



**Alienation versus Delegation Contracts:
Retrieving the inalienable rights debate about
contracts of alienation**

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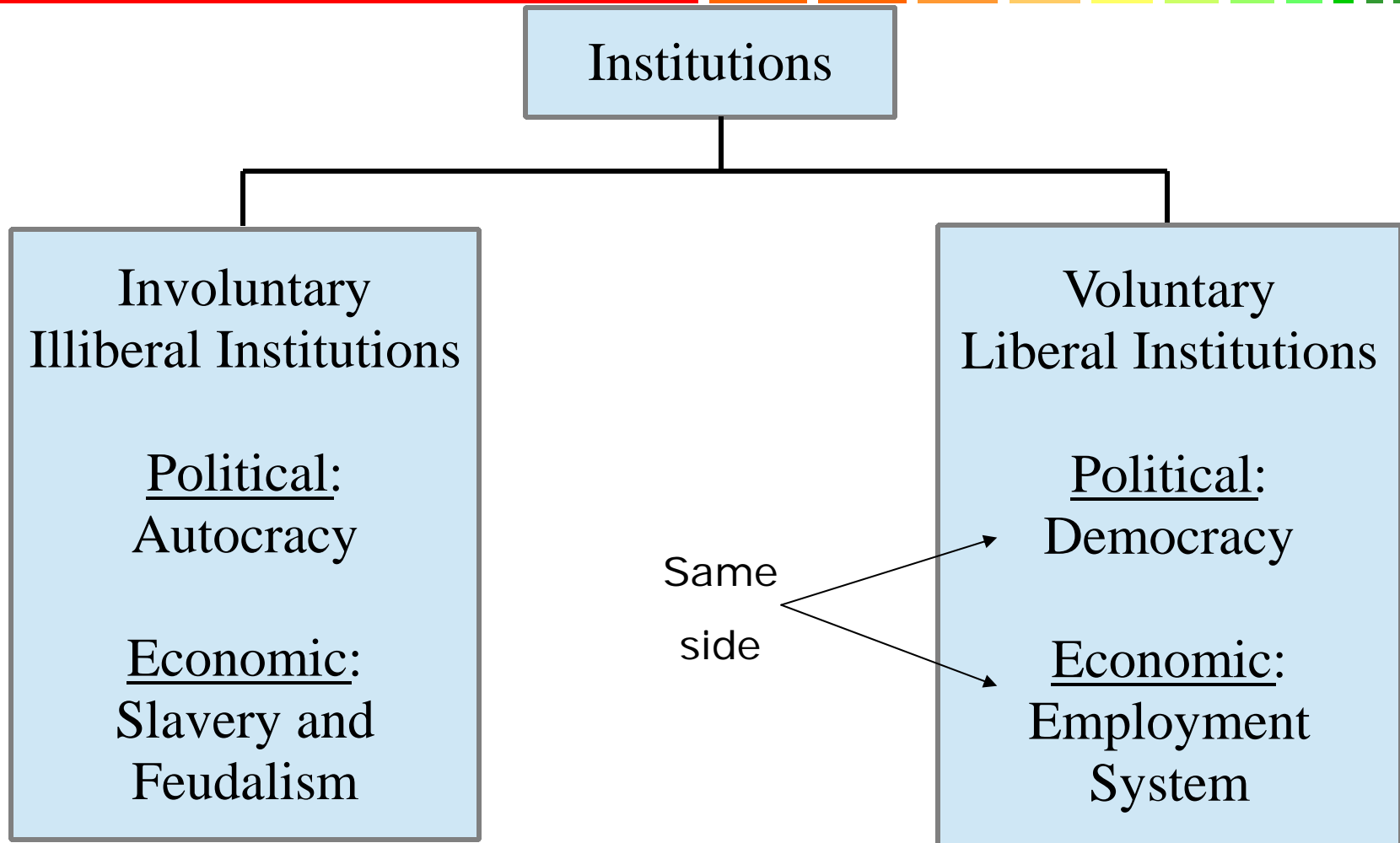
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Classical Liberalism: Consent vs. Coercion



- Classical Liberalism: Basic question is:
Consent versus Coercion.
- Past systems of autocracy (pictured as) based on coercion; democracy based on consent of the governed.
- Past economic systems (pictured as) based on coercion (slavery and feudalism); today's employer-employee relation based on consent.
- Early work of James Buchanan (and Gordon Tullock), *The Calculus of Consent* (1962), was the topic of my 1967 Masters thesis.

