

## Rights, Religion, Riviera, and Roma

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### I. INTRODUCTION

In September of 2010, the French government sent some Roma (gypsies) from Bulgaria and Romania back to their home countries.<sup>1</sup> It was alleged that they engaged extensively in begging and petty theft (pick-pocketing) (*Economist* 2010). Some European Union (EU) commissioners complained bitterly that this action violated the Roma's rights to travel freely within the EU, and most commentators outside of France agreed with these commissioners (see, e.g., Goldston 2010). No one seemed to question the proposition that EU citizens ought to have the right to locate anywhere within the EU. In this article, I call this presumption into question. More generally, I challenge the now widely held presumption, which underlies debates like these over rights, that there exists some set of universal human rights of which free movement is a member.

My argument builds on a theory of constitutional rights, which sees them being defined by citizens seeking to maximize their expected utility under the constitution. The theory is briefly reviewed in Section II. A key feature of constitutional rights, as I define them, is that they are relative to the preferences and expectations of the citizens writing the constitution, which in turn are likely to depend on the history and culture of the community. This makes constitutional rights quite different from the universal human rights many claim exist. An example of why some communities will choose different sets of rights is given in Section III.

In Section IV, I examine the Bill of Rights in the U.S. Constitution (U. S. Const.) and show that most of these rights have characteristics which make it likely that they would have been chosen – at the time the US Constitution was ratified – under the conditions postulated by my theory. In Sections V and VI, I critically examine the UN's Universal Declaration of Human Rights (UN General Assembly 1948) and the EU's Charter of Fundamental Rights (European

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1. The more familiar and historic term is "gypsy," although this is regarded by some people as pejorative. I use the term most often seen in recent newspaper articles. Romani is still another option.

Union 2000). As their names imply, each of these would seem to be a candidate for the definitive set of universal human rights. I argue otherwise. I also show that all lists of universal and fundamental rights such as these are inherently relative.

In Section VII, I take up the issue of whether a right to free movement within the EU is necessarily a good thing. In addition to the issue of the Roma, I look at the Riviera, and access to universities and health care. In each case I show how free movement can produce negative externalities and result in outcomes that are not Pareto optimal. These sub-optimal outcomes are particularly problematic, because the actions causing them are protected as rights, thus making it extremely difficult to eliminate the externalities. The final section draws some conclusions. Chief among these is that the definition of any enforceable constitutional right should be made by weighing the benefits to the actor protected by the right against any costs this action may impose on others. Universal human rights, as they are usually propounded, generally fail this test by ignoring the external costs of the protected actions on others.

Many who claim the existence of human rights use them to make moral arguments. Humans are said to possess a right to a decent standard of living and this, it is argued, creates a moral obligation for the rich to give to the poor, or for rich countries to make transfers to poor ones. No moral claims are made for the kinds of constitutional rights described in this article. For example, Article VI of the U.S. Bill of Rights provides individuals accused of a crime with a right to a trial by jury. Such a right can be justified using the theory presented here. It cannot be argued from this, however, that it is immoral for a country to allow judges to determine guilt or innocence instead of citizen juries. Although I make no moral claims, my theory can be regarded as normative in that it assumes that individuals define certain rights as part of a constitution designed to advance their collective interests. If one thinks that this is what constitutions and, more generally, political institutions ought to do, then the theory provides a framework for making normative judgments about constitutions.

## II. A THEORY OF CONSTITUTIONAL RIGHTS

I have developed my theory of constitutional rights elsewhere, and so only briefly describe its main features here (Mueller, 1991, 1996, Ch. 14). As in Buchanan and Tullock (1962) a polity's constitution is assumed to be written by the citizens themselves under conditions of uncertainty about their future positions under the constitution.<sup>2</sup> When choosing a voting rule for a particular category of decisions, the constitution writers weigh the future utility gains of the winners, if an issue passes, against the utility losses to the losers. The larger the losses to the losers

2. Although Buchanan and Tullock did not discuss rights in their pioneering treatise on constitutions, Buchanan (2001) has more recently stressed their importance for a liberal democracy.

are relative to the gains to the winners, the higher is the required majority that maximizes the expected utility of a participant at the constitutional convention. In the extreme case of huge expected losses, if one is on the losing side, relative to the gains to the winners, the constitution framers will protect future citizens from these huge losses by requiring unanimous agreement. Bans on religious practices could be an example of a category of decisions which might be assigned the unanimity rule in the constitution, if participants at the constitutional stage envisaged great utility gains for people who are allowed to practice their religions and small external costs on the rest of the community from such practices.

