

# **The Constitutional Conflict Between Protecting Expectations and Moral Evolution**

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## **Abstract**

Constitutions must be amendable, to allow for the possibility of incorporating new moral insights into them. This impinges on the protection of expectations, including those regarded as property. Protection of property rights is achieved by constitutional restrictions on the ability of voters and legislators to reduce the value of property by regulation, taxation or expropriation. But such restrictions also prevent voters and legislatures from reflecting new moral insights in legislation, if those insights would reduce the value of property. There have been times in the past when moral development has compelled societies to change laws in ways that reduced the value of property (e.g., elimination of slavery). We cannot guarantee that there will be no future advances in our moral evolution that would require similar changes in laws, reducing or eliminating the value of what we now consider property. Looking forward to the possibility of such moral advances, we should design constitutions that permit amendments to reflect new moral insights, while prohibiting legislators (or voters in referenda) from passing laws that redistribute in ways not explicitly sanctioned by the constitution.

## **1. The Possibility of New Moral Insights that Necessitate Redistribution**

The main point of this paper is simple. Unless the process that generates a constitution is perfect, there should be provision for the possibility of changing the constitution. It is true that the stability provided by constitutions is valuable. By limiting the opportunities for transient majorities to redistribute, constitutions protect property rights. The resulting stability promotes efficiency by reducing rent-seeking. But as valuable as stability is, it is not lexically more valuable than the chance to incorporate new moral understandings into a constitution. And when a society perceives the need to incorporate a new moral understanding into its constitution, a disappointment of pre-existing expectations is likely to be necessary.

Perhaps the point seems so simple that it does not even need to be stated. How could anyone doubt that it will sometimes be appropriate to change a constitution, and that some will lose in the process? However, associated issues are complex enough that some elaboration is warranted. The first point to be made is that disagreement about what constitutes an improved understanding of a moral imperative is nearly inevitable at the time when the new understanding is emerging. That such improvements in our understanding do occur, and that they are controversial when they occur, can be seen most easily by looking back into history.

Three hundred years ago virtually no one questioned the propriety of slavery. Even John Locke, that most articulate advocate of human freedom, invested in slaves. But over the course of the eighteenth and nineteenth centuries, amid extreme controversy in some times and places, slavery was nearly eliminated from the world. With a bit of a lag, a consensus gradually evolved among humanity that slavery was wrong, indeed that no distinctions in civil rights based on race could be justified.

Two hundred years ago almost no one thought that women should be allowed to vote. Amid extreme controversy in some times and places, they were granted voting rights. Now virtually no one argues that women should be denied any rights that men have. We have not yet arrived at a consensus about what equality of the sexes means, but we are near a consensus that we should strive for it.

The next point to be made is that it would not be reasonable to expect constitutional changes that reflect new moral understandings to be made as approximate Pareto improvements. It would have been possible to end slavery in a way that made almost no one noticeably worse off as compared to their expected utilities under slavery. It would merely have been necessary to declare the slaves free, provided that they made reasonable progress on paying debts to their former masters equal to their market value as slaves, and that they used their first earnings to buy insurance policies that would compensate their former masters in the event that they died or became incapacitated before they finished paying the debts. But such an end to slavery would never have satisfied the impulse that pushed for its abolition.

Ending slavery was not an issue of economic efficiency or voter preferences. Slavery needed to be ended because so many people could not in good conscience participate in a legal system that enforced slavery. If slavery was wrong, there was no basis for requiring persons subjected to slavery to purchase their freedom. They had to be recognized as unconditionally free. Others would need to bear the loss from the fact that those formerly recognized as the owners of slaves would no longer be allowed to appropriate the product of slave labor. Who should bear the loss?

## **2. Assigning the Costs of Moral Accidents**

In addressing this question, it is helpful to employ ideas from the theory of accidents. We now see that the perpetuation of slavery was a moral accident. To reduce the likelihood of future moral accidents, it is sensible to assign the costs of accidents to some or all of the persons who could have prevented them. Costs might also reasonably be assigned to anyone who benefitted from the accidents. Among the prominent candidates for bearing the cost would be those who captured people and sold them into slavery, those who bought, sold and transported slaves, those who held slaves, those who passed and enforced laws perpetuating slavery, those who bought products produced with slave labor, those

who sold goods to persons involved in the selling or holding of slaves, etc. Anyone who received an inheritance derived from slavery could be called upon to relinquish it as well. Emphatically not on the list are the slaves themselves and any person who came of age without an inheritance after slavery ended. They did not cause slavery. Thus it was wrong of Britain, in ending slavery in the 1830s, to compensate those who were historically regarded as the owners of slaves with funds from general revenues, and with a rule permitting them to work the slaves for a few more years, during which many slaves were worked to death.

