

Rethinking Libertarianism:

A Review/Essay on Elizabeth Anderson's *Private Government*

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Table of Contents

Introduction

The classical liberal economic ideal of universal self-employment

Private government in the history of political theory

The principled case for democratic governance

Distinguishing the non-democratic and democratic contracts

The principled argument against the alienation governance contract

The inalienable rights argument based on personhood

The application to voluntary slavery contracts

The application to coverture marriage contracts

The analogous case for abolishing the human rental contract

Inalienable rights: the litmus test for classical liberalism

Anderson's rethinking of libertarianism

Concluding remarks

References

Abstract

In her recent book *Private Government* [2017], Elizabeth Anderson makes a powerful but pragmatic case against the abuses experienced by employees in conventional corporations. The purpose of this review-essay is to contrast Anderson's pragmatic critique of many abuses in the employment relation with a principled critique of the employment relationship itself. This principled critique is based on the theory of inalienable rights that descends from the Reformation doctrine of the inalienability of conscience down through the Enlightenment in the abolitionist, democratic, and feminist movements. That theory was the basis for the abolition of the voluntary slavery or self-sale contract, the voluntary non-democratic constitution (*pactum subjectionis*), and the voluntary coverture marriage contract in today's democratic countries. When understood in modern terms, that same theory applies as well against the voluntary self-rental or employment contract that is the basis for our current economic system.

Introduction

This essay develops certain arguments in political theory in the course of reviewing Elizabeth Anderson's interesting new book: *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About it)*, Princeton University Press, 2017. The format of the book is itself noteworthy. There are two chapters by Anderson (who is the Arthur F. Thurnau Professor and John Dewey Distinguished University Professor of Philosophy and Women's Studies at the University of Michigan),

and one chapter each by four commentators, Ann Hughes, David Bromwich, Niki Kolodny, and Tyler Cowen, and then a closing chapter by Anderson answering her commentators.

The overarching theme of the book, as the title indicates, is the governance of the workplace and what she sees as the many abuses of power by employers (or their managerial representatives). As a political philosopher, her position might be described as a classical liberal who has rethought and reacted against many of the positions held by "social justice libertarians," e.g., those held by the members of the collective blog, [Bleeding Heart Libertarians](#) (where she has been a contributor or guest author) who want "free markets *and* social justice." John Tomasi's attempted marriage of Hayek and Rawls in his recent book *Free Market Fairness*,¹ is another example of the social justice libertarian genre.

The classical liberal economic ideal of universal self-employment

One of the great strengths of this book is the discussion in Chapter 1 of the classical liberal ideal of a society of free markets, private property, and almost universal self-employment of individual artisans, shopkeepers, and family farmers.² Focusing on early British and American history, Anderson sees this ideal as being inspired by the Levellers, Adam Smith, Tom Paine, and Abraham Lincoln. In this vision, wage-labor is seen as a temporary position, somewhat like apprenticeship, on one's way to setting up a business on one's own. In her historical telling of the story, this vision was eclipsed by the industrial revolution that introduced wage-labor on a large scale in the factory system.

It is always risky for a reviewer to infer subtexts or implicit targets of argumentation, but much of Anderson's argument can be seen as her rethinking of social justice libertarianism—which among the commentators might be represented by Tyler Cowen (who maintains, along with Alex Tabarrok, the [Marginal Revolution](#) blog). In broad strokes, social justice libertarians see the problem not as large scale industry brought on by the industrial revolution, but as the excessive regulations and other interference by the government in the marketplace—without which there would somehow be more equal bargaining between capital and labor. Hence the sharpest and most substantive disagreements between Anderson and her commentators are with Cowen.

The interchange between Anderson and Cowen is particularly interesting since, in terms of basic principles, they both agree that there is nothing inherently wrong with wage-labor or the employment relation. It is like two writers in Antebellum America, one "attacking slavery" and the other dismissing the attacks—where it turned out that neither writer was against the master-slave relationship in principle. We have one writer (Anderson) who laments the pervasive abuses to be found in the modern workplace and the other writer (Cowen), acknowledging some abuses, but emphasizing the many advantages of the peculiar institution. Anderson's litany of workplace abuses stirs the heart but does not amount to a *principled* critique of the employment relationship. She lists worthy condemnations of existing abuses but does not quite reach escape velocity to leave behind the world of social justice libertarianism.

