made the point quite explicit in no less a forum than Congressional testimony:

Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources .... The institution of private property and free contract as we know it is modified to

permit individuals to sell or mortgage their persons in return for present and/or future benefits (Christ 1975, p. 334).

In spite of the efficiency losses, the voluntary contract to capitalize all of one's labor is now abolished:

Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself; he must *rent* himself at a wage (Samuelson 1976, p. 52).<sup>9</sup>

## Individual Alienation Contracts: The Coverture Marriage Contract

Another historical example of a personal alienation contract is the *coverture marriage contract* that “identified” the legal personality of the wife with that of the husband:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a *feme covert*, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture* (Blackstone 1959 (1765), section on husband and wife).

The baron–femme relationship established by the coverture marriage contract exemplified the identity fiction in past domestic law. A female was to pass from the cover of her father to the cover of her husband (the origin of today's vestiges where the bride's father “gives away” the bride to the groom and the bride takes the groom's family name)—always a “*femme covert*” instead of the anomalous “*femme sole*.” The identity fiction for the baron–femme relation was that “the husband and wife are one person in law” with the implicit or explicit rider, “and that one person is the husband.” A wife could own property and make contracts, but only in the name of her husband. Obedience counted as “fulfilling” the

contract to have the wife's legal personality subsumed under and identified with that of the husband.

## Collective Alienation Contracts: The Hobbesian *Pactum Subjectionis*

Democracy is not merely “government based on the consent of the governed,” since that consent might be to a pact of subjection or *pactum subjectionis*, wherein people alienate (not delegate) their decision-making sovereignty to a ruler. The political constitution of subjection (which turns a citizen into a subject) finds its classic expression in Hobbes, but the idea of an implicit or explicit non-democratic constitution again goes back to Antiquity.

Again we may begin the intellectual history with Roman law. The sovereignty of the Roman emperor was usually seen as being founded on a contract of rulership enacted by the Roman people. The Roman jurist Ulpian gave the classic and oft-quoted statement of this view in the *Institutes* of Justinian (1948):

Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority.<sup>10</sup>

The American constitutional scholar Edward S. Corwin noted the questions that arose in the Middle Ages about the nature of this pact:

During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view (Corwin 1955, p. 4, fn. 8).

It is precisely this question of *translatio* or *concessio*—alienation or delegation of the right of government in the contract—that is the key question, not consent versus coercion. Consent is on both sides of that alienation (*translatio*) versus delegation (*concessio*) framing of the ques-



tion—and thus the later Buchanan moved beyond the calculus of consent (1962) to the additional requirement that people remain the principals who only delegate their decision-making authority. The alienation version of the contract became a sophisticated tacit contract defense of non-democratic government wherever the latter existed as a settled condition. And the delegation version of the contract became the foundation for democratic theory.

The German legal thinker Otto von Gierke (1841–1921) was quite clear about the alienation-versus-delegation question:

This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute ... as to the legal nature of the ancient “*translatio imperii*” from the Roman people to the Princes. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise. ... On the one hand from the people’s abdication the most absolute sovereignty of the prince might be deduced, .... On the other hand the assumption of a mere “*concessio imperii*” led to the doctrine of popular sovereignty (Gierke 1966, pp. 93–94).

A state of government which had been settled for many years was seen as being legitimated by the tacit consent of the people. Thomas Aquinas (1225–74) expressed the canonical medieval view:

Aquinas had laid it down in his *Summary of Theology* that, although the consent of the people is essential in order to establish a legitimate political society, the act of instituting a ruler always involves the citizens in alienating—rather than merely delegating—their original sovereign authority (Skinner 1978, Vol. I, p. 62).

In about 1310, according to Gierke, “Engelbert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subjectionis* which satisfied a natural want and instinct” (1958, p. 146). Indeed, at least by the late Middle Ages,

there was developed a doctrine which taught that the State had a rightful beginning in a Contract of Subjection to which the People was party ....

Indeed that the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled could therefore be propounded as a philosophical axiom (Gierke 1958, pp. 38–40).

That idea passed over into the alienable natural law tradition. After noting that an individual could sell himself into slavery under Hebrew and Roman law, Hugo Grotius (1583–1645) extends the possibility to the political level:

Now if an individual may do so, why may not a whole people, for the benefit of better government and more certain protection, completely transfer their sovereign rights to one or more persons, without reserving any portion to themselves? (Grotius 1901 (1625), p. 63).

Thomas Hobbes made the best-known attempt to found non-democratic government on the consent of the governed. Without an overarching power to hold people in awe, life would be a constant war of all against all. To prevent this state of chaos and strife, men should join together and voluntarily alienate and transfer the right of self-government to a person or body of persons as the sovereign. This *pactum subjectionis* would be a

covenant of every man with every man, in such manner as if every man should say to every man, I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner (Hobbes 1958 (1651), p. 142).

The consent-based contractarian tradition is brought fully up to date in Robert Nozick's contemporary libertarian defense of the contract to alienate one's right of self-determination to a "dominant protective association."