Unanimous agreement to ban a religious practice could only be achieved if members of the religion in question could somehow be convinced, or bribed, to vote for the ban. If, however, the constitution framers were correct about the relative gains and losses from such a ban, it is unlikely that members of a religious group would be convinced to abandon one of their religious practices, or that an offered bribe would be large enough. Realizing this, the constitution writers can avoid long and fruitless debates over bans of religious practices by defining a right to practice one's religion in the constitution, instead of requiring unanimity for bans of religious practices. Thus, under my theory constitutional rights arise as low transaction cost substitutes for the unanimity rule, and are defined only for collective decisions where the costs from being on the losing side of a vote are thought to be extremely high relative to any gains for the winners.

In developing their theory of the optimal voting rule, Buchanan and Tullock (1962, pp. 63–91) justified the assumption of uncertainty over future positions by pointing to the long-run nature of constitutional choices. Thus, to the extent that the uncertainty at the constitutional stage which produces unanimous agreement is real, their theory of the optimal voting rule, and by implication my theory of constitutional rights, might be regarded as positive theories with predictive value. In Section IV, I argue that most of the rights defined in the U.S. Bill of Rights can be defended by this theory. On the other hand, Buchanan and Tullock (1962, pp. 3, 312) clearly state that theirs is a normative theory. Such an interpretation might be further advanced by assuming that the uncertainty at the constitutional stage arises because individuals consciously step behind a veil of ignorance of the kind Rawls (1971) used to derive a theory of justice. Rawls, however, wished to offer his account of justice as an alternative to utilitarianism, and thus assumed a veil of ignorance so thick that utility information could not penetrate. The implicit veil in the theory of Buchanan and Tullock is not so thick, as individuals at the constitutional stage can envisage decision-making and external costs, presumably measured subjectively in units of utility, associated with future collective decisions. This makes both their theory and mine utilitarian in the sense that they rely on utility information. Neither theory is utilitarian, however, in the classic

sense of assuming that the goal of society is to maximize a social welfare function containing individual utilities.

Three features of constitutional rights under this theory need to be noted. First, explicit rights will be defined only for actions capable of generating sufficiently strong negative externalities to elicit efforts by some members of the community to restrict them. Even actions that provide considerable benefits for the actor need not be protected if they are not expected to be challenged.

Second, there is an inherent tension between constitutional rights and the normative principles justifying majoritarian democracy. When explicit rights and the simple majority rule both exist in a constitution to deal with situations where individual interests conflict, these situations should differ dramatically in the perceived losses imposed on the different sides from curtailing the action. The simple majority rule is optimal for resolving a negative externality, when an individual at the constitutional stage expects the utility gain from undertaking the action to equal the loss the externality causes. Rights are defined precisely where the simple majority rule is not optimal, because the expected gains and losses from a ban are dramatically different, and the constitution framers wish to preclude its use. Because rights will be defined only when significant losses are expected for those prevented from acting relative to the losses imposed on others, disputes over rights are likely to be emotionally charged, as they pit a perhaps substantial majority that feels harmed by the action against an intense minority that benefits from it.

Third, constitutional rights in this theory are inherently relative, and thus differ from definitions, which see rights as absolute in some meaningful sense. In a community where everyone is a member of the same religion, it may not occur to anyone that someone would ever challenge practicing this religion, and the constitution may, therefore, not explicitly protect religious freedom. Actions explicitly protected as constitutional rights should vary across communities depending upon their particular histories, the preferences (values) of their citizens, and their expectations of the future benefits and costs from the actions. The next section provides an illustration.

