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Principles of Contracts for Governing Services

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The state provides governance services within a specified territory, demanding payment in the form of taxes, regulations and compulsory service. Some citizens expressly consent to that bargain, as when the President of the United States swears to preserve, protect and defend the Constitution. With regard to many of its subjects, however, the state can claim no more than hypothetical consent, leaving its use of force only weakly justified. Governing services provided under contract, founded in express consent, enjoy a more justified relationship with their citizen-customers. Private institutions already provide the same legal services as the state, offering rules, dispute resolution and armed security, often on a large scale. The success of quasi-sovereign territories such as Hong Kong and China’s Special Economic Zones has encouraged some countries to consider outsourcing government services more comprehensively. Honduras, for instance, has passed legislation that could allow owners or long-term leaseholders to exercise largely independent authority over city-sized territories. The world may soon contain many such regions, called ‘charter’ or ‘free cities’, where an owner or master leaseholder provides governing services to tenants, sub-tenants, invitees and others by contract. What terms should we generally expect to see in contracts for governance services? Examples from history and theory suggest such features as respect for consent, protection of fundamental rights, independent adjudication, and freedom of exit. The specifics of contracts for governance services must respond to market demand, of course; we speak here not of rules but of guidelines. Field tests can tell us more about how best to serve citizen-consumers, offering millions of people the prospect of better government.

Thomas Paine’s Scientific Approach to Government

As a restless young man in the placid town of Thetford in England, Thomas Paine must often have looked to the West and imagined the freedom of the New World. Unhappy as an apprentice to his father, who made corset stays out of whalebone, Paine ran away from home to serve on a privateer. That first bid for freedom failed; Paine’s father dragged him back to staymaking.
Paine soon abandoned his father’s trade, to pursue such ventures as preaching, running a tobacco shop and collecting excise taxes.¹ Professional success eluded him, however. Nor did Paine achieve the other trappings of respectable English life, instead losing his first wife to death and a second to separation, and fathering children by neither. At age 37, Paine escaped to America and made a fresh start.²

Today, we remember Paine primarily for supporting the War of Independence. His writings roused and unified revolutionary Americans. ‘Without the pen of the author of Common Sense, the sword of Washington would have been raised in vain,’ claimed John Adams.³ Paine was no mere pamphleteer, however. He also showed a penchant for industry and entrepreneurship, inventing the single-span iron bridge and a smokeless candle, and getting involved with the then-new steam engine.⁴ Whether designing the machinery of government, industry or commerce, Paine strived for creative solutions to human problems.

What would Paine think today if he could revisit the country that he helped build two centuries ago? Once past the shocking changes wrought by growth and change, Paine would probably give the US experiment in constitutional governance a coolly scientific appraisal. Where did it succeed? Where did it fail? How could it have been better built and operated? Paine would, in other words, give the US government the same treatment he gave the British one.

Paine mercilessly criticised how the Crown had ruled – and, all too often, misruled – its American colonies. Finding fault in monarchy, he called for a different and better form of government, one that would secure ‘The Rights of Man’ (as he titled his book on the topic) and pay due regard to the consent of the governed.⁵ Paine, moreover, had his political theories put through the rigours of real-world testing and lived to see his American experiment off to a promising start.

Since Paine’s death in 1809, we have learned a great deal about how governments work in both theory and practice. We cannot recreate Paine’s thinking, but we can emulate his approach to the challenge of improving human institutions. Just as Paine looked beyond rule by the Crown, we should look beyond rule by the state.

The state provides governing services within a specified territory, demanding payment in the form of taxes, regulations and compulsory service. Some citizens expressly consent to that bargain, as when the President of the United States swears to preserve, protect and defend the Constitution.⁶ With regard to many of its subjects, however, the state can claim no better than hypothetical consent, leaving its exercise of authority only weakly justified.

¹ Kaye (2005), p 22.
² Foner (1976), pp 1–3.
⁵ Paine (1994a).
⁶ Constitution of the United States of America (1787), as amended, art II, s 1, para 8.
A more justified mode of governance would supply laws, adjudication and enforcement services on expressly consensual terms, under contract. Private institutions already provide the same governing services as the state, offering rules, dispute resolution and armed security, often on a large scale. The town of Sandy Springs, Georgia, for instance, has contracted out all of its services but for a handful of supervising administrators. The success of quasi-sovereign territories such as Hong Kong and China’s Special Economic Zones has encouraged other countries to look into the benefits of outsourcing governance. Honduras has amended its constitution, enacted legislation and begun laying the administrative groundwork to create quasi-sovereign special development regions, called ‘REDs’ from their Spanish acronym. The largely independent RED governments will have authority to import laws and adjudication from other countries, creating ‘charter cities’, or to competitively outsource government services in ‘free cities’.

The Honduran REDs represent the most recent example of a form of governance that has existed since the beginning of governance itself: the quasi-sovereign territory. Such regions exercise considerable autonomy, yet fall within the jurisdiction of a larger government with regard to some functions. The earliest examples of such quasi-sovereign governments date from the Philistine city-states that dotted the Eastern Mediterranean, c. 1500–1000 BCE, which joined in a loose confederation. Later and more widely known examples include the poli of the ancient Greek empire, the cities of Hanseatic League, the states of the United States, and even such neighbourhood institutions as homeowners’ associations, condos and cooperative residences. All represent relatively small and relatively independent sovereigns, each of which provides governing services under the constraints of competition and the supervision of a supervening but limited outside authority.

Traditional states have experimented increasingly with outsourcing their functions to private parties. The Honduran REDs take that process to a new but logical extreme, allowing the creation of quasi-sovereign territories that govern almost entirely by contract. These contracts could include choice of law, arbitration and enforcement provisions that would combine to create a complete legal system – one that would aim to compete in terms of price and quality with state-supplied services.

Free cities might soon come to offer millions of suffering people the chance to choose a better, more consensual way of living together. What general features should we expect to see in their contracts for governance services? Examples from history and theory suggest these:

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7 Benson (1990), pp 179–234.
8 Feine (2012).
The specifics of contracts for governance services must vary across applications and in response to market demand, of course; we here speak not so much about rules as of guidelines. Will the framework for consent set forth in these pages hold up to the rigors of the real world? Only field tests can tell.

This article describes the principles of contracts for governance services, covering the topic in three broad tranches. The next section sets the background, using graduated consent theory to assess the justifiability of various forms of government. States face a problem: they typically boast no more than the hypothetical consent of their subjects, a shaky foundation for justifying legal authority. Contractual governments, in contrast, enjoy the express consent of those they serve, making strongly justified relations with their citizen-customers possible.