In view of this history of apologetics for autocracy based on consent, the conventional distinction between coercion and government based on the "consent of the governed" was *not* the key to democratic theory. The real debate was within the sphere of consent and was between the alienation (*translatio*) and delegation (*concessio*) versions of the basic social or political

constitution. Late medieval thinkers such as Marsilius of Padua (1275–1342) and Bartolus of Saxoferrato (1314–57) laid some of the foundations for democratic theory in the distinction between consent that establishes a relation of delegation versus consent to an alienation of authority:

The theory of popular sovereignty developed by Marsiglio (Marsilius) and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher status than that of an official appointed by, and capable of being dismissed by, his own subjects (Skinner 1978, Vol. I, p. 65).

As Marsilius put it:

The aforesaid whole body of citizens or the weightier part thereof is the legislator regardless of whether it makes the law directly by itself or entrusts the making of it to some person or persons, who are not and cannot be the legislator in the absolute sense, but only in a relative sense and for a particular time and in accordance with the authority of the primary legislator (Marsilius 1980 (1324), p. 45).

According to Bartolus, the citizens “constitute their own *princeps*,” so any authority held by their rulers and magistrates “is only delegated to them (*concessum est*) by the sovereign body of the people” (Skinner 1978, Vol. I, p. 62).

Quentin Skinner, writing in the civic republican tradition, continually emphasized the alienation-versus-delegation theme in his two volumes, *The Foundations of Modern Political Thought* (1978). Yet other modern intellectual historians, such as Jonathan Israel (e.g., 2010) writing in more the conventional liberal tradition, have covered the same history of democratic thought and yet ignore the alienation-versus-delegation theme<sup>11</sup> in favor of the emphasis on the consent of the governed as if that were sufficient to entail democratic government.<sup>12</sup> This is in spite of Gierke pointing out that at least by the late Middle Ages, it was “propounded as a philosophic axiom” that “the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled.”

This highlights the importance of James Buchanan, in his mature work, of seeing classical liberalism as requiring social-organizational arrangements that are not only voluntary but have people remaining as sovereigns or as principals only delegating their decision-making authority. That establishes a theoretical bond between classical liberalism and democracy:

To Plato there are natural slaves and natural masters, with the consequences that follow for social organization, be it economic or political. To Adam Smith, by contrast, who is in this as in other aspects the archetype classical liberal, the philosopher and the porter are natural equals with observed differences readily explainable by culture and choice (Buchanan 2005, p. 67).

This natural equality means the sovereigns-or-principals principle would apply to all and thus would rule out governance arrangements based on a voluntary contract of alienation of governance rights:

The postulate of natural equality carries with it the requirement that genuine classical liberals adhere to democratic principles of governance; political equality as a necessary norm makes us all small ‘d’ democrats (Buchanan 2005, p. 69).

This implication of Buchanan’s version of *democratic* classical liberalism exposes a fault line that runs through today’s classical liberal and libertarian thinkers. For instance, it would rule out the non-democratic governance contract to be agreed to “for the benefit of better government and more certain protection” by voluntarily moving to a charter city, a startup city, a shareholder state, or a seastead city—all of which are widely supported by free-market thinkers along classical liberal, libertarian, or Austrian lines:

(I)f one starts a private town, on land whose acquisition did not and does not violate the Lockean proviso (of non-aggression), persons who chose to move there or later remain there would have no right to a say in how the town was run, unless it was granted to them by the decision procedures for the town which the owner had established (Nozick 1974, p. 270).

The libertarian bottom line is that government must be based on consent which includes the possibility of exit when consent is withdrawn. Libertarianism is, of course, not against democratic government; the point is that democracy is only one choice among other consent-based rule-of-law governments. The point is that there should be a “democratizing choice of law, governance, and regulation”<sup>13</sup> which includes well-regulated non-democratic enclaves like old Hong Kong and new Dubai. Libertarian models of consent-based non-democratic municipal or state governments include the notion of “free cities” or “startup cities,” proprietary cities, Patri Friedman’s floating seastead cities, Paul Romer’s charter cities, or “shareholder states” (Tyler Cowen’s phrase) all of which see the resident-subjects as having agreed to a *pactum subjectionis* as evidenced by their voluntary decision to move to and remain in the city or state (assuming free exit).

The philosophical defense of charter/startup cities (e.g., Freiman 2013) also applies the solely economic way of thinking to the piecemeal voluntary alienation of decision-making in the selling of votes:

Under normal conditions voluntary economic exchange is *ex ante* mutually beneficial. A trade is not consummated unless both parties expect to benefit. I will exchange a quarter for an apple only if I value the apple more than the quarter and an apple seller will exchange an apple for my quarter only if she values the quarter more than the apple. The same analysis applies to votes. I’ll sell my vote for  $n$  dollars only if I value  $n$  dollars more than my vote and the buyer will buy my vote for  $n$  dollars only if she values my vote more than  $n$  dollars. All things equal, vote markets leave both buyers and sellers better off (Freiman 2014, p. 3).<sup>14</sup>

## Inalienable Rights: Minimum Constraints on the Economic Way of Thinking

### The Self-Sale Contract and the *Pactum Subjectionis*

We have seen that the debate about slavery and non-democratic government was not a simple consent-versus-coercion debate. From Antiquity down to the present, there were consent-based arguments for slavery and

autocracy as being founded on certain explicit or implicit contracts. The abolitionist and democratic movements needed to answer not just the worst but the “best” arguments based on explicit or implicit voluntary contracts.

