

Examining Social Contract Theory

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INTRODUCTORY QUOTES

“So, however much people may get this wrong, what law is for is not to abolish or restrain freedom but to preserve and enlarge it; for in all the states of created beings who are capable of laws, where there is no law there is no freedom. Liberty is freedom from restraint and violence by others; and this can’t be had where there is no law.”

John Locke, *Second Treatise of Civil Government*¹

“Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that being a natural and unalienable right. To guard a man’s house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man’s conscience, which is more sacred than his castle, or to withhold from it that debt of protection for which the public faith is pledged by the very nature and original conditions of the social pact.”

James Madison, “Property” in *The National Gazette* (29 March 1792)²

More than ever before in human history, we share a common destiny. We can master it only if we face it together. And that, my friends, is why we have the United Nations.

Kofi Annan, *Message for the new millennium* (31 December 1999)³

1. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, 20 (1690), available at <http://www.earlymoderntexts.com/pdfs/locke1689a.pdf>.

2. James Madison, *Property*, *The National Gazette*, Mar. 29, 1792, available at <http://www.heritage.org/initiatives/first-principles/primary-sources/madison-on-property>.

3. Kofi Annan, *Message for the new millennium*, Dec. 31, 1999, available at http://news.bbc.co.uk/2/hi/special_report/millennium/584374.stm.

TOPICS

Social Contract Theory, at its most basic level, states that human beings give up certain rights they have in a state of nature in order to obtain the securities and rights provided by civilization.⁴ Understanding what the effect of this surrender has on the rights of the individual requires answering the following questions: what rights exist in a state of nature; what rights are imparted by the creation of civilization; what rights are lost by signing the social contract; and what rights are retained, in full or in modified form, when the social contract is signed?

This article uses concepts rooted in Social Contract Theory to provide an argument as to why the 9th and 10th amendments to the U.S. Constitution have been given an inappropriate level of importance by the judiciary. This article is not about the validity of Social Contract Theory. Social Contract Theory was prevalent among the founders of the United States;⁵ therefore it must be understood in order to glean what was contemplated by the founders when they drafted the Bill of Rights. Understanding Social Contract Theory and its prevalence among the founders of the U.S. puts the 9th and 10th amendments in an interesting light, and has implications for the nature of civil rights in the United States.

This article also uses concepts of Social Contract Theory to provide an argument for an expanded role and responsibility of the United Nations related to nuclear proliferation, climate change, and human rights. Understanding Social Contract Theory has implications for the nature of the United Nations and the role that institution should play.

RIGHTS AND SOCIAL CONTRACT THEORY

The rights afforded to human beings in the state of nature can largely be summed up as bodily autonomy, or self-determination, rights. Essentially, this means that each human being in the state of nature is, or should theoretically be, the sovereign of his or her body. In this article, the word “sovereign” is being used to demarcate an entity’s ability to control its own course and does not include the idea

4. Jean Jacques Rousseau, *The Social Contract* (1762), available at <http://www.constitution.org/jjr/socon.htm>; <http://www.iep.utm.edu/soc-cont/>, Internet Encyclopedia of Philosophy, Social Contract Theory.

5. See Jennifer Mueller and Demand Media, *Social Contract & Its Effects on American Democracy*, <http://classroom.synonym.com/social-contract-its-effects-american-democracy-9791.html>; <http://www.iep.utm.edu/amer-enl/>, Internet Encyclopedia of Philosophy, American Enlightenment; and Barbara Dillbeck, *Social Contract (The)*, <http://learningtogive.org/papers/paper222.html>.

of final or absolute power. Therefore, in a state of nature, the extent of control of the individual, without aggression or force, would be their body.

The rights created by civil society are property rights because, in the state of nature, the only means of maintaining property is by force or the threat of force. In civilization, other means of protecting property exist such that there is often an expectation of its protection. These means are normally enforced by the society's governing entity and should raise the amount of risk associated with a use of force deemed unacceptable by the society's contract. The governing entity should be as objective and impartial as possible when enforcing the means. Therefore, the concepts of bodily autonomy and property are the base for all rights enjoyed by human beings.

The signing of the social contract necessitates that certain rights be given up by the individual. The forfeiting of these rights by the sovereign individual to the state creates the sovereign state. Criminal laws are the easiest example to point to of rights that have been given up by individuals. Each individual in the state of nature could, for example, murder another human being without fear that a leviathan would impose a penalty for the murder.⁶ Once the social contract is signed, an individual could still commit murder, but would then be subjected to the punishment prescribed for the act by the civilization.⁷

This brings us to, "What rights are retained, in full or in modified form, when the social contract is signed?" Clearly, not all bodily autonomy rights are retained or forfeited by the signing of the social contract. What is much less clear is how rights that are retained are affected by the signing of the contract. Some bodily autonomy rights will be modified to reflect the new power structure created by civilization while others will be retained in whole. An example of a right being modified to fit the new power structure is the right to vote. The right to vote is an extension of an individual's right of self-determination in that a sovereign individual who agrees to join the civilization should, by right of being a human sovereign, have the right to affect the path the civilization takes that was created by the individual signing the contract.⁸

6. It is true, likely even, that there would be retaliation for a murder in a state of nature. The problem with how this retaliation is undertaken is that it is mostly likely not undertaken by uninterested third parties. Instead, the retaliation is carried out by family members, friends, or associates of the victim. This can result in a state of perpetual war where each side seeks to remedy the other's injustice with another injustice. This perpetual war drains resources from pursuits that benefit all of humanity.