Can expressly consensual government present a viable alternative to the state? Condominiums, homeowners’ associations, multiple-tenant income properties, casinos, malls, cruise ships, arbitrators, mediators, security guards – these and other private institutions already offer in bits and pieces the same kind of governance services that the state offers as a package deal. Soon, if plans for seasteads or free cities come to fruition, private suppliers of governing services may largely supplant state suppliers. Drawing from historical and theoretical examples, the third section of the article describes some general principles that appear likely to shape contracts for governance services. Far from novelties, these principles echo similar provisions in the Constitution and other such political documents. Contracts for governance services go farther than the state, however, in pursuing consent, efficiency and fairness. They have to, given that they have to satisfy the market demand of their citizen-customers.

The fourth section observes that competition from contract-based alternatives stands to improve governance in the United States, and throughout the world, by encouraging the better treatment of those subjected to state power. The fifth section runs through some objections and answers. In conclusion, hewing to the observed contractual principles appears likely to normalise government, turning it from the special province of a few monopolists into just another service industry. Contractual governance remains a young and developing field, one that stands to benefit from field tests and careful study.

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12 See Friedman and Taylor (2011), p 6 (‘It may seem strange to think of governance as a product, citizens as consumers, and governments as producers … The governance industry certainly has some unusual qualities, but those qualities do not exclude it from conventional economic analysis.’)
Seasteads, Charter Cities and Other Consent-rich Governments
Consent varies by degrees, and has the power to justify or condemn social relations. As evidenced by contract and tort law, courts enforce expressly consensual transactions and remedy nonconsensual, objectionable ones. By that measure, a state can at best exercise only weakly justified authority over its citizens and residents. Although we can imagine how to reform states to make them more consent rich, they will always fall short of express consent. Alternatives such as seasteads or quasi-sovereign cities offer the prospect of governments justified by the express consent of their customer-citizens.

A Primer on Consent
Consent plays an important role in moral, legal and economic thinking. The presence or absence of consent can determine whether a touch constitutes a friendly pat or actionable battery, and whether goods have changed hands by gift or by theft. Consent does not operate in a simple binary fashion, however, answering only ‘yes,’ or ‘no’ to questions about the justifiability of human interactions. Instead, it comes in various strengths. The common law has, over several centuries and in thousands of cases, grappled with consent in all its guises. That rich body of evidence reveals certain patterns to the discerning eye, revealing that consent varies by degrees and measures the justifiability of human interactions.\(^\text{13}\)

Graduated consent theory describes consent’s various forms and how they relate to justification. In the positive range, the scale runs from express consent, down through implied consent, ending at merely hypothetical consent. Express consent bears more power to justify a transaction than either lesser form of consent can muster, while implied consent in turn has more power to justify than hypothetical consent does. A mirror of that ranking repeats in the degrees of unconsent.\(^\text{14}\) Figure 1 summarises this.

![Figure 1: Grades of consent and their relation to justification](image)

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\(^{13}\) See generally Bell (2010).

\(^{14}\) Bell (2010), pp 33–49.
Physicians who render emergency care on unconscious victims escape liability for battery, for example, because the law presumes that their patients would have consented to treatment if they had been conscious. Hypothetical consent thus has some power to justify a transaction. It has less power to justify than express or implied consent does, though. If an emergency patient wakes up and objects to receiving medical care, an overly persistent doctor would commit assault and battery. A boxer’s express consent, in contrast, can excuse even a fatal blow, as demonstrated when the court in *McAdams v Windham* dismissed an assault-and-battery claim on grounds that the deceased had knowingly and willingly agreed to the fight.

Contract law, likewise, reveals a finely tuned appreciation of the different grades of consent and their power to justify transactions. Parties impliedly consent to certain default terms – that acceptance of an offer happens upon its offer, that words have their ordinary meanings and so on. The parties can change those defaults by mutual agreement, showing that express consent trumps implied consent. As for hypothetical consent, it fills in only when stronger forms of consent cannot be had, as in quasi-contract cases. In contract, as in tort law, consent varies by degrees and measures out the justifiability of human interactions.

Why care about justifiability? Because the law remedies unjustified transactions, such as unexcused assault or battery, and authorises enforcement of justified ones, such as consensual agreements. That is not to say that courts care only about justifiability or consent, of course; state and federal courts routinely authorise the enforcement of statutes, regulations, ordinances and so on, even on defendants who stridently object to them. What such proceedings lack in justification, they evidently make up for in power. So far as private concerns go, however, courts pay devoted attention to consent when called on to resolve disputes.

**The Problem with States**

States do a notoriously poor job of winning the consent of those they govern, leaving the justification of their power on shaky ground. Founded though it was on the claim that rulers derive ‘their just powers from the Consent of the

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16 See, for example, *Curtis v Jaskey*, 759 NE2d 962 (Ill App Ct 2001) (involving a patient who brought an action for battery against her physician for performing an emergency episiotomy despite her denial of consent).
17 *McAdams v Windham*, 94 So 742 (Ala 1922).
19 Llewellyn (1950), p 404 (‘Words are to be taken in their ordinary meaning unless they are technical terms or words of art.’) (footnote omitted).
20 *Carlill v Carbolic Smoke Ball Company* (1893) 1 QB 256 (holding that offeror controls the terms of the offer); American Law Institute (1981) *Restatement (Second) of Contracts*, ss 60, 202(b).
21 See, for example, *Callano v Oakwood Park Homes Corp*, 219 A.2d 332 (NJ Super Ct App Div 1966) (affording restitution for benefits mistakenly bestowed).
Governed’, the American experiment falls short of ideal on that count.\(^{22}\) Granted, select citizens have given their express consent to the US Constitution, which mandates that the President ‘swear (or affirm)’ to ‘preserve, protect, and defend’ the Constitution,\(^{23}\) and requires that all legislators, judicial officials and executive officers, whether of federal and state governments, ‘be bound by Oath or Affirmation, to support this Constitution’.\(^{24}\) Naturalised citizens must swear that ‘I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same’.\(^{25}\) The oaths taken upon military enlistment impose similar terms.\(^{26}\)

Run-of-the-mill citizens are not, however, required to expressly consent to the Constitution. Nor are they requested, invited or officially encouraged to do so. That is not a mere oversight; the problem with consenting to a state runs deeper than winning apparent promises of fidelity. Officials could not require that everyone governed by the Constitution pledge fidelity to it without making a mockery of consent. The difficulty arises not from a lack of oaths, but from a failure of the conditions under which an oath reliably demonstrates genuine consent.\(^{27}\) No court worth the name would grant the enforceability of a supposed agreement imposed on a natural person by an awesomely powerful unnatural institution claiming the sole right to initiate coercion. A state thus cannot generally claim justification by express consent.\(^{28}\)

Nor does implied consent, despite its invocation by ‘love it or leave it’ patriots, go very far toward justifying state power. People live in countries for many reasons – family relations, cultural preferences, economic opportunities – that have nothing to do with the government.\(^{29}\) Indeed, most citizens seem to put up with their governments only grudgingly, for want of better options. At most, a state can claim the hypothetical consent of those it governs. This it does by offering governing services so fair and efficient that we can credibly suppose that hypothetical citizens would agree to them if asked. Professor Randy E Barnett does as well as anyone at justifying the Constitution, as written if not as implemented, on those grounds.\(^{30}\) Some prefer the hypothetical consent generated behind John Rawls’ veil of ignorance\(^ {31}\) or Robert Nozick’s account of how the state might have arisen

\(^{22}\) Declaration of Independence (US 1776), para 2.