In contrast to the faux “liberal doctrine of inalienable rights” developed by Locke, Blackstone, and Montesquieu, the abolitionist and democratic movements developed arguments that there was something inherently invalid in the voluntary alienation contracts—even there might be mutual benefits, and thus that the rights which these contracts pretended to alienate were in fact inalienable. The theory of inalienable rights gives minimum constraints on the economic-way-of-thinking arguments applied to personal alienation contracts such as the voluntary self-sale contract and the collective pact of subjection (and, one might add, the coverture marriage contract) which are already abolished.

The key is that in consenting to such an alienation contract, a person is agreeing to, in effect, take on the legal role of a non-adult, indeed, a non-person or thing. Yet all the consent in the world would not in fact turn an adult into a minor or person of diminished capacity, not to mention, turn a person into a thing. The most the person could do was obey the master, sovereign, or employer—and the authorities would “count” *that* as fulfilling the contract. Then all the legal rights and obligations would be assigned according to the “contract” (as if the person in fact had diminished or no capacity). But since the person remained a *de facto* fully capacitated adult person with only the legal-contractual role of a non-person, the contract was impossible and invalid. A system of positive law that accepted such contracts was only a legalized fraud on an institutional scale.

Applying this argument requires prior analysis to tell when a contract puts a person in the legal role of a non-person. Having the role of a non-person is not necessarily explicit in the contract and it has nothing to do with the payment in the contract, the incompleteness of the contract, or the like. Persons and things can be distinguished on the basis of decision-making and responsibility. For instance, a genuine thing such as a tool like a shovel can be alienated or transferred from person A to B. Person A, the owner of the tool, can indeed give up making decisions about the use of the tool and person B can take over making those decisions. Person A does not have the responsibility for the consequences of the employment of the tool by person B. Person B makes the decisions about using

the tool and has the de facto responsibility for the results of that use. Thus a contract to sell or rent a tool such as a shovel from A to B can actually be fulfilled. The decision-making and responsibility for employing the tool can *in fact* be transferred or alienated from A to B.

But now replace the tool by person A himself or herself. Suppose that the contract was for person A to sell or rent himself or herself to person B—as if a person was a transferable or alienable instrument that could be “employed” by another person like a shovel might be employed by others. The *pactum subjectionis* is a collective version of such a contract but it is easier to understand the individualistic version. The contract could be perfectly voluntary. For whatever reason and compensation, person A is willing to take on the legal role of a talking instrument (to use Aristotle’s phrase). But the person A cannot in fact transfer decision-making or responsibility over his or her own actions to B. The point is not that a person should not or ought not do it or that the person is not paid enough; the point is that a person *cannot* in fact make such a voluntary transfer. At most, person A can agree to cooperate with B by doing what B says—even if B’s instructions are quite complete. But that is no alienation or transference of decision-making or responsibility. Person A is still inexorably involved in ratifying B’s decisions and person A inextricably shares the de facto responsibility for the results of A’s and B’s joint activity—as everyone recognizes in the case of a hired criminal.

Yet a legal system could “validate” such a (non-criminous) contract and could “count” obedience to the master or sovereign as “fulfilling” the contract and then rights are structured *as if* it were actually fulfilled, that is, as if the person were actually of diminished or no capacity. But such an institutionalized fraud always has one revealing moment when anyone can see the legal fiction behind the system. That is when the legalized “thing” would commit a crime. Then the “thing” would be suddenly metamorphosed—in the eyes of the law—back into being a person to be held legally responsible for the crime. For instance, an ante-bellum Alabama court asserted that slaves

are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are ... incapable of performing civil acts, and, in reference to all such, they are things, not persons (Catterall 1926, p. 247).

Since there was no legal theory that slaves *physically* became things in their “civil acts,” the fiction involved in treating the slaves as “things” was clear. And this is a question of the facts about human nature, facts that are unchanged by consent or contract. If the slave had acquired that legal role in a voluntary contract, it would not change the fact that the contractual slave remained a *de facto* person with the law only “counting” the contractual slave’s non-criminous obedience as “fulfilling” the contract to play the legal role of a non-responsible entity, a non-person or thing.

## The Self-Rental Contract

The surprising and controversial result is that the inalienability argument applies as well to the self-rental contract—that is, today’s employment contract—as to the self-sale contract or pact of subjection.<sup>15</sup> I can certainly voluntarily agree to a contract to be “employed” by an “employer” on a long- or short-term basis, but I cannot in fact “transfer” my own actions for the long or short term. The factual inalienability of responsible human action and decision-making is independent of the duration of the contract. That factual inalienability is also independent of the compensation paid in the contract—which is why this inalienability analysis has *nothing* to do with exploitation theories of either the Marxian variety (extracting more labor time than is embodied in the wages) or neoclassical variety (paying wages less than the value of the marginal productivity of labor).