7. See <http://www.iep.utm.edu/soc-cont/>, Internet Encyclopedia of Philosophy, Social Contract Theory.

8. See Jean Jacques Rousseau, *The Social Contract*, Book IV (1762), available at <http://www.constitution.org/jjr/socon.htm>.

Any right that entails an action that does not directly affect other signees of the contract should be retained in full by the individual. An easy example of this is decisions related to hair and clothing style. Because the purpose of the social contract, and the creation of government or civilization, is to control human to human interaction and ensure that scarce resources are utilized in the most efficient way to provide for the collective civilization, acts that do not touch on these purposes should be retained in full by the individual.

A CAVEAT

It is important to note here that no right is absolute. The signing of the contract creates rights and obligations for individuals and the civilization. If either fails in its obligations, the other may choose not to fulfil their side of the contract or in some way punish the breaching side.⁹ The utilization and means of utilization of this failure to fulfil or punish is a complex topic that is deeply divisive, partly due to the globalized and interdependent nature of human society. Furthermore, there are situations where the collective need of a civilization will outweigh the individual autonomy rights of its members even if the rights in question are those rights which would normally be retained in full by the individual. An example of this is placing dress restrictions on individuals who work with hazardous materials or dangerous pathogens while those individuals are at work.

THE 9TH AND 10TH AMENDMENTS

The first ten amendments to the U.S. Constitution were passed in 1791 and are known as the Bill of Rights. James Madison, a primary drafter of the United States Constitution, set out to draft a Bill of Rights shortly after the ratification of the United States Constitution because the Constitution was silent on the subject. The inclusion of a Bill of Rights was the subject of fierce debate at the time.¹⁰

The 9th Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.¹¹

The 10th Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.¹²

9. See <http://www.iep.utm.edu/soc-cont/>, Internet Encyclopedia of Philosophy, Social Contract Theory.

10. THE BILL OF RIGHTS: A BRIEF HISTORY, American Civil Liberties Union, Mar. 4, 2002, <https://www.aclu.org/racial-justice/prisoners-rights-drug-law-reform-immigrants-rights/bill-rights-brief-history>.

11. U.S. CONST. amend. IX.

12. U.S. CONST. amend. X.

By indicating that the enumeration of certain rights should not be construed to deny or disparage others retained by the people and that all rights not delegated are retained, the 9th and 10th amendments imply that Social Contract Theory, or the ideas encompassed by it, were heavily contemplated during the drafting of the Bill of Rights. The 9th and 10th amendments are a representation not only of the idea that the rights of the people extend into areas where society should tread lightly if it is to tread at all, but that the scope of the governing societal entity's sovereignty is not as broad as that of an individual sovereign in a state of nature.

The 9th and 10th amendments have been given very little power in terms of expanding on individual rights.¹³ However, they should be a substantive catch-all provision for the rights of the individual. Because the courts have not relied on the 9th and 10th amendments in the illumination of rights not enumerated in the Constitution, the U.S. has created a patchwork of grounds for civil rights as well as a patchwork explanation for the existence of those rights.¹⁴ This is despite the fact that all of the rights represented by that patchwork stem from the idea of bodily autonomy.

For an example, look at two arguments for the unconstitutionality of same sex marriage bans: equal protection and substantive due process. Equal protection is a civilization's guarantee under the contract that each individual sovereign who signs the contract will be treated in a similar fashion to all other sovereigns who sign the contract. Substantive due process is a civilization's guarantee that certain bodily autonomy rights are retained in full by the individual, and only a special circumstance would allow that right to be infringed upon. So, both of these arguments really are two different aspects of the same right: the right of bodily autonomy.

The 9th and 10th amendments were a powerful statement by the founders about the people's rights, and these amendments have not been given the gravity they were intended. These two amendments are a statement about the concept of bodily autonomy. Courts in the U.S.

13. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (while the 9th was cited, it was not the primary basis for the decision); http://www.law.cornell.edu/anncon/html/amdt9_user.html#amdt9_hd1, Explanation of the 9th Amendment, Cornell University; http://www.law.cornell.edu/anncon/html/amdt10_user.html#amdt10_hd4 Explanation of the 10th Amendment, Cornell University (The 10th amendment has primarily been used in relation to the rights of the various states).

14. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding the Constitution protects a right to privacy despite not having any text present that says as much); *Roe v. Wade*, 410 U.S. 113 (1973) (extending right of privacy to abortion under 14th amendment substantive due process); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no right to assisted suicide, but significant discussion of fundamental rights); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas law outlawing sodomy based on sexual conduct being protected by substantive due process under the 14th amendment).

should place the 9th and 10th amendments front and center in the future when rights not specifically enumerated are explored.

THE UNITED NATIONS, THE SOCIAL CONTRACT, AND SOVEREIGNTY

Currently, the nations that comprise the United Nations do not have to surrender sovereignty to it. That is, the United Nations is not a leviathan, or true sovereign, in that it has little or no means of enforcing its edicts on its own. Instead, it must rely on the goodwill of its member states.¹⁵ In some areas, this is desirable, but in others, it is crippling.

The United Nations represents a new tier of the social contract, and would therefore logically have some sort of limited sovereignty, as all societal sovereigns have. For example, in the United States, there are various levels of sovereigns, or governments. There are municipalities, states, and the federal government,¹⁶ to name a few.¹⁷ Each of the levels of government is there to regulate certain conduct or certain areas of conduct. For instance, municipalities generally handle the provision of services like waste removal and water.¹⁸ The United Nations is a governing entity, and should be given limited sovereignty, at least, in the areas of nuclear proliferation, climate, and human rights.

Areas where there is a “Race to the Bottom” between nations should be placed under the sovereignty of the United Nations. That is to say, where a situation arises that there is no incentive for any one nation to undertake an action despite that action being in the best interest of that nation and humanity at large, the United Nations should play the role of a leviathan and mandate the action. Obvious examples are the issues of nuclear proliferation and the climate. In each of these issues, unilateral action by any one country to redress the issue, without any agreement with others, will merely result in that one country losing out on the benefit of taking no action.

A second area where the United Nations should be given sovereignty is the area of human rights. First, human rights are universal when Social Contract Theory is employed, so the protection of everyone’s rights is a universal responsibility. “Injustice anywhere

15. See Charter of the United Nations, Article 2, <http://www.un.org/en/documents/charter/chapter1.shtml>.

16. <http://www.whitehouse.gov/our-government>, Our Government, official website of The White House.

17. These are also sometimes just building blocks of other, larger entities with limited powers, or sovereignty.

18. <http://www.whitehouse.gov/our-government/state-and-local-government>, State and Local Government, official website of The White House.

is a threat to justice everywhere.”¹⁹ Therefore, the United Nations, as the leviathan of nations and the representative of all peoples, should be given the responsibility of ensuring that the rights of all peoples are infringed by no nation. This belief is manifested by the fact that the United Nations does extensive work protecting human rights through the Universal Periodic Review²⁰ and its various human rights treaty bodies.²¹

Because the United Nations is responsible for the protection of the bodily autonomy rights of all people, it is imperative that it not infringe on these rights as that would be a failure of its obligation under the social contract. Therefore, the legitimacy of the United Nations depends, at least in part, on leading by example in the protection of human rights. This makes its role in the Haiti Cholera outbreak²² and its failure to act to protect human rights when such action conflicts with the agendas of Security Council members²³ particularly damaging to its legitimacy as a sovereign.

CONCLUSION

As human society becomes ever more interdependent and united, Social Contract Theory will continue to provide a strong argument for continually heightening protections of bodily autonomy rights, particularly of minority groups. The concept of individual liberty, the hallmark of the theory, is firmly entrenched in the Bill of Rights and the workings of the United Nations. Bodily autonomy is the heart of individual liberty, of freedom, and its protection from infringement is a primary purpose of the society we live in, wherever we may live.

19. Letter from a Birmingham Jail, Martin Luther King, Jr., Apr. 16, 1963, available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

20. See <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>, Universal Periodic Review, official website of the United Nations.

21. See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>, Human Rights Treaty Bodies, official website of the United Nations.

22. See, e.g., Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, Executive Summary, p. 3, available at <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>.

23. See, e.g., Somini Sengupta, U.N. Security Council Members Propose Resolution on Syrian Aid, N.Y. TIMES, Feb. 20, 2014, available at <http://www.nytimes.com/2014/02/20/world/middleeast/un-security-council-members-propose-resolution-on-syrian-aid.html>; Michelle Nichols, Russia, China veto U.N. Security Council Resolution on Syria, REUTERS, Jul. 19, 2012, available at <http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE86I0UD20120719>; and Donald Neff, An Updated List of Vetoes Cast by the United States to Shield Israel from Criticism by the U.N. Security Council, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, May/June 2005, at 14, available at <http://www.wrmea.org/2005-may-june/an-updated-list-of-vetoes-cast-by-the-united-states-to-shield-israel-from-criticism-by-the-u.n.-security-council.html>.

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Timothy Weber was born in Evansville, Indiana. He graduated from the University of Evansville with a bachelor's degree in Political Science in 2009 and from the Indiana University Robert H. McKinney School of Law with a juris doctorate in 2013. While at McKinney, he was the President of the International Human Rights Law Society, and his law review note was published in the *Indiana Law Review*.

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