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JAMES M. BUCHANAN AND DEMOCRATIC CLASSICAL LIBERALISM

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ABSTRACT

Nancy MacLean's book, Democracy in Chains, *raised questions about James M. Buchanan's commitment to democracy. This chapter investigates the relationship of classical liberalism in general and of Buchanan in particular to democratic theory. Contrary to the simplistic classical liberal juxtaposition of "coercion vs. consent," there have been from Antiquity onward voluntary contractarian defenses of non-democratic government and even slavery – all little noticed by classical liberal scholars who prefer to think of democracy as just "government by the consent of the governed" and slavery as being inherently coercive. Historically, democratic theory had to go beyond that simplistic notion of democracy to develop a critique of consent-based non-democratic government, for example, the Hobbesian* pactum subjectionis. *That critique was based firstly on the distinction between contracts or constitutions of alienation (*translatio*) versus delegation (*concessio*). Then, the contracts of alienation were ruled out based on the theory of inalienable rights that descends from the reformation doctrine of inalienability of conscience down through the Enlightenment to modern times in the abolitionist and democratic movements. While he developed no theory of inalienability, the mature Buchanan explicitly allowed only a constitution of delegation, contrary to many modern classical liberals or libertarians who consider the choice between consent-based democratic or non-democratic governments (e.g., private cities or shareholder states) to be a pragmatic one. But Buchanan seems to not even realize that his at-most delegation* dictum

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would also rule out the employer–employee or human rental contract which is a contract of alienation "within the scope of the employment."

Keywords: Buchanan; non-democratic classical liberalism; contractual defenses of slavery and autocracy; alienation vs delegation contracts; inalienable rights; Nancy MacLean

INTRODUCTION

Nancy MacLean's book, *Democracy in Chains* (2017), raised serious questions about the commitment of James M. Buchanan (1919–2013) to political democracy. This essay focuses on the mature Buchanan's views on democracy rather than on MacLean's book itself.

There is a rather hidden fault-line that runs through classical liberalism concerning the question: does classical liberalism imply democracy or is there only a contingent relationship between classical liberalism and democracy? Accordingly, there are two rather different visions:

(1) democratic classical liberalism, that is, a vision of classical liberalism that entails democracy, and
(2) Non-democratic classical liberalism, that is, a vision of classical liberalism that is not against democracy but is also consistent with non-democratic governance based on consent and the rule of law(Arneson, 2004).

CLASSICAL LIBERALISM AND DEMOCRATIC THEORY: BAD INTELLECTUAL HISTORY

The conventional view is that, at least at first glance, liberalism[1] and democratic theory are natural bedfellows. Classical liberalism analyzes institutions and organizations using the framing that juxtaposes coercion to consent. If democracy is seen as "government based on the consent of the governed," then classical liberal and democracy are particularly congenial. As Georg Vanberg, a Buchanan scholar and President of the Public Choice Society (founded by Buchanan and Gordon Tullock) put it when defending Buchanan against his Duke colleague, Nancy MacLean:

> More fundamentally, Buchanan was emphatically committed to democracy if by democracy we understand the right of individuals to choose the political order under which they must live. (Vanberg, 2017)

And Buchanan certainly does consider that consent or right to choose as a necessary condition for a classical liberal social order.

> 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. (Buchanan, 1999, p. 288)

The Public Choice Society was first named the Committee on Non-market Decision-making (Wagner, 2017, p. 2). The non-market decision-making in the social organizations where most adults spend much of their waking hours is organized on the basis of the "legal relationship normally called that of 'master and servant' or 'employer and employee'" (Coase, 1937, p. 403) in the words of Buchanan's fellow Nobel laureate, Ronald Coase (1910–2013). Since the employer–employee relation is also based on consent,[2] it is seen in the standard classical liberal vision as the natural economic correlate of political democracy.

However, this rather standard picture is horrifically bad intellectual history. Since antiquity, there have been sophisticated defenses of non-democratic government and even slavery based on consent and contracts. Hence, we turn to brief descriptions of that intellectual history.

THE CONTRACTUAL DEFENSE OF SLAVERY

For Western jurisprudence, the story starts with Roman law as codified in the *Institutes* of Justinian (pp. 482–565):

> 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. (Justinian, 1948, 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 (1632–1694) 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. 186–187)

Manumission was an early repayment or cancellation of that debt. And Thomas Hobbes (1588–1679), for example, clearly saw a "covenant" in this 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.