Where the legal system “validates” such contracts, it must fictitiously “count” one’s inextricably co-responsible cooperation with the “employer” as fulfilling the employment contract—unless, of course, the employer and employee commit a crime together. The servant in work then morphs into the co-responsible partner in crime:

All who participate in a crime with a guilty intent are liable to punishment. A master and servant who so participate in a crime are liable criminally, not because they are master and servant, but because they jointly carried out a criminal venture and are both criminous (Batt 1967, p. 612).

When the “venture” being “jointly carried out” by the employer and employee is not criminous, then the *facts* about human responsibility are unchanged. But then the fiction takes over. The joint venture or partner-



ship is transformed into the employer's sole venture. The employee is legally transformed from being a co-responsible partner to being only an input supplier sharing no legal responsibility for either the input liabilities or the produced outputs of the employer's business.

## Some Intellectual History of Inalienable Rights

Where has this key insight—that a person cannot voluntarily fit the legal role of a non-person (e.g., the *de facto* inalienability of responsible agency)—erupted in the history of thought? The Ancients did not see this matter clearly. For Aristotle, slavery was based on “fact”; some adults were seen as being inherently of diminished capacity if not as “talking instruments” marked for slavery “from the hour of their birth.” Treating them as slaves was no more inappropriate for Aristotle than treating a donkey as a non-person.

The Stoics held the radically different view that no one was a slave by their nature; slavery was an *external* condition juxtaposed to the internal freedom of the soul. After being essentially lost during the Middle Ages, the Stoic doctrine that the “inner part cannot be delivered into bondage” (Davis 1966, p. 77) re-emerged in the Reformation doctrine of liberty of conscience. Secular authorities who try to compel belief can only secure external conformity:

Besides, the blind, wretched folk do not see how utterly hopeless and impossible a thing they are attempting. For no matter how much they fret and fume, they cannot do more than make people obey them by word or deed; the heart they cannot constrain, though they wear themselves out trying. For the proverb is true, “Thoughts are free.” Why then would they constrain people to believe from the heart, when they see that it is impossible? (Luther 1942 (1523), p. 316).

Martin Luther was explicit about the *de facto* element; it was “impossible” to “constrain people to believe from the heart.”:

Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith

or unbelief. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force (ibid.).

Although an atheist and a Jew, it was perhaps Benedict de Spinoza (1632–1677) who first translated the Protestant doctrine of the inalienability of conscience into the political notion of a right that could not be ceded “even with consent.” In Spinoza's 1670 *Theologico-Political Treatise*, he spelled out the essentials of the inalienable rights argument:

However, we have shown already (Chapter XVII) that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do. For this reason government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions should actuate men in their worship of God. All these questions fall within a man's natural right, which he cannot abdicate even with consent (Spinoza 1951, p. 257).

But it was Francis Hutcheson (1694–1746), the predecessor of Adam Smith in the chair in moral philosophy in Glasgow and one of the leading moral philosophers of the Scottish Enlightenment, who (independently?) arrived at the same idea in the form that was to later enter the political lexicon through the American Declaration of Independence. Although intimated in earlier works (1725), the inalienability argument is best developed in Hutcheson's influential *A System of Moral Philosophy*:

Our rights are either *alienable*, or *unalienable*. The former are known by these two characters jointly, that the translation of them to others can be made effectually, and that some interest of society, or individuals consistently with it, may frequently require such translations. Thus our right to our goods and labours is naturally alienable. But where either the translation cannot be made with any effect, or where no good in human life requires it, the right is unalienable, and cannot be justly claimed by any other but the person originally possessing it (Hutcheson 1755, p. 261).

Hutcheson appeals to the inalienability argument in addition to utility. He contrasts de facto alienable goods where “the translation of them to others can be made effectually” (like the aforementioned shovel) with factually inalienable faculties where “the translation cannot be made with any effect.” This was not just some outpouring of moral emotions that one should not alienate this or that basic right. Hutcheson actually set forth a *theory* which could have legs of its own far beyond Hutcheson’s (not to mention Luther’s) intent. He based the theory on what in fact could or could not be transferred or alienated from one person to another. Hutcheson goes on to show how the “right of private judgment” is inalienable:

Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable (Hutcheson 1755, pp. 261–62).