\(^{23}\) Constitution of the United States of America (1787), as amended, art II, s 1, para 8.

\(^{24}\) Constitution of the United States of America (1787), as amended, art VI, s 3.


\(^{26}\) Oath of Enlistment, 10 USC s 502 (2012) (mandating and specifying an enlistment oath for US armed forces).

\(^{27}\) Herzog (1989), p 192 (criticising mandatory loyalty oaths as ‘degrading and punitive experiences’ for those forced to swear).


\(^{30}\) See generally Barnett (2004).

without violating any rights (even if in practice it never has).\textsuperscript{32} Regardless, those imaginative arguments can do only so much to justify the very real power that states exercise over their subjects.\textsuperscript{33}

To render a state more justified, we could reform it to admit more freedom of exit, both physical and \textit{de jure}. Even then, though, a state could not creditably claim the express consent of its subjects; the very structure of the state precludes the possibility. The next section explains.

\textbf{Reforming States to Make Them More Consensual}

We can render a given state more justified by reforming it to make it better respect the consent of those it governs. The United States, for example, should do more to satisfy the plain terms of the Constitution before it lays claim to even the hypothetical consent of those it governs. Can we confidently claim that the average American would, if asked, agree to receive the quality and amount of governing services that now issue from Washington, DC? If not, we should question whether the United States has the hypothetical consent of those it subjects to its jurisdiction. To discern fine ideals in the Constitution’s text does not suffice; we would never agree to government that was good in theory but wicked in practice.

We can also render a state more justified by implementing reforms that increase the implied consent of those it governs. As noted above, mere residence in a state does not reliability prove that someone has impliedly consented to its rule. People live where they live for many reasons, and often endure unwanted governance only due to high exit costs. Residence in such cases says more about forbearance than consent. Perhaps a very small state that allowed free emigration, in a world with many attractive immigration options, could point to mere residence as solid proof of consent, perhaps not.\textsuperscript{34} The size of the United States, at any rate, argues against interpreting mere residency as consent to its governance.

In favour of its claim to residents’ implied consent, however, the United States can cite federalism and respect for contractual choice of law provisions – both policies that allow residents a limited kind of exit from the Constitution’s jurisdiction. Those apologies do not go very far, however. The United States has in recent decades failed to take states’ rights seriously, making federal law supreme even in minutely local matters.\textsuperscript{35} In other areas of law, moreover, such as various social insurance schemes or with regard to most of its copious regulations, the federal government does not generally respect the right of uninterested citizens to opt out.\textsuperscript{36}

\begin{thebibliography}{9}
\bibitem{32} Nozick (1974), pp 118–19.
\bibitem{33} Block and DiLorenzo (2000).
\bibitem{34} Barnett (1998), p 43.
\bibitem{35} See, for example, \textit{Gonzales v Raich} (previously \textit{Ashcroft v Raich}), 545 US 1 (2005) (holding that marijuana grown at home and for private use is subject to federal law).
\bibitem{36} Somin (2000), pp 782–894.
\end{thebibliography}
In these and other ways, we can reform a state to make it more consent rich and thus more justified.\textsuperscript{37} At the very least, that would represent a \textit{prima facie} good. Indeed, we might well regard justification as the \textit{summum bonum} of a social institution. Even after deep and wide reforms, however, most states would still probably fall short of winning the express consent of all they govern. To achieve that – the gold standard of justification – we must turn to institutions that provide government services under contract. The next subsection reviews the options.

\textbf{Expressly Consensual Alternatives, Real and Imagined}

Most social institutions seek and win the express consent of their members to accept restrictions on their otherwise unhindered freedom. Employers, churches, schools, clubs, unions – these and a thousand other organisations regulate their members’ behavior through rule-based mechanisms. In a healthy society – one marked by many various intermediary institutions – these expressly consensual sources of the law serve as buffers between the individual and the state. In terms of practical power, they can even grow to rival the state. The Catholic Church has a long history of counterbalancing political authorities,\textsuperscript{38} for instance, and the market capitalisation of Apple now exceeds the gross domestic product of countries as large as Poland, Belgium, Sweden, Saudi Arabia or Taiwan.\textsuperscript{39} But can expressly consensual institutions offer an alternative to the state in terms of supplying rules, resolving disputes and enforcing justice? In other words, can private institutions compete with the state in supplying governing services?

Lon L Fuller aptly defined the law as ‘the enterprise of subjecting human conduct to the governance of rules’.\textsuperscript{40} So understood, expressly consensual institutions such as businesses, churches and clubs already compete with the state in terms of providing the law. Fuller recognised and addressed the objection that his generous definition of law ‘permits the existence of more than one legal system governing the same population. The answer is, of course, is that such multiple systems do exist and have in history been more common than unitary systems.’\textsuperscript{41} We should thus not ask whether expressly consensual institutions can compete with the state in terms of governing human behaviour; we should instead ask how far they can go in replacing it.

One could argue that purely private institutions already do all that states do, and with greater efficiency. As Professor John Hasnas has observed, private institutions already supply rules, resolve disputes, police the law, internalise externalities and provide public goods.\textsuperscript{42} Except for some features few citizens would miss (such as inefficiency, corruption and occasional oppression), and the mixed blessings of patriotism, the state can offer little else.

\textsuperscript{37} For other reforms aimed toward the same end, see Bell (2010), pp 63–71.
\textsuperscript{38} See generally Berman (1983).
\textsuperscript{39} Goldman (2012).
\textsuperscript{40} Fuller (1969), p 123.
\textsuperscript{41} Fuller (1969), p 123.
\textsuperscript{42} Hasnas (2008).
It would almost suffice to combine those various services into a whole, stitching together a quasi-state out of privately generated rules (such as the Restatements of Law), private dispute resolution (such as according to rules of the American Arbitration Association), and private enforcement services (such as ADT Security). That would provide only the software side of the enterprise, however. To launch private governing services requires hardware too – in this case, territory not already subject to countervailing state controls.