Coercion-versus-consent framing



Dark Side of Liberal Contractarian Thought




- But sophisticated (e.g., not “divine right”) defenses of autocracy from Roman and medieval times were based on an explicit or implicit contract of alienation, *pactum subjectionis*, from people to ruler.
- And sophisticated defenses of slavery (not to mention feudalism) from Roman law onward were based on explicit or implicit self-sale contracts.

Some Classical Liberal/Libertarian Thought



- "[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." [Robert Nozick 1974, p. 270]
- Contemporary classical liberal but non-democratic thought is illustrated by the advocacy of:
 - * free cities,
 - * startup cities,
 - * charter cities,
 - * seastead cities, and
 - * shareholder states.

Real Debate: Alienation versus Delegation Contracts

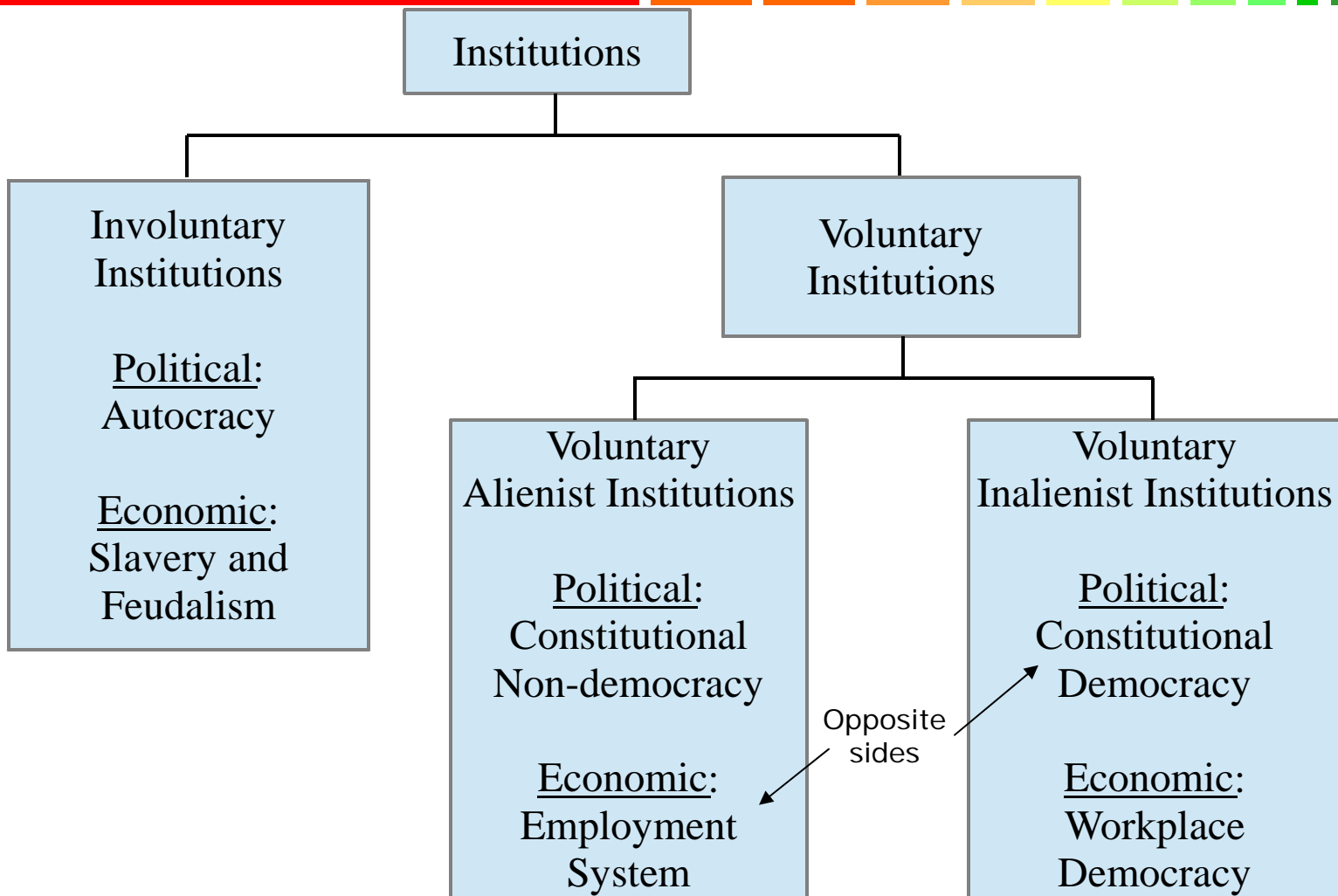


Coercion	Consent	
	Alienation (<i>translatio</i>)	Delegation (<i>concessio</i>)

- Classical liberalism presents debate as being: Consent vs. Coercion (top row).
- Nozick: free society should allow people to alienate right of self-government to a “dominant protective association.” “The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.” (*Anarchy, State and Utopia*, 1974, p. 331)
- But actual historical debates had autocracy and slavery defended on contractarian grounds with explicit or implicit alienation (*translatio*) contracts.
- Hence the democratic and anti-slavery movements developed theories of inalienable rights which were critiques of contracts of alienation (*translatio*) in favor of contracts of delegation (*concessio*).
- Thus the sophisticated historical debate, within the sphere of consent, was:

Delegation vs. Alienation.

Real debate as alienable vs. inalienable rights



History of Contracts of Subjection



- Roman law: Institutes of Justinian: “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.”
- Medieval law: “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.” (Quentin Skinner)
- Thomas Hobbes: *Pactum subjectionis* is 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.*” (*Leviathan*, 1651)
- Harvard’s Robert Nozick: A free society would authorize alienation of one’s right of self-determination to a “dominant protective association.”⁸

History of Inalienable Rights Theory I



- Stoics: Body can be enslaved but soul is “sui juris”—the “inner part cannot be delivered into bondage”.
- Martin Luther: Inner part that cannot be enslaved becomes inalienable “liberty of conscience”:

“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?” (*Concerning Secular Authority*, 1523)
- Francis Hutcheson (and Spinoza): Translated “liberty of conscience” into notion of inalienable rights. “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.” (*System of Moral Philosophy*, 1755)