Democratic theory carried over this theory from the inalienability of conscience to a critique of the Hobbesian *pactum subjectionis*, the contract to alienate and transfer the right of self-determination as if it were a property right that could be transferred from a people to a sovereign:

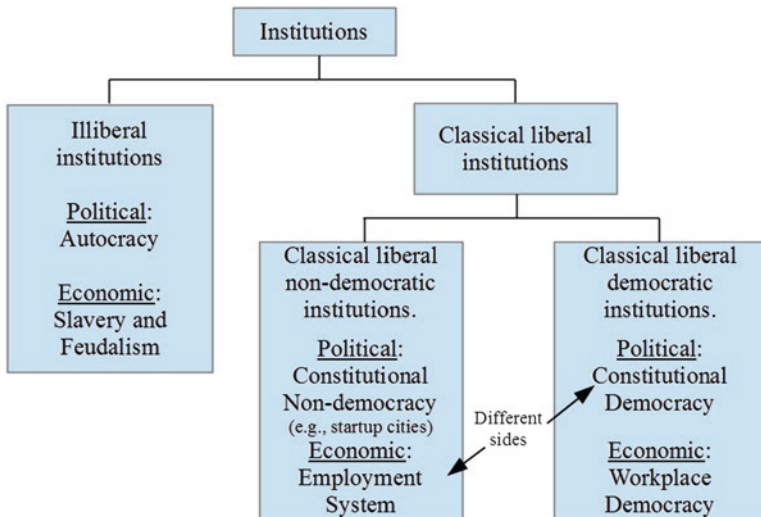
There is, at least, one right that cannot be ceded or abandoned: the right to personality. Arguing upon this principle the most influential writers on politics in the seventeenth century rejected the conclusions drawn by Hobbes. They charged the great logician with a contradiction in terms. If a man could give up his personality he would cease being a moral being. ... This fundamental right, the right to personality, includes in a sense all the others. To maintain and to develop his personality is a universal right. It ... cannot, therefore, be transferred from one individual to another. ... There is no *pactum subjectionis*, no act of submission by which man can give up the state of a free agent and enslave himself (Cassirer 1963, p. 175).

Few have seen these connections as clearly as Staughton Lynd in his *Intellectual Origins of American Radicalism* (1969). When commenting on Hutcheson’s theory, Lynd noted that when “rights were termed ‘unalienable’ in this sense, it did not mean that they could not be transferred without consent, but that their nature made them untransferrable”

(Lynd 1969, p. 45).<sup>16</sup> The crucial link was to go from the de facto inalienable liberty of conscience to a *theory* of inalienable rights based on the same idea:

Like the mind’s quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human. (Lynd 1969, pp. 56–57)

In the American Declaration of Independence, “Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important” (Wills 1979, p. 213). But the theory behind the notion of inalienable rights was lost in the transition from the Scottish Enlightenment to the slave-holding society of ante-bellum America. The phraseology of “inalienable rights” is a staple in our political culture, for example, our 4th of July rhetoric, but the original theory of inalienability has been largely ignored or forgotten (Fig. 2).<sup>17</sup>



**Fig. 2** Reframing that separates non-democratic and democratic classical liberalism

## The Implications for Today's Social-Organizational Structures

After this long “detour” through intellectual history, we must return to the main theme of how the virtues of individual self-regarding activity in the marketplace might generalize to the virtues of collective activity by people in their own organizations. We have taken James M. Buchanan's description of the normative basis for classical liberalism as the framework to apply to the theme. We have also noted that Buchanan's mature thought moved beyond the mere calculus of consent in the solely economic way of thinking to the stronger requirement that people always remain sovereign or principals who only delegate decision-making authority. And we have noted how Buchanan's strictures implied democratic self-governance in contrast to the currents of right-libertarianism and Austrian thought that accept the consent of the governed to non-democratic governance, for example, startup cities.

In many modern discussions of associative and deliberative democracy (e.g., in the tradition of Tocqueville), there is a curious “dog that didn't bark.” The emphasis is rightly on the associative activities of citizens who come together for discussion, dialogue, deliberation, and responsible action to address problems that they cannot resolve at the level of the individual or the family. People create many associations for collective action: church groups, charities, issue-oriented non-profits, unions, social clubs, hobby groups, political parties, and ad hoc special-purpose groups. People might participate after-hours in these various Tocquevillean associations to try to accomplish together what they cannot accomplish individually.

But that list of non-governmental associations leaves out the one organization that dominates most people's lives outside the family, namely, the workplace.<sup>18</sup> That lacuna corresponds to the curious classification of non-governmental organizations into the second sector of private workplace organizations and the third sector of “non-profit” organizations.

Of course, some people work for themselves or in small family firms so those workplaces are only a marginal extension of family life. But most people work in larger organizations requiring the concerted associated

activities of many non-family members. These work organizations provide the primary sites, outside the family, where people acquire mental habits and social skills and where they engage in effective collective activities.

Almost all workplaces are organized on the basis of the employment contract. In common usage, to have an income-producing job is to be “employed.” Indeed, Ronald Coase (1910–2013) identifies the nature of the firm with the “legal relationship normally called that of ‘master and servant’ or ‘employer and employee’” (1937, p. 403).<sup>19</sup>

In the employment contract, the employees are not Buchanan’s principals; they do not delegate decision-making authority to the employer. The employer is not the representative or delegate of the employees; the employer does not manage the organization in the name of those who are managed. The employees are not directly or indirectly part of the decision-making group; the employees have alienated and transferred to the employer the discretionary decision-making rights over their activities within the scope of the employment contract. In short, the employment contract is the limited *pactum subjectionis* of the workplace.