Buchanan's intellectual mentor was Frank Knight (1885–1972) who was perhaps the most philosophically sophisticated economist to vigorously defend the current economic system in the name of classical liberalism. Knight pointed out that the foundations of classical liberalism, as he saw it, were laid well before Adam Smith:

> 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)

But John Locke (1632–1704) 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. (Locke, 1960 (1690), Second Treatise, Sec. 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.[3] 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."

Moreover, all three of these pillars of classical liberal thought condoned a voluntary slavery contract as long as it was civilized in the sense of having rights on both sides, for example, so the master did not have the right to kill the slave. Here are the three pertinent quotes that seem invisible to conventional classical liberal scholars (see Fig. 1).

> 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. (Locke, 1960 (1690), Second Treatise, Sec. 24)

> 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)

> 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 (1765), Sec. on "Master and Servant")

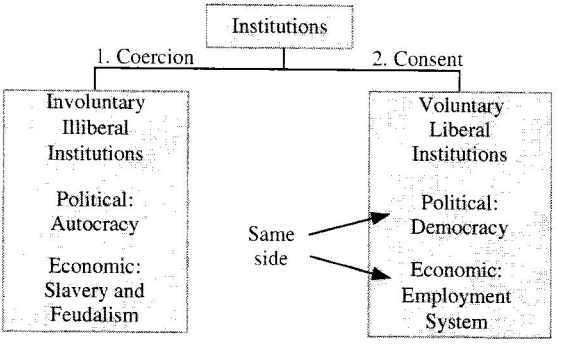

Fig. 1. The Standard Liberal Correlation of Political Democracy with the Employment System.

In the Antebellum debates over slavery, there were writers such as Rev. Samuel Seabury (1801–1872) who defended slavery on the contractual grounds that wherever slavery existed as a settled condition, then it could be seen as based on tacit consent to an implicit contract.

> 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 contractual defense of slavery has largely gone down the memory hole in the liberal intellectual history of the slavery debates. For instance, Eric McKitrick (1963) collected essays of fifteen pro-slavery writers, the just-retired President of Harvard University, Drew Gilpin Faust (1981) collected seven pro-slavery essays, and Paul Finkelman (2003) collected 17 pro-slavery writers, but *none* of them included 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. Unfortunately, the historical contractual defense of slavery just does not fit into the standard classical liberal narrative (Fig. 1), so it has to be "overlooked."

The defense of contractual slavery is brought up to date by today's most influential libertarian thinker, Harvard's late Professor Robert Nozick (1938–2002):

> 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)

Since the whole intellectual history of contractual slavery confounds the simplistic classical liberal narrative of "consent versus coercion," it can also be dismissed with a little word play by just defining slavery as being involuntary as is done by one of the thought-leaders at the Koch-funded Cato Institute: "'Voluntary slavery' is impossible, much as a spherical cube or a living corpse is impossible." (Palmer, 2009, p. 457)

THE CONTRACTUAL DEFENSE OF NON-DEMOCRATIC GOVERNMENT

The standard potted intellectual history by classical liberal scholars is as bad in "overlooking" the contractual defense for non-democratic "government based on the consent of the governed" as it is in overlooking the contractual defense of slavery.

As illustrated in Fig. 1, classical liberalism juxtaposes political democracy to some coercive form of government. But the best alternative to political democracy would be a government also based on consent to a non-democratic constitution that alienated and transferred a subject's self-governing rights to the governing or sovereign body. That sophisticated defense of non-democratic government has "always" been based on some implicit or explicit contract at least since the Roman *lex regia*.

> 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. (Corwin, 1955, quoted on p. 4) (Sabine, 1958, p. 171)

Such a social contract of governance was traditionally called a *pactum subjectionis* by which a people became subjects instead of citizens. The Hobbesian *pactum subjectionis* was a good example of a non-democratic government based on consent to 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)

John Locke in his defense of democratic government in the *Two Treatises* (1960 (1690)) did not compare it to the best alternative of a consent-based non-democratic government as espoused by his contemporary Thomas Hobbes. Locke prudently ignored Hobbes and used as his strawman, the patriarchic theory (1680) of Robert Filmer (1588–1653) where consent had no role.

Eventually, the consent-based defense of non-democratic government became rather standard. The great legal scholar, Otto von Gierke (1881–1921) showed that by the 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 philosophic axiom. (Gierke, Political Theories of the Middle Age 1958, pp. 38–40)

Or as the medieval scholar, Brian Tierney, put it: "The idea that licit rulership was conferred by consent of the community to be ruled was fairly commonplace at the beginning of the fourteenth century." (Tierney, 1997, p. 182) In spite of being a "philosophic axiom" and a "commonplace" idea by the late Middle Ages, it is surprising how many conventional liberal scholars today, for example, (Israel, 2010), think the case for democratic government is made by arguing for government based on the consent of the governed – in contrast to easily dismissible notions such as divine right, patriarchy, conquest, or the medieval notion of lordship and dominion.