Thanks to their respect for property rights, many states already allow a great deal of room for private government of a sort. To a large degree, landowners can create their own little kingdoms, complete with proprietary rules, enforcement mechanisms and dispute resolution. Many private communities rival small cities in size and the range of services provided. Homeowners’ associations and casinos do not completely substitute for the state, however, which claims special powers and possesses special attributes. Because it claims the right to initiate coercion absent (and even contrary to) its subjects’ express consent, the state represents something of an exception to the usual means of coordinating human behaviour. It shares that distinction with organised criminal bands; some theorists even posit that the state arose when marauding thieves decided to settle down and tend their victims like cattle. Regardless of its origins, however, the state as we know it today differs from mere banditry in that it credibly claims a monopoly on initiating coercion within a particular geographic area. Seasteads and free cities would make similar claims, but premised on more justified foundations.

Because states do not claim the open oceans as part of their territory, there remain remote and watery parts of the earth where expressly consensual communities could arise completely free from political interference. This has some visionaries to ‘work to enable seasteading communities – floating cities – that will allow the next generation of pioneers to peacefully test new ideas for government’. Although seasteading remains more theory than practice, its advocates have given careful thought to establishing consent-based communities, providing good fodder for this article’s study of the principles of contracting for governance services.

43 Foldvary (2002); Boudreaux and Holcombe (2002).
44 MacCallum (2002).
45 See, for example, Nock (1983), p 40 (‘[T]he State invariably had its origin in conquest and confiscation.’); Oppenheimer (1914), p 8 (explaining the state as ‘forced by a victorious group of men on a defeated group … Teleologically, this dominion had no other purpose than the economic exploitation of the vanquished by the victors.’)
46 Weber (1922), p 154 (‘A compulsory political association with a continuous organization … will be called a “state” if and insofar as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.’)
48 See Taylor (2010); Friedman and Taylor (2011).
Sovereign cities date back to the very foundations of human history – consider early Athens or Rome, for instance – and played an especially important role in European history. The competition that the cities gave to royal power help to endow the Western legal tradition with such virtues as respect for individual liberties and conformity to the rule of law.\textsuperscript{49} The Hanseatic League, a loose confederation of self-governing cities, dominated the Baltic region for hundreds of years, making and breaking kingdoms.\textsuperscript{50} Even today, city-sized states such as the Vatican City, Luxembourg and Monaco enjoy full standing in the international order established by the Peace of Westphalia.\textsuperscript{51}

A community does not have to have a seat in the United Nations to exercise considerable authority, however.\textsuperscript{52} Consider Hong Kong, which has long enjoyed quasi-sovereignty, first thanks to disinterest of British officials and now due to the self-interest of Chinese ones.\textsuperscript{53} Sheltered within a harbour of near independence, Hong Kong has flourished with a lean government, the rule of law and respect for economic liberties.\textsuperscript{54} It and other small sovereigns can teach us about the principles that should guide contracts for governance services.

Note, however, that a modest size does not alone make a state a good model for consensual communities. Consider the self-proclaimed Principality of Sealand, perched on an abandoned gun platform sited about 6 miles (9.6 kilometres) off Britain’s eastern coast.\textsuperscript{55} Far from arising out of diplomatic agreements or duly executed contracts, its relations with Britain, Germany, other states and various private parties have been marked with grand talk, occasional violence and a casual regard for the rule of law.\textsuperscript{56} Sealand receives little by way of international recognition and does not serve as an apt example for this study.

The success of Hong Kong, China’s SEZs and free ports around the world has stirred interest in creating new quasi-sovereign territories. Professor Paul Romer, for instance, has suggested that developing nations create ‘charter cities’ that would effectively import governing services from another state to encourage local investment and economic growth.\textsuperscript{57} Other reformers propose ‘free cities’, set up and run by private parties under long-term agreements with host states.\textsuperscript{58} Among the various countries that have expressed an interest in creating quasi-sovereign territories, Honduras has amended its constitution, passed enabling legislation and begun administering a process through which new cities, operating largely under new laws, will rise on Honduran soil.\textsuperscript{59} The developing practice of

\textsuperscript{49} See generally, Berman (1983); Pirenne (1925).
\textsuperscript{50} Zimmern (1891).
\textsuperscript{51} Opello and Rosow (2004), p 13.
\textsuperscript{52} See Spruyt (1994), p 171.
\textsuperscript{53} See generally Welsh (1993).
\textsuperscript{54} Friedman (1998).
\textsuperscript{55} Principality of Sealand (2012).
\textsuperscript{56} Grimmelmann (2012).
\textsuperscript{57} Romer (2010).
\textsuperscript{58} See Free Cities Institute, http://www.freecities.org.
\textsuperscript{59} Economist (2012).
designing quasi-sovereign cities provides another source for this article’s investigation into the principles that apply to contracts for governance services.

Academics have long studied the theory of purely consensual governments, viewing the topic from the vantage point of law, economics, philosophy, and combined disciplines. Commentators have often suggested the types of provisions that contracts for governance systems might include, as in Randy Barnett’s suggestion that parties might agree to have their conflicts resolved under the American Law Institute’s Restatements of Law. Kevin Lyons, an entrepreneur working on the Honduran RED project, has described some terms his firm would include in contracts for governance services. A few especially far-sighted theorists have written comprehensive agreements, ready for signing. All of these sources provide evidence of the general principles applicable to contracts for governance services.

Principles of Contracts for Governance Services

This section surveys the theory and practice of contracting for governance services, uncovering a number of general principles. Foremost among these is allowing customer-citizens to live under laws of their own choosing. The process of contracting for government services itself can do much to secure express consent, the gold standard of justification. Other measures, such as providing fair notice of territorial restrictions and respecting fundamental human rights, can help to win implied and hypothetical consent.

A governing service must resolve not only disputes between its citizen-customers but also their claims against it. In any such case, a contract for governance services should provide for independent adjudication – not by paid employees of either party, but rather by mutually acceptable third parties. Seldom can states boast of so fair a process.

Whereas esoteric interpretive theories allow states to evade the plain language of their own laws, contracts for governance services would follow the same straightforward and fair interpretive rules that already generally apply to legal agreements. To ensure the enforcement of their laws, private governing services could exile lawbreakers and require that citizens and guests provide bonds against the risk wrongdoing. In order to guard against de facto imprisonment, privately provided governments should preserve freedom of exit.

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60 See, for example, Post (2009), pp 137–41 (describing the ‘rough consensus’ that governs the internet).
63 See, for example, Benson (1990); Bell (1991–92).
65 Lyons (2011).
66 See MacCallum and van Notten (2005); MacCallum (1996).
Maximise Consent

As noted above, we can maximise the justifiability of social relations by founding them on express consent. Because they typically rely on little more than hypothetical consent, states fall far short of that ideal. To a notable degree, however, private parties can already opt out of the state’s default legal system and into another, mutually agreeable one. Choice of law and choice of forum clauses, widely used and enforced, allow contracting parties to choose what rules will govern their relationship and what forum will resolve their disputes. Contracts also determine membership in private communities, such as homeowners’ associations and hotels, which compete with the state in providing rules, housing, security, recreation and other services.