The form of workplace organization that would satisfy the strictures of Buchanan’s liberalism is one where all the people working in a firm are the members or workplace citizens. That requires re-constituting the corporation as a democratic organization; the workplace citizens are the principals who only delegate decision-making authority to the managers.

## Two Earlier Liberal Philosophers

### John Stuart Mill

To see the context and corroboration for Buchanan’s normative framework, we might consider the work of two earlier liberal philosophers, John Stuart Mill (1806–1873) and John Dewey.

Mill argued that social institutions should be judged in large part by the degree to which they “promote the general mental advancement of the community, including under that phrase advancement in intellect, in virtue, and in practical activity and efficiency” (Mill 1972, Chapter 6).

Mill saw government by discussion as an “agency of national education” and mentioned “the practice of the dicastery and the ecclesia” in ancient Athens as institutions that developed the active political capabilities of the citizens.

In his *Principles of Political Economy*, Mill considered how the form of work would affect those capabilities and how the workplace association could become a school for the civic virtues if it progressed beyond the employment relation:

But if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured. The aim of improvement should be not solely to place human beings in a condition in which they will be able to do without one another, but to enable them to work with or for one another in relations not involving dependence (Mill 1899, *Book IV*, Chapter VII).

Previously those who lived by labor and were not individually self-employed would have to work “for a master,” that is, would not be a principal in their work activity:<sup>20</sup>

But the civilizing and improving influences of association, ..., may be obtained without dividing the producers into two parties with hostile interests and feelings, the many who do the work being mere servants under the command of the one who supplies the funds, and having no interest of their own in the enterprise except to earn their wages with as little labor as possible (Mill 1899, *Book IV*, Chapter VII).

One halfway house in this direction would be various forms of association between capital and labor:

The form of association, however, which if mankind continue to improve, must be expected in the end to predominate, is not that which can exist between a capitalist as chief, and workpeople without a voice in the management, but the association of the labourers themselves on terms of equality, collectively owning the capital with which they carry on their operations, and working under managers elected and removable by themselves (Mill 1899, *Book IV*, Chapter VII).

Under this form of cooperation, Mill sees an increase in the productivity of work since the workers then have the enterprise as “their principle and their interest.”:

It is scarcely possible to rate too highly this material benefit, which yet is as nothing compared with the moral revolution in society that would accompany it: the healing of the standing feud between capital and labour; the transformation of human life, from a conflict of classes struggling for opposite interests, to a friendly rivalry in the pursuit of a good common to all; the elevation of the dignity of labour; a new sense of security and independence in the labouring class; and the conversion of each human being’s daily occupation into a school of the social sympathies and the practical intelligence (Mill 1899, *Book IV*, Chapter VII).

What Mill sees as happening in the democratic workplace echoes what he earlier found in Tocqueville’s description of the educational effect of the New England township. In Tocqueville’s words:

Nevertheless local assemblies of citizens constitute the strength of free nations. Town-meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty (Tocqueville 1961, Chap. V, p. 55).

As Mill expanded on the point:

In this system of municipal self-government, coeval with the first settlement of the American colonies...our author (Tocqueville) beholds the principal instrument of that political education of the people, which alone enables a popular government to maintain itself, or renders it desirable that it should. It is a fundamental principle in his political philosophy, as it has long been in ours, that only by the habit of superintending their local interests can that diffusion of intelligence and mental activity, as applied to their joint concerns, take place among the mass of the people, which can qualify them to superintend with steadiness or consistency the proceedings of their government, or to exercise any power in national affairs except by fits, and as tools in the hands of others (Mill 1961 (1835), p. xvii).



## John Dewey

A century later, John Dewey emphasized the formative implications of people's daily activity in an industrial society:

For illustration, I do not need to do more than point to the moral, emotional and intellectual effect upon both employers and laborers of the existing industrial system. ... I suppose that every one who reflects upon the subject admits that it is impossible that the ways in which activities are carried on for the greater part of the waking hours of the day, and the way in which the share of individuals are involved in the management of affairs in such a matter as gaining a livelihood and attaining material and social security, can not but be a highly important factor in shaping personal dispositions; in short, forming character and intelligence (Dewey in: Ratner 1939, pp. 716–17).

Do these primary sites for outside-the-family socialization and development foster the virtues of associative democracy? While “democratic social organization make provision for this direct participation in control: in the economic region, control remains external and autocratic” (Dewey 1916, p. 260),

[c]ontrol of industry is from the top downwards, not from the bottom upwards. The greater number of persons engaged in shops and factories are “subordinates.” They are used to receiving orders from their superiors and acting as passive organs of transmission and execution. They have no active part in making plans or forming policies—the function comparable to the legislative in government—nor in adjudicating disputes which arise. In short their mental habits are unfit for accepting the intellectual responsibilities involved in political self-government (Dewey and Tufts 1932, pp. 392–393).