There are particular advantages to assigning the cost of the end of slavery to those who thought of themselves as slave owners. It is administratively more efficient than other possibilities, because it means leaving the costs where they fall. More importantly, the idea that slavery might be seen to be wrong, and that then the costs of ending slavery might be left where they fall, provides a continuing incentive for those involved in slavery to cease.

Contrary arguments can be made. From a utilitarian perspective, concentrating the losses leads to a greater felt cost than if the same losses are dispersed. Uncertainty in rights makes it more difficult to effect the transactions that lead to efficient resource allocation. And the persons historically regarded as the owners of slaves will generally be a politically powerful group, who may exercise their power to perpetuate slavery far longer if they must bear the full cost of freeing slaves than if the cost is shared.

Furthermore, defenders of historical institutions will argue, when social arrangements look exploitive, there is often another perspective from which those arrangements promote efficiency. For example, slavery has been defended as a Pareto improvement from an environment in which those defeated in war are killed. Another example comes from the theory of the origin of government advanced by Mancur Olson. He theorizes that autocratic governments originated in an environment of roving bandits, when some potential bandits decided that there was a greater gain in becoming stationary bandits and protecting the victims from roving bandits.<sup>1</sup>

The Russian Mafia today can be understood, in many cases, as promoting efficient resource allocation by preventing the dissipation of rent through competition. For example, Old Arbat Street in Moscow was for many years a place where artists would sell their wares to tourists. But to operate there, artists were required to pay the Mafia gang that controlled the street. The fees collected by the Mafia served to ration the space to an efficient number of artists. Without that rationing device, there would have been an excess of artists crowding the street and interfering with each other inefficiently. And people would have been getting up at 2:00 in the morning to get space before anyone else claimed it. In these circumstances, the Mafia action served to prevent the dissipation of the rent and did not reduce the net incomes of artists. If there were no public-good aspects

of the provision of art, it could be argued that complete efficiency was achieved by this "spontaneous" private appropriation of rent.

The person who wishes to abolish such exploitative institutions as slavery, autocratic governments and Mafia protection schemes, without compensation for those who derive income from them, can be asked to explain why it is right to terminate these incomes without compensation, when the development of the institutions served to improve allocative efficiency.

The answer comes in two parts. Part of the answer is that slavery, autocratic government, Mafia protection and other exploitive institutions are second-bests. Slavery may be better than the killing of those who are defeated in war, but magnanimity by victors, or an end to war, are better. And once slavery starts, it generates enslavements of the weak who would otherwise be safe. Autocratic government may be better than suffering the predations of roving bandits, but government that reflects a sense of community among the governed is certainly better. Mafia protection of Old Arbat Street artists may be better than chaotic appropriation of selling space, but public collection of rent for the use of selling space is better. The fact that these institutions may be improvements on what would otherwise have existed does not imply that they should continue to exist when yet better institutions become feasible.

The second part of the answer is that if one is tempted to suppose that the income from the indefinite duration of an exploitive institution is needed to induce people to invest efficiently in creating the institution, that temptation should be resisted. If the developer of an exploitive institution were able to capture exactly the full increase in aggregate income from its development, and if the profit in developing such an institution depended on receiving the increase in income for all eternity and not just until a better institution became feasible, and if the time when the better institution became feasible was independent of whether the first institution was developed, then it would not be worthwhile to develop the institution in the first place. In these circumstances a right in perpetuity is like a perpetual patent on something that would have been discovered by someone else if not by its first inventor. In the same way that a perpetual patent can motivate excessive expenditures on inventive activity, a perpetual right to benefit from an exploitive institution induces excessive investments in exploitation.

If you believe that a little extra incentive for the creation of property rights does no harm, there are reasons for disagreeing. Those who develop exploitive institutions are not limited to collecting the increase in aggregate income from the development of those institutions. If they sometimes promote efficiency, they more generally steal unboundedly. There is no need to worry about insufficiency of the incentive to exploit. When we are able to replace an exploitive institution with a better one, we should not be concerned about the efficiency consequences, or the justice, of disappointing the financial expectations of those who counted on the continuation of exploitation.

Returning to earlier points, there is the utilitarian argument that a concentrated loss produces a greater felt cost than the same loss when spread. While this is true, general attention to this argument would lead to complete leveling. We refrain from spreading costs for the sake of creating incentives.

Next is the argument that uncertainty in rights adds to transactions costs and therefore impedes the efficient allocation of resources. This too is true, but need not stop us. During the course of the U.S. civil war, the market price of slaves rose and fell with the fortunes of the Confederacy. But improving the efficiency with which those who thought of themselves as slave owners allocated slave labor would not have been a sufficient reason to guarantee them against loss from the end of slavery.