Today, this alternative of a consent-based rule-of-law non-democratic government can be easily found in certain contemporary strands of libertarianism and anarcho-capitalism that promote a range of arrangements including a proprietary city, private city (Tabarrok & Rajagopalan, 2015), voluntary city (Beito, Gordon, & Tabarrok, 2002), startup city, free zone, charter city (Freiman, 2013), seastead city (Quirk & Friedman, 2017), or even a shareholder state policed by private protection agencies. For instance, George Mason University economist, Tyler Cowen (who looms large in MacLean's book as the head of the Koch-funded Mercatus Center), opposes such a private shareholder state but only on pragmatic grounds as in the non-democratic school of classical liberalism.

> I think modern anarchy would indeed be "orderly," but I also think that private protection agencies would end up colluding and re-evolving into a form of coercive government [...], furthermore in a form that libertarians would find objectionable. I would much rather have the West's current democratic governments, for all their imperfections, than a for-profit "shareholder state," not to mention the transition costs and the uncertainties along the way. [...] In the meantime, we are seeking to rebuild the history we have. (Cowen, 2014)

In the municipal form of this idea, a new city would be built on land carved out from the sovereignty of any state (or afloat in international waters as in the seastead or "Waterworld" version) and, like old Hong-Kong or modern Dubai, it would be run by a non-democratic government. Consent to this form of government would be evidenced by voluntarily choosing to move to such a city, and exit would always be free.

> [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 CASE FOR DEMOCRATIC GOVERNANCE

Distinguishing the Democratic and Non-democratic Contracts

There is a principled case in favor of democratic governance (and against consent-based non-democratic governance) that descends from the Reformation and Enlightenment in the democratic movement. The case is based on distinguishing the democratic from the non-democratic contract or constitution and

then showing that there is something inherently invalid in the non-democratic contract.

Since the non-democratic and democratic versions of constitutional government were both based on (implicit or explicit) consent, what is the real difference between the two options? Pragmatic considerations? Quibbles about the quality of the consent? Rather *ad hoc* special pleas for the "standing, respectability, and autonomy interests" (Anderson, 2017, p. 133) of the governed or against their domination as in some strands of civic republican thought?

The fundamental difference between the two types of contracts emerged even in the Middle Ages. As Gierke put it:

> 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 Princeps. 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)

And Tierney concurs.

> In the centuries before Ockham, medieval jurists had argued endlessly, without ever reaching a consensus, about whether the Roman people alienated its rights in creating an emperor (the "translation theory") or merely conceded to the ruler the exercise of rights that remained with the people (the "concession theory"). (Tierney, 1997, p. 183)

And the American constitutional scholar, Edward S. Corwin concurs as well.

> 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)

Corwin provides the modern translation of *translatio* as *alienation*, and of *cessio* as *delegation*. The consent-based non-democratic constitution is a contract of *alienation*, while the consent-based democratic constitution is a *delegation*. Quentin Skinner's history of modern political theory (Skinner, 1978), in contrast to many other civic republican thinkers, continually highlights this alienation-versus-delegation distinction.

Here, we see the difference between the two fundamentally different forms of classical liberalism:

(1) the non-democratic form that allows for the *alienation* type of governance contract (e.g., the startup cities, seasteads, and shareholder states) and considers the choice between the non-democratic and democratic forms of consent-based government to be a pragmatic question; and
(2) the democratic form of classical liberalism that rules out the alienation contract and allows at most the *delegation* form of governance.

Now the remarkable aspect of the case at hand (MacLean's book) is that the mature Buchanan comes down in favor of democratic classical liberalism as

opposed to the non-democratic form by allowing at most a delegation contract instead of an alienation contract.

> 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)

The mature Buchanan "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals" which rules out all the consent-based rule-of-law schemes of the non-democratic strain of libertarianism and classical liberalism. However, Buchanan presents the "as either sovereigns or as principals" requirement as an *obiter dictum* without any supporting theory. But the history of democratic theory does provide a supporting theory – to which we now turn.

The Principled Argument against the Alienation Governance Contract

To argue for democracy on more than pragmatic or consequentialist grounds, one needs a principled argument that *rules out* the non-democratic consent-based contract of governance. What sort of argument would rule out a contract to alienate self-governing rights? This is a tough question for classical liberalism or libertarianism since its natural bent is not to abolish any voluntary contract but to promote a broader choice of contracts. Thus, Nozick allows a voluntary slavery contract, the usual human rental contract,[4] or any other voluntary contract between consenting adults. But there is an idea that looms large in Western thought and that implies the abolition of certain contracts, namely, the idea of inalienable rights.