Contractual governance simply represents another step along the continuum from the unjustifiable imposition of objectionable rules to the justified embrace of freely chosen ones. The Seasteading Institute, for instance, has outlined a variety of approaches to establishing governance, modelled on such examples as common interest communities, multiple-tenant income properties and corporations, all of which rely at root on expressly consensual contractual arrangements. Advocates of establishing a free port in Somalia – an area notably free of state control – have offered a detailed agreement, largely in the nature of a lease, that asks for the express consent of those it would govern. That agreement derived from an earlier one, designed for a hypothetical space settlement called ‘Orbis’, also structured as a lease agreement. Kevin Lyons, co-founder of a startup that aims to help host countries such as Honduras launch free cities, has likewise proposed using contracts to establish expressly consensual legal relations. As something of a double guarantee of consent, his proposal includes both choice of law and choice of forum provisions, allowing citizen-customers to opt for any mutually agreeable set of rules and dispute-resolution method.

It bears noting that even a system of governance designed to win the express consent of its citizen-customers may sometimes fall short of that worthy goal. Signed agreements – ideally backed with video recorded attestations of sincerity – give reliable proof of express consent. At least with regard to its residents, a governing service would do well to embrace a Statute of Frauds. It might prove awkward to impose such formalities on temporary visitors such as business invitees or social guests, however; in those cases, duly recorded oral acceptance should suffice to establish express consent to local rules.

Actions can speak as loudly as words in establishing consent. A governing service might fairly claim that anyone who intentionally enters its territory under notice of local rules has expressly consented to them. At the very least, that form

67 Taylor (2010).
68 MacCallum and van Notten (2005).
69 MacCallum (1996).
70 Lyons (2011).
71 Lyons (2011).
of proof should apply to trespassers who enter the jurisdiction of a governing service without going through the proper channels.\textsuperscript{72}

As graduated consent theory suggests, any provider of governing services ought to aim for implied consent as a second-best alternative when express consent cannot be had. This, it might do by following the practices that most people would reasonably assume apply by default in such circumstances. The Seasteading Institute has thus suggested building new systems of governance out of trusted customary rules.\textsuperscript{73} The founding agreement of the Somali free port proposed by MacCallum and van Notten likewise invokes ‘the universal order of human society’.\textsuperscript{74} The freedom of exit afforded by building choice of law and forum into the very structure of governance, as Nozick, Lyons and others have suggested, would likewise increase the credibility of claims to implied consent.\textsuperscript{75}

Hypothetical consent offers a third-best alternative when neither express nor implied consent obtains. Those offering governing services can win it by acting in ways to which their citizen-customers would agree, if asked. States thus augment their authority by pledging, in such documents as the US Bill of Rights and the UN Declaration of Human Rights, to respect fundamental rights.\textsuperscript{76} Like those documents, contracts for governance services would almost certainly guarantee to respect citizen-customers’ persons, properties and promises. The next sub-section explains.

\textbf{Protect Persons, Property, and Promises}

Should contracts for governance services explicitly guarantee certain fundamental rights, such as freedom of speech and respect for private property? States routinely do as much, promising to protect long lists of enumerated rights.\textsuperscript{77} Sometimes those promises amount to little more than pretty words; sometimes, as with the First Amendment of the US Constitution, enumerated rights effectively limit state power. If for no other reason than market demand, contracts for governance services might also list some of the rights enjoyed by their citizen-customers. The US Constitution’s Bill of Rights offers a worthy example in that regard, as it protects both specifically named rights and, in the Ninth Amendment, other unenumerated ones. In that spirit, MacCallum and van Notten’s proposed agreement for a Somali free port offers a detailed list of freedoms, many of which echo those in the Bill of Rights, which would trump any legislative or contractual rule to the contrary.\textsuperscript{78}

\textsuperscript{72} See American Law Institute (1981) Restatement (Second) of Contracts, s 50 (describing the requirements for acceptance by return promise or performance).
\textsuperscript{73} Taylor (2010) pp 7–9.
\textsuperscript{74} MacCallum and van Notten (2005), p 212.
\textsuperscript{76} Barnett (1998), pp 32–52.
\textsuperscript{77} See Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948).
\textsuperscript{78} MacCallum and van Notten (2005), pp 214–15.
Are specific enumerations of rights necessary? The success of Hong Kong in attracting immigrants and growing a thriving city suggests that combining the rule of law with the common law strongly protects fundamental human rights. From its very beginning, Hong Kong has offered, as one early promoter touted, ‘ample protection, for persons and property’.Protected from afar by England’s unwritten constitution, the citizens and residents of Hong Kong long enjoyed freedom of speech and religion, protection from unwarranted prosecution and respect for commercial interests, setting a precedent that Chinese authorities have promised to follow.

Hong Kong owes its success not to mere paper promises but to a legal culture deeply rooted in the principles of the common law. The common law rules for torts, property and contracts go very far, indeed, in protecting our freedoms of conscience, expression and association, our liberty from cruel or arbitrary legal procedures, and the security of our homes, papers, effects and other properties. Whether the rule of law combined with the common law would suffice to protect fundamental human rights in a system of contractual governance, precluding the need to list certain protected rights, remains uncertain. Only real-world testing can tell us what citizen-consumers will demand and governments provided under contract can supply.

At the very least, prudence suggests that contracts for governance services should respect the rule of law and protect persons, property and promises. Toward that end, the common law offers a well-tested set of rules – most notably, those embodied in tort, property and contract law. Although the common law itself develops incrementally on a case-by-case basis, the American Law Institute has in its various Restatements of Law conveniently summarised the relevant principles in a statute-like format. A contract for governance services could incorporate select Restatements of Law by reference, using a choice of law clause to make those the default rules for tort, property, contract and other areas.

Provide Independent Adjudication

To resolve disputes fairly requires independent adjudication. As John Locke explained, justice serves to ‘to avoid, and remedy those inconveniencies of the State of Nature, which necessarily follow from every Man’s being Judge in his own Case’. State courts offer private litigants an independent forum for resolving disputes. State courts do not, however, offer a truly independent forum for resolving disputes that name the state itself as a party,

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82 American Law Institute (2012).
84 Locke (1967), p 344.
as when a citizen complains of a statute’s unconstitutionality.\textsuperscript{85} Contracts for governance services could do better in that regard by following the lead of the private sector, where contracts routinely include clauses providing that third parties will resolve disputes arising under the agreement by the use of mediation or binding arbitration.