Private government in the history of political theory

The point of this review-essay is to contrast Anderson's argument with a principled critique of the employment relationship itself from the perspective of radical democratic classical liberalism. How has Anderson (and Cowen for that matter) misframed the issue of democratic self-governance? What parts

¹ Reviewed in Ellerman 2017.

² Another recent book by Alan P. Thomas [2017] raises a similar idea of a "Republic of Equals" in the context of elaborating on James Meade's notion of a property-owning democracy [Meade 2012 (1964), 1986].

of intellectual history has she systematically neglected to apparently deny any inherent conflict between the employment relationship and democratic principles?

We begin with the intellectual history of democratic theory. In economics, the opportunity cost doctrine holds that to appraise some option, call it Plan A, one has to compare it to the *best* foregone alternative Plan B, not to some clearly inferior alternative. In political theory, if one wants to argue for, say, political democracy, then one should compare it to the best alternative, not to some clearly inferior “strawman” option such as a communist dictatorship or patriarchal kingship. The defense of political democracy can then take two forms: a merely *pragmatic* defense (“At present, the weight of the evidence seems to favor Plan A...”) or a *principled* defense by arguing that there is something inherently wrong with the next best alternative Plan B, not to mention the other alternatives.

The best alternative to political democracy would be a government based on the rule of law and consent to a non-democratic constitution that alienated and transferred a subject's self-governing rights to the governing or sovereign body. 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), 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. Instead, Locke prudently ignored Hobbes and choose as his strawman, the patriarchic theory of Robert Filmer where consent played no role.

Today, this best 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 the proprietary city, private city [Glasze et al. 2006; Tabarrok and Rajagopalan 2015], voluntary city [Beito et al. 2002], startup city, free zone [Easterling 2014], [charter city](#) [Mallaby 2010; Freiman 2013], [seastead](#) city, or even a shareholder state policed by private protection agencies. For instance, Tyler Cowen opposes such a private shareholder state but only on pragmatic grounds.

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 (Cowen n. d.), 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 version) and, like old Hong-Kong or modern Dubai [Makai 2015], 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, 270]

After ruling out non-democratic government based on three grounds mentioned by Anderson, the great chain of being, patriarchy, and original sin [Anderson 2017, 10] as well as divine right, conquest, or the medieval notion of Lordship, dominion, and ownership, we are left with essentially two possibilities: democratic or non-democratic government both based on the consent of the governed. In most forms of libertarianism and non-democratic classical liberalism, the choice between these two options is framed on pragmatic, not principled, grounds, e.g., Cowen's preference for the "current democratic governments" as opposed to an untested shareholder city or state.³

In Anderson's use of terms [2017, 43-45], "private government" refers essentially to the option involving non-democratic consent-based government—particularly as applied to a firm based on the "legal relationship normally called that of 'master and servant' or 'employer and employee'" [Coase 1937, 403].⁴ Since the brunt of Anderson's book is an attack on this form of consent-based non-democratic "private" government, several of the commentators wonder why she doesn't come out in favor of workplace democracy, i.e., collective self-employment in a democratic firm [Ellerman 1990]. For instance, David Bromwich notes:

Throughout her lectures, Anderson argues (in effect) that political theory should not stop at the door of the workplace. Supposing we share that belief, we still have to ask what prevented the new economic doctrine of the eighteenth century and the liberal political theory of the nineteenth from leading finally to acceptance of a democratic doctrine of self-government among men and women at work. [Bromwich in Anderson 2017, 89-90]

Niko Kolodny asks essentially the same question, and Anderson's answer is that she considers the choice between the consent-based democratic and non-democratic governments to be a pragmatic one.

Kolodny wonders, given the analogy I draw between state and workplace governance, why I don't simply endorse full workplace democracy. My fundamental reason is pragmatism... . [Anderson 2017, 130]

She claims that we do not have "enough information about what arrangements are likely to make sense for the workplace" [130-1] and that we "need to experiment to learn the costs and benefits of different forms of workplace governance." [131] It is hard to take this claim seriously since there are around

³ See also Arneson 2004.

⁴ The use of "public" and "private" as rough synonyms for democratic and non-democratic respectively is not a particularly good idea. It has led to much mischief such as the socialist argument that in order for an enterprise to be "democratic," it must be "public" in the sense of being run by the government at some level. And feminism has had to do battle with the old argument that human rights do not extend inside the household door since that is "private." And for many people, saying that an enterprise is "private" is sufficient to imply that basic self-governing rights "do not apply."