**More serious is the argument that, since those who benefit from exploitation will use their considerable power to perpetuate it, a greater good is achieved by buying them off.** Insurance companies often pay to retrieve stolen property from persons they believe to be thieves, to avoid the greater cost of compensating the victims of thieves. As a financial proposition, compromise with principle can pay.

But there are enduring costs. Truth is often a casualty as well. If one were dealing with a straightforward iniquitous person (a professional blackmailer or kidnapper, perhaps), who would acknowledge that his position was without moral justification and represented nothing more than a selfish effort to extract what he could from his position of power, then one could readily weigh the costs and benefits, and bow to power if that was less costly. But if one is dealing with persons who style themselves the owners of slaves and want acknowledgement that they are justly entitled to compensation for the taking of their property, then concession may cloud the perception of right and wrong for a long time. Concession in this case comes at a great price. This is what makes it worthwhile to fight for the establishment of principle instead of cutting a deal with those who perpetuate iniquity.

### **3. The Possibility of a Right of Secession**

But slavery is long gone. Of what relevance, you may ask, are such arguments today? I suggest that, some time in the next century or two, a number of moral issues as momentous and contentious as slavery will rise to public consciousness and pose the same issues of moral advance versus the protection of financial interests that might be thought of as property rights.

Consider the issue of secession. While there is often a correspondence between the borders of a nation and the set of persons who want to identify with a particular nationality, there are many instances when the preponderance of persons in a region would strongly prefer not to be part of the nation that exercises sovereignty over them--Chechins in Russia, Basques in Spain, Kurds in

Turkey, Iran and Iraq, Kashmiris in India, Catholics in Northern Ireland, Hungarians in Serbia, Romaina, and Slovenia, Corsicans in France, Palestinians in Israel, Christians in Sudan, and so on around the globe. The particular locations of national borders are primarily the result of wars. In many cases, the only justification that can be given for borders apart from "If you try to take what I claim, I'll kill you," is that any acknowledgement that borders were subject to question would lead to interminable conflict, so we are better off abiding by what we have than allowing the question to be opened.

But this puts the advocates of maintaining existing borders in the potentially uncomfortable position of needing to support every "reasonable" government that seeks to suppress its secessionists. This then necessitates an evaluation of the reasonableness of the complaints of every minority with regard to language, religion, education, the provision of public services, marriage rules, child-rearing practices, tolerated intoxicants, and every other area of social life about which people can disagree. The person who wants to support the efforts of a government to suppress its secessionist minorities must be able to say that in every area where the government imposes a rule on the minority, no right that the minority ought to have is violated. It is becoming increasingly difficult to sustain a claim that it is possible to know what rights minorities deserve. I predict that within a century, humanity will come to a consensus that the right of a defined unit to secede from a larger governmental entity is a basic human right, that no nation or administrative sub-unit is entitled to cling to control of a compact sub-unit whose citizen are united in their desire not to be controlled by the larger entity.

Already we may be seeing the first signs of this. Czechoslovakia was peacefully partitioned into The Czech Republic and Slovakia, although the fact that this seems to have been mutually desired makes it less evidential for the thesis. The Kremlin acquiesced with only a little grumbling to the dismantling of the USSR. Here one might propose that with democracy looming, it was valuable for Russians to ensure that they would not become a minority in their own nation. After some fighting, the international community pressured the remnants of Yugoslavia to accept the departure of Slovenia, Croatia and Bosnia. Canada seems to acknowledge implicitly that if the people of Quebec really want to no longer be part of Canada, they may have their way. When Quebecois insist that Native American tribes that want to remove their tribal lands from the jurisdiction of Quebec must never be allowed to do so, they sound inconsistent. This is not enough evidence to make a convincing case, but it may be straws in the wind. Still, in so many other cases, there is little if any general international support for the efforts of secessionists.

#### **4. The Complementary Right of Equal Access to Natural Opportunities**

One of the factors that makes the case for secession difficult is the problem of regional inequality in natural resources. When the people who called themselves Biafrans sought to secede from Nigeria in the 1960s, the morality of their claim

was undermined by the fact that, if they had succeeded, they would have taken disproportionate oil resources from the rest of Nigerians. The limited support for the efforts of the Chechins to separate from Russia is explained in part by the understanding that, even though the Chechins have been abused by Russians for centuries and have never fully acceded to their incorporation into Russia, if Chechniya were allowed to separate from Russia, that would create a precedent that would make it difficult to oppose an effort by the people of the sparsely populated Yakutia region of Eastern Siberia, rich in oil and diamonds, to insist that they too have a right to be a separate nation.