Long practice has led to the development of rules, such as those promulgated by the American Arbitration Association\textsuperscript{86} and the International Chamber of Commerce,\textsuperscript{87} providing for the fair and efficient resolution of disputes by independent parties. The contractual clauses necessary to invoke those rules have likewise been polished into standard forms – for example, ‘All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.’\textsuperscript{88} Various procedural rules help ensure the independence of such arbitrators. The American Arbitration Associations, for instance, offers a system where each party chooses an arbitrator and then those two arbitrators choose another, resulting in a balanced three-party panel.\textsuperscript{89}

Theorists have often suggested that consent-rich legal systems should use similar methods to resolve disputes.\textsuperscript{90} Contracts for governance services would probably include the same sort of mediation and arbitration clauses so often now seen in contracts generally. Contracting out dispute resolution offers not only greater efficiency that state courts offer, but also – and crucially in this context – greater fairness.

\textbf{Follow Clear and Fair Interpretative Rules}

Many and various factions debate how founding political documents, such as the US Constitution, ought to be interpreted. Their disputes go not just to the meaning of particular provisions, such as ‘unreasonable searches’\textsuperscript{91} or ‘cruel and unusual punishments’,\textsuperscript{92} but to how courts should approach the problem of reading a constitution or other founding political document in the first place. One leading theory argues that judges should hew to their own precedents; another argues for seeking to recreate the meaning held by those who originally ratified the document in question. Though each of those

\begin{itemize}
  \item Bell (2010), pp 68–71.
  \item American Arbitration Association (2010).
  \item International Chamber of Commerce (2012).
  \item International Chamber of Commerce (2012), p 78.
  \item See, for example, American Arbitration Association (2010), ss R-12, R-13 (describing the process by which directly appointed arbitrators choose a third arbitrator).
  \item Constitution of the United States of America (1787), as amended, amend IV.
  \item Constitution of the United States of America (1787), as amended, amend VIII.
\end{itemize}
interpretive theories has its virtues, to have them at war creates dangerous uncertainty, eroding the rule of law.\(^93\)

Contracts for governance services could avoid that interpretive mess simply by remaining true to their nature as contracts. Compared with constitutional law, the law of contracts has largely solved the problem of interpretation. Constitutions remain relatively new-fangled inventions, after all, whereas humans have had millennia to figure out how to interpret legally enforceable agreements. The common law, in particular, seems to have evolved a set of rules that encourage peace and prosperity – compare Hong Kong with Maoist China, c1950, for instance. The American Law Institute’s Restatement of Contracts (2D) offers a convenient summation of the common law’s approach to interpreting contracts.\(^94\) A contract for governance services need only incorporate those rules by reference in its choice of law clause to escape the vagaries that plague the interpretation of constitutions.

How would interpreting a contract for governance services like any other contract affect citizen-customers? They would have fair notice of the contract’s meaning, as they would know what processes and rules control its interpretation. The US Constitution, in contrast, authorises the creation of a judicial branch without limiting its interpretive power.\(^95\)

Not only would the citizen-customers of a contractual governing service know what interpretive rules to expect, they could also expect those rules to generate interpretations easily accessible to lay-people and friendly to their concerns. The common law generally looks for the plain, present, public meaning of a contract’s words and resolves uncertainties against a document’s drafter.\(^96\) In a contract for governance services, ‘no law’ would thus mean what a typical citizen-customer would take those words to mean – presumably something along the lines of ‘not a single legally enforceable restriction is allowed’. The common law approach to interpreting contracts would, moreover, resolve any remaining uncertainties in favor of citizen-customers, given the relative bargaining power of the parties and the fact that the governing service would have written the contract.\(^97\)

Living constitutionalism shows admirable concern for respecting the consent of those subjected to state power. Originalism, in contrast, shows admirable fidelity to the Constitution’s text. The virtues of those contesting theories combine in the common law’s approach to contract interpretation – the approach that would presumably apply to any contract for governance services.


\textbf{Enforce Laws via Exile and Bonding}

States enforce their rules via a variety of mechanisms, including damages or fines, equitable remedies and imprisonment. A contract for governance

\(^{93}\) Bell (2012).

\(^{94}\) American Law Institute (1981), Restatement (Second) of Contracts, ss 201–204.

\(^{95}\) Constitution of the United States of America (1787), as amended, Art III, ss 1–2.

\(^{96}\) Leib (2008), p 368.

\(^{97}\) See Bell (2010), pp 71–83.
services could conceivably borrow any of those devices. In authorising semi-sovereign REDs, for instance, Honduras has required the creation of judicial systems able to ‘address all pertinent legal issues’, including ‘entities responsible for criminal prosecution, due process rules and of operating their own prison system’.\(^98\) The courts of a RED ‘may pronounce judgments in equity or in law or both’,\(^99\) and must provide jury trials in criminal proceedings.\(^100\) Any RED contract for governance services must address those and other questions of enforcement. Importing the common law rules distilled in the Restatements of Law might help in that effort. This subsection sets aside that broader concern, however, to focus on two related enforcement mechanisms that might prove especially useful in a contract for governance services: exile and bonding.

History demonstrates that micro-states and quasi-sovereigns often impose exile rather than imprisonment or capital punishment. In the mid-1800s, for instance, Hong Kong offered convicted criminals a choice between suffering their sentences or being sent into exile with an identifying tattoo. Any such tattooed criminal who returned in violation of exile faced both the original sentence and an additional flogging.\(^101\) The Hanseatic League relied on the threat of economic blockades to control foreign sovereigns and the threat of exclusion to control its own member cities.\(^102\) Exile has also proven widely popular in customary legal systems, which generally do not possess the infrastructure necessary for imprisonment.\(^103\)

Exile need not be an all-or-nothing affair. Especially in modern, networked societies, it can come by degrees, as when a spendthrift loses access to credit or an ex-employee finds that they are locked out of their former workplace. Properly implemented, exile offers a precise, inexpensive and humane alternative to imprisonment. Theorists have thus described variations of exile, ranging in severity from outlawry to ostracism, as an useful enforcement mechanism for contractual governments.\(^104\)

Whereas exile gets rid of troublemakers, a bonding mechanism can keep them out in the first place. To require that wrongdoers compensate their victims will mean little if wrongdoers cannot pay. To better enforce such laws, a contract for governance services could require that parties to it post bond, show proof of insurance or provide some other guarantee that valid claims against them will be paid.


\(^{100}\) Constitutional Statute of the Special Development Regions, Honduras Decree No 123-2011 (July 29, 2011) (official trans) art. 47.

\(^{101}\) Welsh (1993), p 258.

\(^{102}\) Spruyt (1994), pp 127, 163.

\(^{103}\) Benson (1990), p 21.