From his earliest writings in 1888 to his mature years, Dewey's liberalism saw democracy as a norm applicable to all spheres of human activity, not just to the political sphere:

(Democracy) is but a name for the fact that human nature is developed only when its elements take part in directing things which are common,

things for the sake of which man and women form groups—families, industrial companies, governments, churches, scientific associations and so on. The principle holds as much of one form of association, say in industry and commerce, as it does in government (Dewey 1948, p. 209).

It should not be too much of a surprise that the normative framework of James M. Buchanan's classical liberalism has the same implications for Tocqueville's "science of associations" in this regard as Mill and Dewey<sup>21</sup> even though the full implications were not explicitly drawn.<sup>22</sup>

## Re-constitutionalizing the Corporation

People are involved in effective collective action all day long in their work associations. But today the structure of most companies of any size—namely, the employment relation with the "employer" being the absentee "owners" on the stock market—institutionalizes irresponsibility by disconnecting the far-flung shareholders from the social and environmental impact of their "corporate governance."<sup>23</sup> Or viewed the other way around, that employment structure prevents the local managers and staff in widely held companies from being the principals to use the main outside-the-family organizational involvement to address local problems. That institutionalized irresponsibility in turn increases the need for a stronger third sector to address the resulting social problems.

There have been a few social commentators who have pointed out the institutionalized irresponsibility of the *absentee-owned* joint stock corporation. In his 1961 book aptly entitled *The Responsible Company*, George Goyder quoted a striking passage from Lord Eustace Percy's *Riddell Lectures* in 1944:

Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise—the association of shareholders, creditors and directors—is incapable of production and is not expected by the law to

perform these functions. We have to give law to the real association, and to withdraw meaningless privilege from the imaginary one (Percy 1944, p. 38; quoted in Goyder 1961, p. 57).

This elemental solution re-constitutionalizes the corporation so that the “human association which in fact produces and distributes wealth” is recognized in law as the legal corporation where the ownership/membership in the company would be assigned to the “workmen, managers, technicians and directors” who work in the company.

## Conclusion

That would change everything—including essentially abolishing much of the distinction between the second sector and the third sector. The natural site of collective action for people to address their own community problems would be where people are involved in effective collective action all day long: their work organization. When firms are organized as workplace democracies, then *that* is the natural generalization of sovereign individuals acting in the marketplace—so ably described in the classical liberal economic way of thinking—to associated individuals acting as *the principals in their own organizations*.

## Notes

1. The phrase “external organization” does not apply to associations where people join together to apply their collective efficacy to address some problems of their own; it applies to organizations, particularly those with a paid staff, tasked to help others. The aim of a helping agency should be to do itself out of a job—which is rather difficult for a professionally staffed organization of any type. See Ellerman (2005) for a development of this theme along with a philosophical analysis of why it is so difficult for such external helping organizations to actually “help people help themselves.”
2. See Laslett (1960), notes on §24, pp. 325–26.

3. Locke, Montesquieu, and Blackstone are not arbitrary choices. When discussing Adam Smith's classical liberalism, Frank Knight noted: "Interestingly enough, the political and legal theory had been stated in a series of classics, well in advance of the formulation of the economic theory by Smith. The leading names are, of course, Locke, Montesquieu, and Blackstone" (Knight 1947, p. 27, fn. 4).
4. For more of this development, see Ellerman (1992 or 2010).
5. It is a re-validation since in the decade prior to the Civil War, there was explicit legislation in six states "to permit a free Negro to become a slave voluntarily" (Gray 1958, p. 527; quoted in Philmore 1982, p. 47). For instance in Louisiana, legislation was passed in 1859 "which would enable free persons of color to voluntarily select masters and become slaves for life" (Sterkx 1972, p. 149).
6. David Boaz (2011) reports that Tom Palmer said that David Schmidtz said at a Cato Institute forum in 2002 that:

Nozick told him that his alleged "apostasy" was mainly about rejecting the idea that to have a right is necessarily to have the right to alienate it, a thesis that he had reconsidered, on the basis of which reconsideration he concluded that some rights had to be inalienable. That represents, not a movement away from libertarianism, but a shift toward the mainstream of libertarian thought.

In his own book on libertarian theory, Palmer traces the "mainstream of libertarian thought" (2009, p. 457) about inalienable rights back to Locke's treatment.

7. See, for example, Genovese (1971), Wish (1960), or Fitzhugh (1960).
8. For a more complete story, see Philmore (1982) or Ellerman (2010).
9. This may seem an unusual use of "rent" but "hiring a car" in the U. K. and "renting a car" in the U.S. are the same thing. As Paul Samuelson (1915–2009) goes on to explain:

One can even say that wages are the rentals paid for the use of a man's personal services for a day or a week or a year. This may seem a strange use of terms, but on second thought, one recognizes that every agreement to hire labor is really for some limited period of time. By outright purchase, you might avoid ever renting any kind of land. But in our society, labor is one of the few productive factors that cannot legally be bought outright. Labor can only be rented, and the wage rate is really a rental (1976, p. 569).