7,000 Employee Stock Ownership Plans (ESOPs) in the US alone⁵ and a host of worker-owned cooperatives in other countries (e.g., the Mondragon system in Spain [Whyte and Whyte 1991] and the Lega cooperatives in Italy [Jones and Zevi 1993]) that have been extensively studied by scholars for decades—*none* of which are mentioned by Anderson.

Moreover, many of Anderson's concerns seem strangely illiberal as when she shares Henry Hansmann's [1990] old anti-democratic canard that people might spend too much time deliberating or 'arguing' with each other. The case for self-government should not be contingent upon concerns that people will (or will not) make the "right decisions" according to some heteronomous criterion (such as 'too much deliberating' or even 'efficiency') but that they should pay the full costs or reap the benefits of their own decisions. My point is that the case for democracy in the workplace should not rest on the need to summon reassuring empirical evidence for pragmatic considerations. It should be based upon the recovery of the historically principled case for democratic over non-democratic forms of consent-based government.

The principled case for democratic governance

Distinguishing the non-democratic and democratic contracts

Such a principled argument is precisely what *is* provided by a study of the historical development of democratic theory. Although many of the defenders of democratic government have taken as their foils patriarchy or divine right, the 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. [quoted in Corwin 1955, 4, or in Sabine 1958, 171]

Eventually, the consent-based defense of non-democratic government became rather standard. The great legal scholar, Otto von Gierke 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 1958, 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." [1997, 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 [e.g., 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, and the like. Fortunately, the history of democratic theory is not so superficial.

Since both the non-democratic and democratic versions of constitutional government were 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,

⁵ See Kruse et al. 2010 or Blasi et al. 2013 for a start or the website of the National Center for Employee Ownership (NCEO).

respectability, and autonomy interests” [Anderson 2017, 133] of the governed or against their domination as in some strands of civic republican thought?

On the general question of abuses in the employment relationship, liberal or civic republican thought gives a lawyer’s list of special pleas including disrespect, lack of autonomy, and domination experienced in the employee’s role. These objections are proposed as clinching or knock down arguments against the employment relationship.⁶ But however worthy sounding they may be, neo-classical thought calmly responds that each of these complaints are part of the well-known disutility of work. They are surely aggravated by working as an employee—but in return the employee receives wages and benefits. If the employees do not consider the pay adequate to counterbalance the negative aspects, they can organize to bargain for more or look elsewhere for a job. Similar considerations apply if one is renting out a mule, truck, or apartment, where the owner felt the renter was abusing the rented entity in various ways. Such considerations do not constitute a serious argument against the hiring out system for mules, trucks, or apartments.

The fundamental difference between the two types of contracts emerged even in the Middle Ages. Again Gierke explains:

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, 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, 183]

And the US 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, 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 [1978], continually highlights this alienation-versus-delegation theme (particularly in the second volume).

⁶ Anderson even repeats the oft-cited abuse of not being able to freely take pee breaks—which speaks volumes about the current state of liberal and left-wing criticism of the employment relation, e.g., Linder and Nygaard 1998.

If the distinction between an alienation and delegation of self-governing rights has been clear since the Middle Ages, how can so many classical liberal scholars seem unaware of it? One explanation is well-illustrated by Anderson throughout her book; talk only about “hierarchy” without distinguishing the hierarchy between the governors and the governed in the democratic case and the non-democratic case.⁷

Another way to confound the distinction is simply to use the verb “to delegate” as a synonym for alienate and transfer—as in saying that the consensual subject “delegates” governing rights to the sovereign in the *pactum subjectionis*—even though the sovereign is hardly the delegate or agent of the subjects as principals. The distinction is also confounded by the opposite mistake of loosely describing a genuine delegation of decision-making as an alienation of one’s decision—instead of an agreement to jointly make one’s decision according to the recommendation and decision of one’s agent.

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

- the non-democratic form that allows for the *alienation* type of governance contract (e.g., the aforementioned 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 (e.g., both Anderson and Cowen); and
- the democratic form that rules out the alienation contract and requires at most the *delegation* form of governance.

Quite contrary to the claims of a recent book [MacLean 2017], James M. Buchanan is a clear representative of *democratic* classical liberalism who rules out any socio-organizational form where the individual is not a sovereign (e.g., individual acting in the market place) or a principal in a delegation of decision-making authority.