History of Inalienable Rights Theory II



- Thomas Jefferson: “Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important.” (Garry Wills, *Inventing America*, 1979).
- “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”
- “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.” (Staughton Lynd, *Intellectual Origins of American Radicalism*, 1969).

Delegation vs. Alienation



- Started with late Medieval and Renaissance distinction between voluntary contracts of alienation (*translatio*) and delegation (*concessio*).
- "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." [Otto von Gierke, *The Development of Political Theory*, 1966]
- "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." [E.S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 1955]
- "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." [Quentin Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance*, 1978]

Mature James Buchanan's Views



- "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." [James M. Buchanan, *The Logical Foundations of Constitutional Liberty: The Collected Works of James M. Buchanan Vol. 1*, 1999, p. 288]

The Workplace *Pactum Subjectionis*

- As a workplace constitution, the employment contract is a contract of alienation, not delegation. The employer is not the delegate, representative, or trustee for the employees.
- “The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution. ...
Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought.” [Abram Chayes, “The Modern Corporation and the Rule of Law.” In *The Corporation in Modern Society*, 1966]
- And contract with those who are governed, i.e., those who are under the authority of management, is the employment contract, a contract of alienation.

Rethinking Corporations



- If the employment contract is disallowed as a personal alienation contract, then the corporation would be reconstitutionalized as a democratic organization with only the *delegation* of authority.
- "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 withdraw meaningless privilege from the imaginary one." [Sir Eustace Percy, *The Unknown State: 16th Riddell Memorial Lectures*, 1944; quoted in: George Goyder, *The Responsible Company*, 1961]

Conclusion: This Changes *Everything*



- When the staff in any corporation are the members-owners of their company, then they are empowered to "do good" for themselves and their communities.
- This greatly reduces the need for "outside help" from philanthropic organizations. Essentially, the distinction between the second and third sector collapses.
- 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*.