\(^{104}\) See, for example, Barnett (1998), pp 291–92.
States implement bonding policies piecemeal, as when they require drivers to carry insurance or licensees in certain professions to post bonds. Bonding mechanisms frequently appear in customary legal systems when, as among Anglo Saxon *bohrs*\(^\text{105}\) in times past and Somali *jilibs*\(^\text{106}\) today, a group promises to stand for the good behaviour of any its members. To help enforce laws designed to compensate victims of wrongdoing, theorists have suggested that a contract for governance services require its citizen-customers post bonds and that hosts agree vouch for their guests.\(^\text{107}\)

Such a bonding mechanism would not only protect the rights of citizen-customers after the fact by ensuring that they get compensation; it would also protect their rights before the fact by screening out parties too dangerous to win any third party’s confidence. It need not prove especially difficult to implement, either. With regard to the law of suretyships and guarantees as elsewhere, the common law offers a trusted and time-tested set of rules, which a contract for governance services could import by reference.\(^\text{108}\)

A contract for governance services should also, of course, guarantee citizen-customers that it will pay any valid legal claims that they have against it.\(^\text{109}\) Simple fairness demands nothing less. It may demand considerably more. Traditional African legal systems often require officials such as judges or politicians to pay greater than usual fines – for instance, when they violate the same rules that they would presume to enforce on others.\(^\text{110}\) A contract for governance services might likewise reassure wary citizen-consumers by promising to pay more than just compensation for any abuse of authority.

**Keep Exits Open**

Political scientists have long recognised that freedom of exit can limit the excesses of bad government.\(^\text{111}\) For the same reasons that states should and generally do allow the unhappy residents to emigrate, contracts for governance services would doubtless guarantee the freedom of citizen-customers to exit to other legal systems. Both history and theory support that policy.

Although more generally known for affording freedom of immigration, for instance, Hong Kong so typically supported freedom of emigration that the exception to that rule – an instance in 1922 when Hong Kong officials used armed force to prevent striking Chinese labourers from leaving the


\(^{107}\) MacCallum and van Notten (2005), pp 201, ss III.D, H.

\(^{108}\) See, for example, American Law Institute (1996), *Restatement of the Law (Third) Suretyship and Guarantee*.

\(^{109}\) MacCallum and van Notten (2005), p 200, s II.1.

\(^{110}\) Van Notten (2005), pp 37, 51, 97.

\(^{111}\) For a seminal example, see Tiebout (1956), pp 416–24.
territory – stands out as a black mark.\textsuperscript{112} Customary legal systems also typically afford ample freedom of exit; they virtually have to, given that they lack the means to deny it.\textsuperscript{113}

Unsurprisingly, theoreticians describing contractual governance have given careful thought to ensuring freedom of exit. Surprisingly, they have gone beyond merely allowing it. Barnett explains that to err on the safe side of justification, ‘consent-based regimes might have to subsidize the exit of those who do not consent’.\textsuperscript{114} MacCallum and van Notten implemented that idea in their model lease for a Somali free port by providing that a tenant leaving the territory after suffering violations of the agreement shall have the right to claim reimbursement of the costs of transporting his or her person and effects to another location (with such reimbursement capped at the cost that the disgruntled tenant bore to originally immigrate to the community).\textsuperscript{115} With regard to freedom of exit more generally, contracts for governance services will have to work hard to earn the express consent of their citizen-customers. Guaranteeing to help pay exit costs can make a contract for governance services more attractive to would-be emigrants.

**Constitutional Competition**

Insofar as the state enforces a monopoly over the supply of governing services, its justification suffers. Few of the supposed beneficiaries of the state’s governing service expressly consent to receive it. Many do no more than quietly suffer state rule; some expressly object to it. A state can typically claim little more than the hypothetical consent of those it governs, arguing that an imaginary, abstract person \textit{would have} agreed to its rule, if asked. Sometimes states fail even that weak test, instead unjustifiably trapping and preying on their subjects. A state thus cannot very convincingly claim the implied consent of its subjects based simply on their failure to exit its jurisdiction. Most people live where they live for other, non-political reasons.

A state can improve its claim to implied consent, however, insofar as it makes it easier for unhappy subjects to opt out of its rule. Freedom of \textit{exit}, while long understood as a necessary step towards improving the competitiveness of governing services, covers only half of the equation. As theoreticians have recently begun to note, freedom of \textit{entry} into better systems of governance matters too.\textsuperscript{116} Choosy citizen-customers care not simply about the costs of leaving one jurisdiction or the costs of joining another one after all; they care about the net costs of making such a move.

At some limit, of course, freedom of exit and freedom of entry blend together. Someone unable to escape a bad legal system necessarily lacks the option of fleeing to a better one. The difference between the two freedoms

\textsuperscript{112} Welsh (1993), p 370.
\textsuperscript{114} Barnett (2004), p 43.
\textsuperscript{115} MacCallum and van Notten (2005), pp 204, s IV.E.1.b.2.
\textsuperscript{116} See, for example, Friedman and Taylor (2011).
becomes clear, however, when we consider that citizens can in general now exit from the frying pan of one state only by jumping into the fire of another. That lack of choice makes it hard to regard living under state rule as implying much about consent.

In a more consensual world, people unhappy with state rule would have another option: contracting to receive governing services from private parties. The resulting increase in competition, far from threatening states, would help to render them more justified. It becomes more plausible to claim that sedentary subjects consent to a state’s governance, after all, when they can easily access alternative legal systems. Respecting the choice of law provisions in private parties’ contracts – a routine matter for courts in the United States – represents a step in that direction, as do the pockets of relative autonomy that China has created with its SEZs and that Honduras plans to create with its REDs. Contracts for governance services, insofar as they come to substitute for a state’s founding documents, can further that beneficial trend.

**Objections and Answers**

This section briefly raises and answers some objections to the article’s thesis that more general implementation of observed principles of contracts for governing services would create a more consensual, and thus more justified, system of social regulation.

**Imperfect Consent**

**Objection**

This is a consent-based approach to analysing contracts, for governing services cannot accommodate parties who, because of age, ignorance, mental incapacity, intoxication or other factors, cannot reliably act in their own self-interest.

**Answer**

The common law of contracts has long experience in policing the limits of consent, providing us with good rules for the hard cases that governing services would face. Where age, mental incapacity or intoxication makes consent dubious, a disadvantaged party suffers only voidable contract obligations, empowered to enforce good deals yet free to shake off bad ones.\(^{(117)}\) In cases where one party presses a standardised form agreement on another, as when a governing service invites an immigrant to become a citizen-customer, the common law protects the adhering party from terms that the contract’s drafter knows or should know would, if brought to the attention of the adhering party, evoke rejection.\(^{(118)}\) Parties suffering from mistake, misrepresentation, undue influence, duress or fraud find relief through a collection of sophisticated but well-crafted rules.\(^{(119)}\)


expect perfection from any social institution. In the common law, however, we find a comprehensive and practical set of rules for making sure that consent counts only when it should. These rules, applied to contracts for governing services, would protect disadvantaged parties from unjustified legal obligations.