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, 288]

Here, in his clear English, 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 non-democratic schemes of the non-democratic strain of libertarianism (“social justice” or not) and classical liberalism. Thus the relevant question to ask of the various schemes of private voluntary governance from the viewpoint of democratic classical liberalism, [e.g., as in Stringham 2015] is whether the voluntary contract at the basis of the governance system is a contract of delegation or a contract of alienation on the part of the people who are governed.

⁷ This is a much favored way for economists to avoid the issues, e.g., Williamson 1975.

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? The question practically answers itself: an argument that those rights are in-alienable.

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 worthy but 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 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.

There is also the sham and rhetorical notion of inalienable rights in the classical liberal and libertarian tradition that was analyzed at length in Ellerman [2017]. Frank 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.” [1947, 27, fn. 4] All three of these classical writers had a notion of “inalienable rights” but it was more a rhetorical flourish than a serious theory since they would only rule out a slavery contract where the master had the right to kill the slave. All three writers then ‘turn around’ and acknowledge that this notion of “inalienable rights” would not apply against a civilized voluntary slavery contract that had some rights on both sides. Here are the three pertinent quotes.

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, *Second Treatise*, § 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), section on "Master and Servant"]

The inalienable rights argument based on personhood

One has to dig deeper to find the serious inalienable rights theory in democratic, abolitionist, and feminist thought. 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), 316]

This inalienability of conscience is sometimes expressed in the slogan “No one can believe for another”—which Ernst Cassirer takes as the “central principle of Protestantism” [1963a, 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. One can at most agree to make one’s decision according to the better judgment of an agent with superior knowledge, experience, or the like. That is the essence of the delegation relationship.

In addition to Ellerman [1993, 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.⁸

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 2013a, 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

⁸ Both Smith [1997, 54] and the author [1993, 136] independently arrived at the science fiction example of a human with a computer chip implanted in their brain and controlled by another as a genuine example of one person being “employed” by another. And Smith [1997, 54] and the author [1993, 133] also both used the example of a rented person committing a crime at the behest of their employer—where the law fully recognizes the factual inalienability of moral agency in the case of a hired criminal.

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. [Ibid., 114]

Although an atheist and a Jew, Benedict de Spinoza 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.⁹

Inward worship of God and piety in itself are within the sphere of everyone's private rights, and cannot be alienated. [Spinoza 1951 (1760), 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. [Ibid., 257]

The transition from the Reformation inalienability of conscience to a theory of inalienable rights was also made (independently?) by Francis Hutcheson [Ellerman 2010; Smith 2017b, 116-117]. Few have seen these connections as clearly as Staughton Lynd in his *Intellectual Origins of American Radicalism*. 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, 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, 56-7]

And then "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" [Wills 1979, 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 2017b, 118-9]

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

⁹ See also Chapter 15 in Smith 2017a.

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 1963b, 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, 288] Anderson does not use *any* notion of inalienable rights in her book. She is thus left with solely pragmatic considerations to judge non-democratic versus democratic systems of governance.

The application to voluntary slavery contracts

This theory of inalienable rights, that descends from the Reformation through the Enlightenment in the abolitionist, democratic, and feminist movements applies against any contract that puts a *de facto* person of normal capacity into the legal or *de jure* position of a person of diminished capacity, not to mention a non-person. Historical examples include the voluntary self-sale contract and the coverture marriage contract in addition to the political *pactum subjectionis*. A person cannot actually fulfill such a contract to voluntarily alienate one’s decision-making power and responsible agency to become a person of diminished or no capacity. It is not a matter of “should not”; it is a matter of “can not.” When considering a voluntary slavery contract that “Murphy” might make, Smith is quite clear.