10. *Institutes*, Lib. I, Tit. II, 6; Quoted in: Corwin (1955, p. 4).
11. Often the liberal literature just fudges or ignores the alienation-versus-delegation distinction by describing either type of contract as “giving up rights” to the government or as establishing “hierarchy.”
12. Again, this follows the intellectual pattern set by Locke who had no genuine inalienable rights theory to counter Hobbes so he ignored Hobbes and took Robert Filmer (1588–1653) as his foil since Filmer’s patriarchal theory (1680) did not require the consent of the governed anymore that the father’s governance over his children requires the consent of the children.
13. This phrase was used without apparent irony in an earlier version of the free cities website. In the current version of the *startup cities site*, the phrase is “democratizing access to law and governance.” Even though the subjects have no vote, the startup cities nevertheless have “democratic accountability by giving people the ability to raise their voice through the power of exit.”
14. See also: <http://bleedingheartlibertarians.com/2014/03/vote-markets/>. As James Tobin grudgingly noted: “Any good second year graduate student in economics could write a short examination paper proving that voluntary transactions in votes would increase the welfare of the sellers as well as the buyers” (Tobin 1970, p. 269; quoted in: Ellerman 1992, p. 100).
15. This has generated a minor industry of thinkers who develop ad hoc arguments against the perpetual service contract (e.g., the rule against perpetuities supposedly rules out all “till death do us part” contracts) but not against the time-limited person rental contract. These arguments are dealt with from a Nozickian perspective by J. Philmore who concludes with what libertarians would take as a *reductio ad absurdum*: “Any thorough and decisive critique of voluntary slavery or constitutional non-democratic government would carry over to the employment contract—which is the voluntary contractual basis for the free market free enterprise system” (1982, p. 55).
16. The fact that the inalienability of conscience was rooted in the aspects of personhood that do not change with consent or contract was expressed with great clarity by the New Light minister Elisha Williams in 1744:

No action is a religious action without understanding and choice in the agent. Whence it follows, the rights of conscience are sacred and equal in all, and strictly speaking unalienable. This *right of judging*

*every one for himself in matters of religion* result from the nature of man, and is so inseparably connected therewith, that a man can no more part with it than he can with his power of thinking: and it is equally reasonable for him to attempt to strip himself of the power of reasoning, as to attempt the vesting of another with this right. And whoever invades this right of another, be he pope or Caesar, may with equal reason assume the other's power of thinking, and so level him with the brutal creation. A man may alienate some branches of his property and give up his right in them to others; but he cannot transfer the right of conscience, unless he could destroy his rational and moral powers (Williams 1998, p. 62).

See also Smith (2013, pp. 88–94) on inalienability which includes references to Williams.

17. These and related “forgotten” ideas are developed at book length with a focus on economic theory in Ellerman (1992) which was published in a series co-edited by the late neo-Austrian economist, Don Lavoie, who described the theory in his acceptance letter as follows:

The book's radical re-interpretation of property and contract is, I think, among the most powerful critiques of mainstream economics ever developed. It undermines the neoclassical way of thinking about property by articulating a theory of inalienable rights, and constructs out of this perspective a ‘labor theory of property’ which is as different from Marx's labor theory of value as it is from neoclassicism. It traces roots of such ideas in some fascinating and largely forgotten strands of the history of economics. It draws attention to the question of ‘responsibility’ which neoclassicism has utterly lost sight of. ...It constitutes a better case for its economic democracy viewpoint than anything else in the literature (Lavoie 1991, pp. 1–2).

18. Cornuelle (1991) is a welcome exception to the rule.
19. The older name of the relation was the “master-servant” relation but, aside from a few law books on agency law that use the “master-servant” language as technical terms (e.g., Batt 1967), that usage was slowly replaced in the late nineteenth century and early twentieth century with the Newspeak terms of “employer” and “employee.”
20. Kant considered working for a master in the master-servant relation as being so subordinating as to disqualify one for a civic personality.

Apprentices to merchants or tradesmen, servants who are not employed by the state, minors (*naturaliter vel civiliter*), women in general and all those who are obligated to depend for their living (i.e., food and protection) on the offices of others (excluding the state)—all of these people have no civil personality,.... (Kant 1991 (1797), p. 126, Section 46).

21. Note how the implications of Buchanan's *principals principle* gives essentially the same results as Dewey's democratic "principle (that) holds as much of one form of association, say in industry and commerce, as it does in government."
22. This is much like Jefferson and the Founding Fathers who enunciated the principle of inalienable rights, but did not apply it to the peculiar institution of their time.
23. As was noted long ago (for example, Scitovsky 1951), there is no reason for the entrepreneur or family firm to take profits as the sole maximizing goal (although costs, of course, have to be covered for long-term sustainability). But with scattered absentee owners, profit seems to be the only thing that they can agree on in general. Hence profit maximization has been canonized as "the goal" of the firm when in fact it is only an artifact of a particular organizational form.

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