### III. THE RELATIVE NATURE OF CONSTITUTIONAL RIGHTS: AN EXAMPLE

Habeas corpus protection is found in many liberal constitutions. It can be justified by my theory of constitutional rights under the assumption that the loss in utility to someone imprisoned is very large, and the costs on the rest of the community from letting this person go free if she has not been charged and convicted of a crime are rather modest. Now consider the country Libertystan. Its constitution contains strong habeas corpus protection. Ten years ago, Donald Faith founded a religious group dedicated to the worship of Ba'al of Tyre, an

ancient Phoenician god. The group seeks to replace the democratic institutions of Libertystan with a theocracy devoted to the worship of Ba'al. Seven years ago, three Baalists were convicted of blowing up a bus and killing 14 people. No evidence could be found implicating other members of the sect, which then numbered 100. Five and a half years ago, a bomb went off in the capital, killing 79 people. Police suspected four Baalists, but could not gather enough evidence to convict them. A year later, the same four Baalists were charged and convicted of blowing up a train killing 276 people. Once again, no evidence was found implicating other members of the sect, which now numbered over 200. Three years ago Baalist suicide bombers entered Libertystan's parliament and killed 412 people, including over half of the members of parliament.

As these events unfold, Libertystanians may begin to rethink constitutional habeas corpus protection. Waiting until a Baalist commits a crime and then arresting him or her has proved rather costly. Indeed, for suicide bombers, the threat of capture is inoperative. If the Baalists and other Libertystanians stepped behind a veil of ignorance, they might unanimously agree to allow preventive incarceration, when the state perceives a grave threat to the community from a particular group.<sup>3</sup> Even a right as seemingly basic as habeas corpus protection may not be chosen by a community that is maximizing its expected utility if it anticipates that some members may pose significant threats to its welfare.

Here we might consider the dilemma faced by the United States with respect to the people imprisoned at Guantanamo. That the United States mistreated some prisoners in violation of its own rules seems indisputable. Similarly, it seems to have imprisoned some people who did not pose a threat to the country. But, unless we assume that the CIA and American military are totally incompetent, some prisoners are bent on attacking the United States should they be released. Freeing all prisoners and waiting to see which ones carry out attacks is a risky strategy.

#### IV. THE BILL OF RIGHTS

As discussed above, uncertainty at the constitutional stage might be thought of as real due to the long-run nature of constitutional choices, or artificially imposed by persons who adopt a kind of veil of ignorance as proposed by Rawls (1971). It is reasonable to assume that individuals are more likely to adopt a Rawlsian frame of mind when making the kind of basic choices for a community that are involved when writing a constitution, and that agreement on the constitution is reached for this reason. The theory might thus be used to predict what sorts of actions will receive rights protection in constitutions. In this section, I illustrate that the Bill of

3. Let  $B$  be the loss in utility to a Baalist from being imprisoned,  $L$  the gain to a non-Baalist from the reduced threat of death, and  $\alpha$  the fraction of the population that is Baalist. Then the incarceration of Baalists would be unanimously approved from behind a veil of ignorance if  $\alpha B < (1-\alpha)L$ , which is equivalent to  $\alpha(B + L) < L$ . With sufficiently small  $\alpha$ , and  $L$  being large relative to  $B$ , this condition will be satisfied.

Rights appended to the U.S. Constitution seems, at the time of the ratification at least, to have satisfied the utilitarian calculations underlying my theory.

### The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (US Const. Amend I)

Many colonists migrated to America to escape religious persecution, and recognized that religious practices often come under attack. If Americans at the end of the 18<sup>th</sup> century felt that the loss to someone prevented from practicing their religion would be very large relative to any externality this action caused, the conditions for defining a religious freedom article were met.

Free speech, free press and freedom of assembly are essential requisites for a healthy democracy. Free speech can cause injury to others. Article I of the Bill of Rights fits my three criteria for a constitutional right to a tee.

### The Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. (US Const. Amend II)

Section 8 of Article I of the main Constitution limits Congress's power to support an army to two years. The gains from having each citizen armed and ready to join a militia would, at the time of the Constitution's ratification, have been large relative to any negative external effects from an armed citizenry. Article II illustrates the relative nature of constitutional rights. At the end of the 18<sup>th</sup> century, the United States was sparsely populated, and many citizens owned guns for hunting and protection. These conditions do not characterize the US at the beginning of the 21<sup>st</sup> century, and Article II today cannot be defended as a constitutional right.