This supposed contract, according to the theory of inalienable rights, is no contract at all, because nothing has been transferred. The slavery contract makes no more sense than if Murphy had agreed to give me an absolute property right in his subjective beliefs and values. Regardless of whether he "consented" or not, a right cannot be alienated unless the object of that right is capable, in principle, of being transferred from one person to another. And, as I argued in my essay, moral agency cannot be transferred, abandoned, or forfeited. Moral agency is inalienable, and so must be the right to exercise that agency. [Smith 1997, 53-4]

Thus "inalienable" in this sense refers to rights that *cannot* be transferred to another, not to rights that merely *should not* be transferred to another. If the subject of a right—such as the ability to reason and judge—cannot be alienated, then neither can the right associated with that subject. [Smith 2013b, 27-28]

Thus any contract to put a person in the legal position of having alienated such a right would be impossible to actually fulfill and would thus be inherently invalid. As Smith put it in the case of the slavery contract: “This slavery contract is invalid not because it is morally reprehensible, but because it is physically impossible. The ‘terms’ of the contract correspond to nothing in the real world.” [1997,

54] Thus the legal systems that supported such personal alienation contracts always accepted some alternative performance (than actually alienating decision-making to become a person of diminished or no capacity) as “fulfilling” the contract. And that alternative performance always had the same form: obey the ruler, master, husband, or employer. When the person thus “fulfilled” the contract, then the legal authorities enforced the consequences *as if* the person was in fact of diminished or no capacity, i.e., with the *legal* rights of a person with diminished or no capacity. Thus such a legally implemented personal alienation contract amounts to a fraud on an institutional scale, and should be abolished in any system of free *and non-fraudulent* contracts.

The application to coverture marriage contracts

Since the coverture contract is the most recent example of a legally abolished voluntary contract, it may be useful to review the inalienable rights argument against that free and voluntary contract. Note that we are *not* playing the usual Left-wing parlour game of escalating one’s notion of “voluntariness” until the contract we want to rule out is seen as being “involuntary.” The inalienable rights critique applies even if it is perfectly voluntary.

Normally, to establish a legal guardian relationship of one adult as guardian over another adult as dependent, there must be some *factual* condition on the part of the dependent such as some mental disability, insanity, or senility that needs to be legally certified.

Yet the coverture marriage contract established the husband as the “Lord and Baron” or, in less flowery language, guardian over the *feme covert* who had no independent legal personality and thus could not make contracts or own property except in the name 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, section on “Husband and Wife”]

In an adult woman of normal capacity, that factual capacity is factually inalienable in the sense that the woman cannot by voluntary action actually alienate that capacity and factually become a person of diminished capacity, a dependent, factually suitable for a guardianship relation. Yet the coverture contract gave her precisely that *legal* position.

As summarized in Table 1, the point is the mismatch between the factual and the legal situation (analogous to Type I and II errors in statistics).

Table of legal errors due to mismatch of factual and legal dependency status		Factual Dependency Status	
		Factually independent	Factually dependent
Legal Dependency Status	Legally independent.	True positive	Type II error: Dependent person not legally dependent.
	Legally dependent	Type I error: Independent person made legally dependent.	True negative

Table 1: Legal errors due to mismatch of factual and legal dependency

It is obvious that this critique has nothing whatever to do with pragmatic considerations such as the size of the allowance given by husband to wife, abusive relationships, or the like.

Since the woman is just as much a *de facto* capacitated adult as before voluntarily agreeing to the contract (the Type I error), the coverture contract was essentially an institutional fraud sponsored by the legal system in patriarchal society that allowed the reduction of married women to the status of legal dependents to parade in the form of a voluntary contract.

The critique of the human rental or employment contract is entirely analogous using the usual notions of factual and legal responsibility as applied to the appropriation of the liabilities and assets created in production.

The analogous case for abolishing the human rental contract

The inalienable rights argument against not only buying but renting people can be illustrated with a simple story. Suppose that an entrepreneur hired an employee for general services (no intimations of criminal intent). The entrepreneur similarly hired a van, and the owner of the van was not otherwise involved in the entrepreneur's activities. Eventually the entrepreneur decided to use the factor services he had purchased (man-hours and van-hours) to rob a bank. After being caught, the entrepreneur and the employee were charged with the crime. In court, the worker argued that he was just as innocent as the van owner. Both had sold the services of factors they owned to the entrepreneur. "Labor Service is a Commodity" [Alchian and Allen 1969, 469 (section title)] as the scientific texts proclaim. The use the entrepreneur makes of these commodities is "his own business."

The judge would, no doubt, be unmoved by these arguments. The judge would point out it was plausible that the van owner was not responsible. He had given up and transferred the use of his van to the entrepreneur, so unless the van owner was otherwise *personally* involved, his absentee ownership of the factor would not give him any responsibility for the results of the enterprise. But man-hours are a peculiar commodity in comparison with van-hours. The worker cannot "give up and transfer" the use of his own person, as the van owner can the van. Employment contract or not, the worker remained a fully responsible agent knowingly co-operating with the entrepreneur. The employee and the employer share the *de facto* responsibility for the results of their joint activity, and the law will impute legal responsibility accordingly.