Perhaps, a general recognition of a right of secession will need to wait for another component of moral evolution: a recognition that all persons have equal claims on the value of natural opportunities. If this were recognized, then any nation or region with disproportionately great natural resources would be seen to have an obligation to share the value from using those resources with those parts of the world that have less than average resources per capita. This would eliminate the desire to appropriate natural resources as a reason for secession and as a reason for opposing secession. Signs of a recognition of the equal claims of all persons on the use of natural opportunities are slim. One can point to John Locke:

Whether we consider natural Reason, which tells us, the Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence: Or Revelation, which gives us an account of those Grants God made of the World to Adam, and to Noah, and his Sons, 'tis very clear, that God, as King David says, Psal. CXV. xvi. has given the Earth to the Children of Men, given it to Mankind in common.<sup>2</sup>

Locke goes on to say that every person has a right to himself, and therefore to the things of value that are created by combining his efforts with natural opportunities, "at least where there is as much and as good left in common for others." He then argues that with so much unclaimed land in America, no one can justly complain if all of Europe is privately appropriated. Locke does not address the question of how rights to land should be handled if there is no unclaimed land.

Thomas Jefferson, writing on the subject of patents, said, But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance.<sup>3</sup>

Henry George said,

The equal right of all men to the use of land is as clear as their equal right to breathe the air--it is a right proclaimed by the fact of their existence. For we cannot suppose that some man have the right to be in this world and others no right.

If we are all here by the equal permission of the creator, we are all here with an equal title to the enjoyment of his bounty--with an equal right to the use of all that nature so impartially offers. This is a right which is natural and inalienable; it is a right which vests in every human being as he enters the world, and which during his continuance in the world can be limited only by the equal rights of others.<sup>4</sup>

General recognition of the equal rights of all to the use of land and other natural opportunities is hard to find. When the powerful nations of the world got together to eject Iraq from Kuwait, very little was heard of the bizarreness of supposing that Emir of Kuwait and his relatives had a right to all the oil that lay under Kuwait. Some recognition of equal rights to the use of natural opportunities can be found in the proposed Law of the Sea Treaty, which would have had all nations benefiting from the granting of franchises to extract minerals from the sea. From an economic perspective, the treaty was flawed by the fact that it would have created an artificial scarcity of seabed mining activities in order to raise revenue, and it was opposed by the U.S. and not implemented. But it did suggest general recognition of global equal rights to at least those natural opportunities that no one has yet begun to use.

One impediment to the recognition of equal rights to the use of natural opportunities is that some system of assessment would be needed to identify the transfers that would compensate for unequal access to natural opportunities. Another impediment is that a system of rewards for those who discover new opportunities would be needed. But if there were a will to address them, these technical difficulties could be solved adequately, as they are in jurisdictions such as Alberta, Canada, that claim all mineral rights for the government.

## **5. Power, Population and Process**

There are two other difficulties that are more serious.

- First, the existing distribution of recognized exclusive rights to natural opportunities (land, mineral resources, fishing rights, water rights, etc.) is the outcome of a game of power, and those who have won at this game have great power and are loathe to part with their winnings.
- Second, Malthusian analysis has led people to expect that if the value of exclusive use of natural opportunities were distributed equally, population would expand until everyone was at a subsistence level.

There is a solution to the second problem, contained in the idea that all persons have equal rights to the use of natural opportunities. If the crowding effects of additional persons outweigh the beneficial effects of greater economies of scale, then any region that has an above-average population growth rate is appropriating more than its share of the scarce natural opportunity to be a parent. The costs that this region thereby imposes on other regions can justly be subtracted from what



would otherwise be its claim on the value of using natural opportunities. Each region could then decide for itself whether to pass those costs on to individual couples who decide to conceive children.

Similarly, when a region imposes costs on others through interregional pollution, the costs so imposed should be subtracted from the region's claim to the value of exclusive use of natural opportunities. The great challenge is to overcome the entrenched power that benefits from continued blindness to moral necessity. The mechanism must not be force of arms, for that entails too great a risk of installing a new power elite who would be as unprincipled as the first. Nor should the mechanism be the power of majorities, through legislation and referenda, for these processes can also be used for the selfish aggrandizement of those who control them. It is good that constitutions prohibit the taking of property without just compensation. It is to be hoped that courts will interpret such restrictions as prohibiting taxes that take all of the value of things currently regarded as property.

When respect for a newly understood moral truth requires the disappointment of previously protected expectations, those who would push their fellow citizens to incorporate that truth into the governmental process should be obliged to have their ideas reviewed in a constitutional amendment process that will ensure that they will be adopted only if a broad consensus on them is achieved. When people are ready to see a new moral truth, that truth can overcome such a hurdle.

## Notes

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1. Mancur Olson, "Dictatorship, Democracy and Development," *American Political Science Review* 87: Fall 1993, 567-76.
2. John Locke, *Two Treatises of Government*, Second Treatise, paragraph 25.
3. Thomas Jefferson, Letter to Isaac McPherson, August 13, 1813.
4. Henry George, *Progress and Poverty*, Book VII, Chap. 1 (pp. 338-39 in many editions).