### The Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law. (US Const. Amend III)

Article III is the first to reflect the injuries that the colonists suffered under British rule, and their desire to be protected from similar injuries under the new government. It and the articles that follow reflect the heavy weight at the founding placed on individual freedom, and the founders great suspicion of the state. This suspicion is perhaps most clearly evidenced in the Fifth Amendment, which forbids both trying a person for the same crime twice, and compelling him

to testify against himself. To reconcile this amendment with my theory, one must assume that imprisonment imposes tremendous costs, and that allowing a person suspected of a crime to go free would produce relatively modest costs for the community. Only under these assumptions can one justify denying the prosecution the possibility to cross-examine someone accused of a crime, or retrying someone should new evidence be found that conclusively shows that this person was guilty. Similar utility calculations can justify the Sixth Amendment, which introduces habeas corpus protection. A careful review of each of the first eight articles of the Bill of Rights would, I believe, reveal that most fit easily into my theory, when the Constitution was ratified, under plausible assumptions about perceived costs and benefits from protecting certain individual freedoms.

The Ninth and Tenth Amendments are rather different from the first eight, and do not fit my theory as nicely.

Articles II and III and perhaps some additional elements in the Bill of Rights would not be included in a new constitution written today. The fact that they are still in force can be attributed to the difficulty of amending the U.S. Constitution created by the procedures specified in the original document. Thomas Jefferson (1816) felt that each generation should be allowed to write its own constitution and not be forced “to remain under the regimen of their barbarous ancestors,” and I am inclined to agree. Ideally, a constitution should contain provisions for periodic reviews, so that its provisions reflect the preferences and environment of the current generation.<sup>4</sup>

## V. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights (UN General Assembly 1948). As its name implies, the Declaration presumes that a set of human rights exists, and that they are universal. Scholars making similar claims often cite the UN Declaration to justify their positions (e.g., Pogge 2002). This in itself is rather strange, since on most issues, the UN General Assembly would not generally be regarded as a moral authority. Its members today include Zimbabwe, Myanmar (Burma) and Cuba, and in 1948 included Stalin’s Soviet Union. Given the frequency with which it is cited, however, the Declaration deserves a closer look in light of the arguments put forward here.

The Declaration contains 30 articles, many of which have multiple parts. Several involve economic entitlements, and thus raise the question of who will fulfill them in poor countries. Others are vague. For example, Article 24 proclaims a right to “rest and leisure.” I shall, however, focus only on one article that is not vague. Part 3 of Article 26 asserts, “Parents have a prior right to choose the

4. For further discussion, see Mueller (1996, 217-219, 323-324).

kind of education that shall be given to their children.” By “prior” I assume it means prior to the state. Such a right was effectively granted to the parents of Amish children by the US Supreme Court. Wisconsin had a law requiring school attendance through age 16. The Amish removed their children after the 8<sup>th</sup> grade to protect the Amish way of life. Chief Justice Berger’s majority opinion defended the right of Amish parents to withdraw their children from secondary schools with the following argument.

Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community . . . Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary education as an impermissible exposure of their children to a “worldly” influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal “learning through doing;” a life of “goodness,” rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from rather than integration with, contemporary worldly society. (Justia: *Wisconsin vs. Yoder* 1972)

In finding for the Amish community, the Supreme Court chose to protect parents’ freedom to determine their children’s life plans over the children’s freedom to choose their own life plans. Should an Amish girl at age 20 wish to follow a life plan that includes intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and a social life with people outside of the Amish society, this option would be largely precluded by the parent’s decision to deny her the education necessary to follow this path.

Under my theory, a constitution would protect the right of parents to choose their children’s education, including no education, if the benefits to the parents were very great and the costs to the rest of the community quite small. The benefits to the Amish parents are the psychological satisfaction of knowing their children are highly likely to follow the Amish way of life. The law exists, as Berger later concedes, because Wisconsin citizens benefit from their fellow citizens having good educations. The largest external costs of Amish parents withdrawing their children from school, however, fall on the children themselves. Their life choices are severely constrained by their parents. A liberal community which weighed the benefits to both parents and children might well decide not to grant parents the right to deny their children an education.