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, 612]

Unless one wants to argue that employees suddenly become robots or some sort of non-responsible instruments to be ‘employed’ by the employer-entrepreneur when the venture “they jointly carried out” was non-criminous, then the employees (and working employer) in an enterprise are jointly factually responsible for using up the inputs (i.e., creating the input-liabilities) and producing the products (i.e., the output assets) that make up the negative and positive components in the “Whole Product” representing the whole results in a productive opportunity.

Thus, by the usual juridical norm of imputation—impute legal responsibility according to factual responsibility—they should *jointly* have the legal liabilities for using up the inputs and the legal ownership of the produced outputs. Yet, the employees, qua employees, have 0% of the input-liabilities charged against them and 0% of the produced outputs owned by them which is exactly the legal role of a rented non-responsible instrument.¹⁰

The employer holds 100% of the input-liabilities and owns 100% of the produced outputs. Yet the employees are as inextricably and inalienably co-responsible (in factual terms) as in the case of the criminous venture.

The employees cannot by any voluntary act turn themselves into de facto non-responsible instruments (like capital goods or land), just as the married woman cannot voluntarily alienate her adult capacity to become a de facto dependent—as is illustrated in Table 2.

It is furthermore obvious that this critique has nothing whatever to do with pragmatic considerations such as the size of the wage, the working conditions, employers dominating employees, or the like.

Whenever two things ought to match, like being a legal and factual dependent or being legally and factually responsible for something, then there are two ways to have a mismatch—like the type I and type II errors in statistics. It is an injustice when there is a mismatch. For instance, when a factually guilty person is judged legally not guilty, that is a miscarriage of justice—analogue to a Type I error of rejecting a true hypothesis. Or when a factually not guilty person is found to be legally guilty, that is also a miscarriage of justice—like the Type II error of accepting a false hypothesis.

¹⁰ Note that we are not concerned here with any moral/legal argument for or against the juridical norm of imputation—only with the descriptive argument that the employment firm violates that norm.

Table of injustices due to mismatch of factual and legal responsibility		Factual Responsibility	
		Was factually responsible for X	Was not factually responsible for X
Legal Responsibility	Held legally responsible for X	True positive	Type II injustice: Innocent party legally guilty
	Not held legally responsible for X	Type I injustice: Guilty party legally innocent.	True negative

Table 2: Mismatches between factual and legal responsibility

In the case at hand, both errors occur. The factually responsible party or association, the people working within a firm, do not get the legal responsibility for the whole product (the Type I injustice with X = whole product), and the party or association that does get the legal responsibility, such as the corporate shareholders in the employing corporation, do not have the factual responsibility (the Type II injustice with X = whole product).

In a remarkable case of courage and clarity, the British Conservative minister and writer, Lord Eustace Percy, precisely pointed this out 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, 38]

In our terms, 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” is the party factually but not legally responsible for the whole product (type I error), while the “association of shareholders, creditors and directors” is legally but not factually responsible for the whole product (type II error).

Inalienable rights: the litmus test for classical liberalism

That is the basic theory of inalienable rights that libertarians ‘can not’ and will not comprehend—and for good reason. There is one huge ‘problem’ with this whole inalienable rights analysis in our current society; it applies not only to the self-sale contracts, pacts of subjection, and coverture marriage contracts (all of which have been abolished in the advanced democracies) but also to the contract to rent¹¹ one’s self out as an ‘employee’ to an ‘employer.’¹² And that employer-employee relation is

¹¹ The word “rented” is used deliberately even though American English prefers to say that cars are rented but people are hired. In the UK, rental cars are called “hire cars.” The underlying economic relationship (buying the services of a productive factor instead of the ownership of the factor) is the same no matter what it is called. Moreover, this is not a matter of controversy; as the late dean of neoclassical economics, Paul Samuelson, 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

considered by almost all classical liberals, not to mention libertarians, as part and parcel of the *free* market *free* enterprise system. Thus any argument or theory that leads to the neo-abolitionist [Ellerman 2015] call for abolishing the institution of voluntary renting persons is seen as a *reductio ad absurdum*.