Such an inalienable rights argument was indeed developed in the history of democratic and abolitionist thought. Before recovering that argument, some trivial abuses of the notion of "inalienable rights" need to be set aside. For instance, the notion of "inalienable rights" often degenerates into a way for a person to rhetorically signal that they think a certain right is *really* important and should be enforced by the government. Examples of these aspirational claims include the "inalienable" right to clean water, to a full education, and to a basic income. Another misuse of the phrase "inalienable rights" refers to rights that may not be taken away without one's consent. But that simply distinguishes between a right and a privilege that may be granted or rescinded. An *inalienable right* is one where the contract to alienate the right is inherently invalid, so the right may not be alienated *even with consent* – and is thus incomprehensible to many libertarians and classical liberals.

After the distinction between the governance contracts of alienation and of delegation were first articulated in the Middle Ages, the root of the inalienability theory to rule out the alienation contracts was to be discovered in the Reformation doctrine of the inalienability of conscience (where "conscience" means one's basic religious beliefs, not one's "inner moral voice"). The key

insight is that even if one accepts whatever the priest or Pope tells one to believe that is still inexorably or inalienably one's own decision to accept those beliefs.

> 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. (Luther, 1942 (1523), p. 316)

This inalienability of conscience is sometimes expressed in the slogan "No one can believe for another" – which Ernst Cassirer (1874–1945) takes as the "central principle of Protestantism" (The Question of Jean Jacques Rousseau, 1963b, p. 117) in the sense that the priest or Pope cannot determine another person's beliefs that is inalienably one's own decision. It should be noted that this is a very strong notion of inalienability that is part of being a person. The point is not that one *should not* give up that decision-making power by being dominated by a priest or Pope, but that as long as one remains a person, one *cannot* alienate such decision-making power. Your decision to believe what you are told is still inalienably your decision. As the modern philosopher, Karl Popper (1902–1994), put it:

> But if we have the physical power of choice, then the ultimate responsibility remains with us. It is our own critical decision whether to obey a command; whether to submit to an authority. (Popper, 1965, p. 26)

In addition to Ellerman (1993) or (2010), the intellectual historian of libertarian and classical liberal thought, George H. Smith, has independently recovered the *same* theory of inalienable rights from the democratic and abolitionist traditions.

> This argument (which has a long ancestry) illustrates the historical connection between inalienable rights and religious freedom – or "liberty of conscience," as it was often called. Although the ideological origins of liberal individualism were complex and multifaceted, this concern with the inalienable rights of conscience was the foundation from which many other features of the Lockean paradigm arose. [...] Emerging from the centuries-long struggle for religious freedom, the idea of conscience was gradually expanded by liberals to include other areas of social interaction. (Smith, The System of Liberty: Themes in the History of Classical Liberalism 2013, p. 111)

Smith also emphasizes that this is a strong notion of inalienability since it is part and parcel of our personhood.

> The sphere of inner liberty gradually developed into the notion of inalienable rights. As we have seen, an inalienable right cannot be surrendered or transferred by any means, including consent, because it derives from a person's nature as a rational and moral agent. For example, we cannot alienate our right to freedom of belief, because our beliefs cannot be coerced. Similarly, we cannot surrender our right of moral choice, because an action has moral significance only if it is freely chosen. Our beliefs and values fall within the sphere of inner liberty, the domain of conscience. This sphere is inseparable from our nature as rational and moral beings; it is what elevates us above animals to the status of persons. (Smith, The System of Liberty: Themes in the History of Classical Liberalism 2013, p. 114)

Although an atheist and a Jew, Benedict de Spinoza (1632–1677) was a key figure in translating the Reformation inalienability of conscience into a political theory of inalienable rights. Smith quotes two key passages from Spinoza.[5]

> Inward worship of God and piety in itself are within the sphere of everyone's private rights and cannot be alienated. (Spinoza, 1951 (1670), p. 245)

> However, we have shown already 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 (1670), p. 257)

The transition from the Reformation inalienability of conscience to a theory of inalienable rights (Ellerman, 2010) was also made (independently?) by Francis Hutcheson (1694–1746). 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." (1969, p. 45) 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)

And then "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" (Wills, 1979, p. 213).