**Judicial Independence**

*Objection*

Paper promises mean little if not protected by an independent authority. What court will have the power to interpret the terms of a contract for governing services, and how can we be sure it will protect citizen-consumers?

*Answer*

As discussed above, observation of a variety of contracts for governing services suggests a term requiring the use of an independent third party to adjudicate disputes arising under the agreement – not only disputes arising between those who subscribe to the governing service but also in disputes arising between them and the governing service itself. For example, a citizen-customer aggrieved about rough treatment at the hands of the governing service’s officials might seek relief before a panel composed of one judge of the plaintiff’s choosing, one of the governing service’s choosing and a third judge chose by the first two. Such a procedure, borrowed from the American Arbitration Association, ensures both professionalism and impartiality. Indeed, it offers more impartiality than state courts, run as they are by state officials, can offer.

**Voting**

*Objection*

Contracts for governing services run the risk of adopting voting rules that either fail to respect democratic processes or run roughshod over individual rights.

*Answer*

States can hardly claim to have perfected democracy or its variants, such as constitutional or parliamentary republics. Free cities and other quasi-sovereigns, because they have to attract citizen-customers, have powerful incentives to study and adopt the voting rules most likely to both to invite participation and protect individual rights. Traditional states may not provide the best models. The small size and relative independence of such contract-based governments will encourage the search for new and better ways of translating residents’ preferences into good public policy. The sorts of sophisticated methods that have long helped corporations maximise shareholder value may provide fruitful guides, for instance. Though we cannot be sure what will result from bringing greater entrepreneurship to
governing services, we have little reason to assume it will result in voting rules any worse than those now in wide use.

**Tragedy of the Anti-Commons**

**Objection**

Because they use private law mechanisms to supplant public law ones, governing services founded in contract run the risk of over-privatising resources, resulting in a tragedy of the anti-commons where conflicting property claims gum up normal social life.

**Answer**

Private law mechanisms do not rule out common ownership and access. As homeowners’ associations, condos and housing cooperatives demonstrate, contractual communities include a wide range of common properties, including buildings, streets, parks and pools. Striking the right balance between individual and joint ownership can prove tricky, but there is no reason to think that traditional states can do any better at finding it than quasi-sovereign governing services that have to compete for citizen-consumers (and good reason to think that states will do more poorly at it).

**Nostalgia for Brutality?**

**Objection**

Quasi-sovereign governing services run against the historical trend towards universal nation states, threatening to return us to a simpler but more brutal era of fractured polities, local despots and powerless serfs.

**Answer**

Far from running against the tide of history, contracts for governing services represent a continuation of the trend, most famously described by Sir Henry Sumner Maine, from status to contract. Although Maine spoke primarily of the transition from feudal to commercial relations, the same holds true of the transition from traditional citizenship, typically premised on mere residency, to the contract-based relationship arising between a governing service and its citizen-customers. Though the resulting polycentric order might be more simple in legal terms, when compared with the Byzantine bureaucracy of a modern state, it would likely encourage the growth of a more complex, variegated and civilised culture. Freedom from coercion and respect for consent tend to generate not brutality, but peaceful prosperity.

**Conclusion: A Program for Field Testing**

How can we live together in peace and prosperity? The answer has too often eluded us. The failures of human institutions run from the chronic to the acute,
from the local to the pandemic, and from the annoying to the fatal. Here, as in so many other areas, science can help.

To advance the science of government requires both a theoretic framework and experimental evidence. Graduated consent theory, which provides a way to assess the justification of governing institutions, provides the former. As for experimental evidence, we can start with such examples as homeowners’ associations, hotels, micro-states, quasi-sovereigns, free ports and Chinese SEZs. Those examples suggest that competition improves governing services. Honduran REDs and other free city projects may soon teach us even more about the costs and benefits of expressly consensual governments. We should welcome those experiments as a way to help us discover new and better forms of social cooperation.

But why should a state invite competition in the supply of governing services? To some degree, even if they abhor the prospect of expressly consensual alternatives, states face a common pool problem. It takes just one state willing to effectively lend out its sovereign powers – Honduras, for instance – to show the whole world a new and improved form of government. The experiment might flop, of course, and leave states strutting. Theory and practice suggest, though, that introducing more competition to markets for governance services will improve the lot of citizen-customers at the expense of former state monopolies.

That may not sound like an appealing prospect to everyone, but states should welcome the prospect of expressly consensual alternatives. Somewhat paradoxically, a state that relaxes its monopoly on power grows stronger in the process. By making it easier for its subjects to opt out of its rule and into better forms of government, a state wins a stronger claim to the implied consent of its subjects. That, in turn, gives it a stronger claim to justified legal force. What greater power could a state want?

A state that fosters alternative governing services, moreover, learns to serve its subjects better. Competition for citizen-consumers will drive innovation, uncovering new solutions to the age-old problems of violence, theft, accident and fraud. By nurturing and studying small-scale, semi-sovereign regions, a country can learn the particular needs of its own people. The US government, for instance, could learn from Sandy Springs, Georgia about the benefits of contracting out its functions to private providers.  

Friendly competition inspires improvement in games and governments alike. Informed voters should thus favour policies that increase freedom of choice in governing services. Granted, those who enjoy state sinecures or privileges may not welcome the immediate results of giving up some monopoly power. However, the bracing effects of a free market in governing services would benefit almost everyone in the long run.

By contracting for government services, we can win a world more consensual, and thus more justified, than mere political institutions can offer. States have begun exploring how to bring the benefits of privately provided government to their people, with the goal of contracting out much of their rule-

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121 Feine (2012).
making, adjudication and enforcement services. Those experiments will come to little if they fail to attract immigrants, though, and a truly free city must earn express consent from its citizen-customers. Theory and practice suggest that successful contracts for governance services should offer:

- respect for consent
- protection of fundamental rights
- independent adjudication
- clear and fair interpretive rules
- adequate remedies for wrongs, and
- freedom of exit.

That just offers a sketch, of course. To fill the details, we must put expressly consensual government to the test. Thomas Paine, surveying the prospects for a government founded on popular consent, concluded that ‘we have every opportunity and every encouragement before us, to form the noblest, the purest constitution on the face of the earth. We have it in our power to begin the world over again.’ Paine convinced the Founders to take that bold chance, to their honour and to our benefit. May we have the courage and wisdom to choose likewise, and create governments founded on the strongest form of consent those governed can give.

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