We have focused on the substantive division between not-necessarily-democratic and necessarily-democratic classical liberalism. But even among democratic classical liberals, the application of democratic theory and inalienable rights theory to the workplace seems to be beyond the pale. For instance, after Buchanan forcefully “denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals,” he neglects to recognize that the worker *qua* employee is neither sovereign nor principal.¹³ And George H. Smith does not recognize that the inalienable rights argument against the self-sale contract and the pact of subjection in the political sphere applies just as well against the self-rental contract which is also the workplace pact of subjection, the employment or human rental contract. And free market economists are loathe to recognize that the essential difference between the self-rental contract and a civilized voluntary self-sale contract is the amount of labor sold at one time.

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 (James) 1844, 21-2]

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*

wage.” [Samuelson 1976, 52 (his italics)] Or as other neoclassical economists put it: “The commodity that is traded in the labor market is labor services, or hours of labor. The corresponding price is the wage per hour. We can think of the wage per hour as the price at which the firm rents the services of a worker, or the rental rate for labor. We do not have asset prices in the labor market because workers cannot be bought or sold in modern societies; they can only be rented. (In a society with slavery, the asset price would be the price of a slave.)” [Fischer et al. 1988, 323; or nearly identical passage in: Begg et al. 1997, 201].

¹² In a democratic firm, the shop-floor or office-floor member is voluntarily agreeing to follow decisions made by persons higher up in the (democratic) hierarchy to whom decision-making authority has been directly or indirectly delegated. In the conventional human rental firm, the employee is *also* voluntarily agreeing to follow decisions made by persons higher up in the (non-democratic) hierarchy (without any pretension of the higher-ups being delegates)—since that is all a person can voluntarily do. There is no different voluntary performance in the human rental firm where moral agency is actually transferred so the person can be actually ‘employed’ by the ‘employer’ (as the Law fully recognizes in the hired criminal example). In both cases, the people working in the firm are de facto responsible for creating the liabilities for the used-up inputs and for thereby creating the produced outputs. But the *legal* consequences are diametrically opposite in the two cases. In the democratic firm, the worker-member is a part of the legal party that bears those costs and owns that product—so the people in the firm jointly appropriate the positive and negative fruits of their labor. But in the human rental firm, the employee *qua* employee is not part of the legal party that bears those costs and owns the product since the employee’s inexorably co-responsible actions are treated as an input commodity ‘employed’ by the ‘employer’ and as another one of the input liabilities to be paid off by the ‘employer.’ This is a brief summary of the property-theoretic analysis of the firm—which is quite beyond the pale for the so-called “economics of property rights” in the conventional literature [Ellerman 1985, 1993, 2014, 2016].

¹³ Contrary to his early mentor, Frank Knight, Buchanan never seems to have focused on the non-market governance system under which most adults spend the greater part of their waking hours. Indeed, most classical liberals and libertarians never get beyond the image of the sovereign labor-seller in the labor market. And contrary to our intellectual version of the opportunity cost doctrine, Buchanan does not explicitly take on the next best alternative to a democratic constitutional government. Instead, he considers cases of libertarian anarchism (e.g., a two-Crusoe economy) or a complete slavery version of the Hobbesian contract [Buchanan 2000 (1975), 187] so he does not develop any *theory* of inalienable rights to rule out the alienation version of consent-based rule-of-law constitutional government which would imply his stipulation of at most the delegation type of contract.

difference in any two cases is the tenure. [Bryan 1858 (italics in original), 10; quoted in Philmore 1982, 43]

Indeed, the economists' "fundamental theorem" that a competitive equilibrium is allocatively efficient requires the assumption of free markets in all future labor. As one distinguished economist pointed out in 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, 334]

Although Anderson does not apply the principles of *democratic* classical liberalism to the workplace, she does advance noticeably beyond some of the more superficial arguments put forward by libertarians and classical liberal economists.

Anderson's rethinking of libertarianism

Libertarians often like to conceptualize the rights one has qua person as the "ownership" of one's self. The more one thinks of one's self as a piece of property, then the more one is likely to think that "free markets" require the ability to voluntarily sell this piece of property—or, at the very least, to voluntarily rent it out. And in that capacity of the owner of a piece of property, the person is acting as a sovereign in the rental market to rent out a piece of property, just as the owner might rent out a mule, a truck, or an apartment. In the latter case, it is easy to separate the sovereign person of the owner from the non-person (the mule, truck, or apartment) rented out. But in the case of the employment contract, the self-same person plays a double role, the sovereign owner of a piece of property acting in the rental market, and the piece of property rented out. Unlike the mule, truck, or apartment, the rented-out entity providing the services cannot be separated from the person of the owner.