> Although the appeal to inalienable rights first arose in the context of religious freedom, it was quickly extended to spheres other than religion, as we find in Jefferson's appeal to the inalienable rights of "Life, Liberty and the pursuit of Happiness." This was one of the most significant developments in the history of libertarian thought. (Smith, The American Revolution and the Declaration of Independence: The Essays of George H. Smith, 2017a,b, pp. 118–119)

George H. Smith correctly states that this theory was "one of the most significant developments in the history of libertarian [i.e., classical liberal] thought" since it provided the principled theory to rule out the alienation version of the consent-based social contract or constitution. Needless to say, many libertarians have yet to appreciate the significance of this development. Ernst Cassirer provides a good summary of this argument that rules out the non-democratic *pactum subjectionis*.

> 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. He would become a lifeless thing – and how could such a thing obligate itself – how could it

> make a promise or enter into a social contract? This fundamental right, the right to personality, includes in a sense all the others. [...] There is no *pactum subjectionis*, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation, he would give up that very character which constitutes his nature and essence: he would lose his humanity. (Cassirer, The Myth of the State 1963a,b, p. 175)

It is this principled theory that "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals" in a delegation. (Buchanan, 1999, p. 288)

WHERE DOES THIS LEAVE BUCHANAN?

James M. Buchanan was a complex figure. There seems to be little doubt that, as MacLean documents, Buchanan's prestige and views were used by others in ways that contradicted his professed theories. Consider the question of equality.

> 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)

> 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)

But the main issue of the MacLean book was Buchanan's views on democracy. Here, we saw that according to the professed views of the mature Buchanan, he was in fact one of the rare democratic classical liberals who (unlike, say, Tyler Cowen) ruled out non-democratic governance based on a contract of alienation rather than delegation.

However, this judgment must be qualified on two grounds. First, to rule out an alienation contract other than by an *obiter dictum*, one needs a theory of inalienable rights (or an equivalent notion of contractual invalidity), and Buchanan developed no such theory in spite of the key role of that theory in the history of democratic theory to answer the sophisticated contractual defenses of non-democratic governance.

Second, Buchanan was oddly unable to focus on the example of non-market decision-making that governs most adults' waking hours, the governance of economic firms under the employer–employee relationship. Unlike his mentor Frank Knight's almost obsessive concern with justifying the employment system, Buchanan essentially ignored it. This is doubly odd since his *obiter dictum* rules out the employment contract which is an alienation contract. Not even the most intellectually servile apologists for the human rental system think that the employer is the delegate, agent, or representative of the employees as principals. Buchanan's professed view is not just about political governance; it "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals." (Buchanan, 1999, p. 288)

Hence, we are left with the odd spectacle of the mature Buchanan professing a rather radical view that would rule out the economic system of human rentals

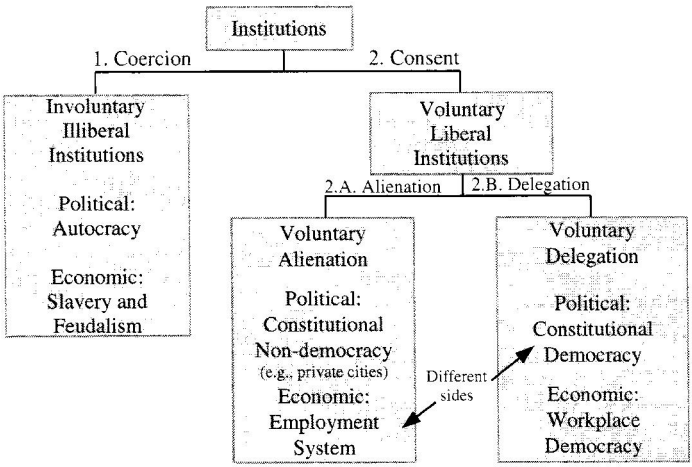

Fig. 2. Division of Governance Contracts into Alienation or Delegation.

in which he lived his whole life (and in which the Koch brothers have thrived), and he does not even seem to be aware of those implications. In democratic classical liberalism, the natural correlate (see Fig. 2) to constitutional democracy in the political sphere is workplace democracy in the economic sphere.

NOTES

1. Henceforth by "liberalism" I will mean "classical liberalism" in the European sense, not American "liberalism" as opposed to "conservatism."

2. This is by the usual juridical standards of consent. I am resisting the left-wing parlor game of escalating one's notion of "coercion" until the employment relation is seen as "historically" or "socially" involuntary.

3. See Locke 1960 (Laslett's fn. to Sec. 24, pp. 325–326).

4. This may seem an unusual phrase to describe the employment relation since in American English, one rents a car but hires a person. However, in British English, a rental car is a "hire car." Moreover, standard economic theory agrees. As Paul Samuelson (1915–2009) put it: "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)

5. See also Smith, Freethought and Freedom: The Essays of George H. Smith (2017, Chap. 15).

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