This "peculiarity" of the peculiar institution of renting persons is not new. As Alfred Marshall so quaintly put this "Second peculiarity. The seller of labour must deliver it himself." [1961, 566] One of the founders of Swedish social democracy, Ernst Wigforss, made the same point as to why the notion of a purchase and sale contract does not apply to the human rental contract.

There has not been any dearth of attempts to squeeze the labor contract entirely into the shape of an ordinary purchase-and-sale agreement. The worker sells his or her labor power and the employer pays an agreed price. ...But, above all, from a labor perspective the invalidity of the particular contract structure lies in its blindness to the fact that the labor power that the worker sells cannot like other commodities be separated from the living worker. This means that control over labor power must include control over the worker himself or herself. Here we perhaps meet the core of the whole modern labor question, and the way the problem is treated, and the perspectives from which it is judged, are what decide the character of the solutions. [Wigforss 1923, 28]

Carole Pateman's feminist classic, *The Sexual Contract* [1988], envisions patriarchal society as a type of coverture marriage contract writ large as a social contract. The book was written in part to answer the argument for the validity of such personal alienation contracts as argued by Nozick [1974] and

Philmore [1982]. She makes the same point about the inalienability of personhood in the context of the human rental contract.¹⁴

The contractarian argument is unassailable all the time it is accepted that abilities can "acquire" an external relation to an individual, and can be treated as if they were property. To treat abilities in this manner is also implicitly to accept that the "exchange" between employer and worker is like any other exchange of material property. [Pateman 1988, 147]

The answer to the question of how property in the person can be contracted out is that no such procedure is possible. Labour power, capacities or services, cannot be separated from the person of the worker like pieces of property. [Ibid., 150]

The voluntary self-sale and self-rental contracts are in the same moral boat (as emphasized by Philmore 1982). The problem does not arise in the first role of the sovereign owner acting in the marketplace. The problem in both cases arises from applying an alienation contract (in the sale or rental version) to persons instead of only to things. This should not be hard to understand—unless one is living in a society where owning or renting other persons is the norm, e.g., the Antebellum South or today's society, respectively.

Hence libertarians and many classical liberal economists need a simple way to avoid the problem; simply ignore the person qua rented entity and focus exclusively on the role of the sovereign self-owning person continuously making and remaking the employment contract.

This makes it seem as if the workplace is a continuation of arm's-length market transactions, as if the labor contract were no different from a purchase from Smith's butcher, baker, or brewer. ...But the butcher, baker, and brewer remain independent from their customers after selling their goods. In the employment contract, by contrast, the workers cannot separate themselves from the labor they have sold; in purchasing command over labor, employers purchase command over people. [Anderson 2017, 57]

Anderson uses a striking metaphor to describe this cultivated blindness to the fact of persons being rented out in the employment contract.

The result is a kind of political hemianosia: like those patients who cannot perceive one-half of their bodies, a large class of libertarian-leaning thinkers and politicians, with considerable public following, cannot perceive half of the economy: they cannot perceive the half that takes place *beyond* the market, *after* the employment contract is accepted. [Ibid., 57-8]

Concluding remarks

One great strength of the book is to revive the almost-forgotten classical liberal ideal of a market economy where everyone is essentially self-employed, e.g., as artisans, shop-keepers, or yeoman farmers—as in the writings of the Levellers, Adam Smith, Tom Paine, and Abraham Lincoln. However, Anderson inexplicably neglects the considerable modern literature on the theory and practice of the

¹⁴ See also Pateman 2002.

democratic firm where labor hires capital and the people in the firm are jointly self-employed or, better stated, jointly working for themselves.

Anderson also essentially ‘sees’ the basic insight behind the inalienable rights argument against personal alienation contracts but does not use it to rule out the contract *per se*, and thus does not quite reach escape velocity to extract herself from the world of non-necessarily-democratic classical liberalism. But she does rethink libertarianism and separate herself from “a large class of libertarian-leaning thinkers and politicians” (e.g., the aforementioned social-justice or ‘bleeding-heart’ libertarians)—and that is a great strength of the book.

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