If human rights exist and are universal in the sense that everyone possesses the same set of rights, then everyone should agree about these rights once they are explained. Why would anyone deny the existence of a right that he or she possesses? I, and I am sure others,<sup>5</sup> would not grant parents the right to deny their

5. See the dissent of Justice William O. Douglas in *Wisconsin v. Yoder* at FindLaw (<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=406&invol=205> , accessed 12.04.11).



children an education. Unanimous acceptance of other articles of the Declaration also seems highly unlikely. If the rights contained in the Declaration are not universally recognized as rights, how can we be certain that they are indeed universal in the sense that we all possess the same rights?

## VI. THE CHARTER OF FUNDAMENTAL RIGHTS

The EU's Charter of Fundamental Rights (European Union 2000) came into full effect with the Lisbon Treaty on December 1, 2009 (European Union 2007). Although the Charter does not claim to be a set of universal rights, the word "fundamental" in the title suggests that the drafters had something like the UN's Declaration in mind. Indeed, many rights in the Charter have similar wording to those in the Declaration.

While the UN Declaration has only 30 articles, the Charter has 54. Many of the Charter's articles are also vague with respect to the nature of the protection offered. Some imply economic entitlements (health care, education) without specifying how they are to be fulfilled. Others are totally vacuous. Many would be difficult to rationalize under the kind of utilitarian calculus underlying my theory of constitutional rights. Some illustrations follow.

Article 12.2 Political parties at Union level contribute to expressing the political will of the citizens of the Union. (European Union 2000)

In what sense is this a right protecting a specific freedom or action?

Article 25. The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. (European Union 2000)

Does this article seek to prevent the Union from passing a law prohibiting the elderly from participating in social and cultural life? Alternatively, is it implying that the community has an obligation to facilitate such participation by the elderly by providing free transportation to social events, free tickets and the like? If the first is meant, then the article would seem to rest on a rather dubious premise that the Union is likely to try to prevent the elderly from participating in its social and cultural life. If the second is implied, then the article contains an undefined and seemingly open-ended financial commitment to the elderly. Article 26 contains similar ambiguities with respect to "persons with disabilities."

When I drive into Italy, I anticipate being subject to Italy's laws and rules of the road. Now imagine an article in the EU constitution that would read as follows:

Article S. Drivers have, in accordance with Community law and national laws and practices, the right to drive at any speed that they choose.

What would such an article imply? At first glance it seems to create a right to drive at any speed across the entire Union. A closer reading reveals that when I drive in Italy I am subject to its rules of the road. But that is the case already. The article has changed nothing and as such is totally vacuous. Consider now Article 28 of the Charter.

Article 28. Workers and employers, or their respective organizations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. (European Union 2000)

A literal interpretation of Article 28, like that of Article S, implies that workers and employers are subject to national laws and practices. The article changes nothing. Why then did the Charter's drafters write such a vacuous article? An alternative interpretation is that the drafters intended to enshrine certain workers' rights, including the right to strike, in the EU constitution. If this was the intent, then Article 28 is no longer vacuous, but rather pernicious.

An action should be protected as a right only when the loss to a person prevented from acting is very large relative to any negative externalities caused by the action. The most powerful unions in Europe today are public sector unions. Strikes by their members, air traffic controllers, railroad workers, fire-fighters, and teachers, often impose heavy costs on the community for seemingly modest benefits for the strikers – higher wages, shorter hours, or early pensions. The relative utility payoffs to justify a right are reversed; the actors' gains are modest and the costs imposed on others are large. Indeed, other rights in the Charter, such as Article 33, which guarantees that "the family shall enjoy legal, economic and social protection" (European Union 2000) would seem to preclude strikes by workers who provide essential services. Thus, under either interpretation of Article 28, it has no place in the EU's constitution.

Several articles are so vague that the rights proclaimed are largely meaningless. Article 35, for example, ensures "a high level of human health protection." Articles 37 and 38 ensure "high levels" of environmental and consumer protection. Presumably ensuring high consumer protection would involve a vigorous competition policy. But is the loss to a consumer from a cartel always very large relative to the benefits to the rest of the community, including cartel members? What about workers' cartels (unions), farmers? The EU should have a strong competition policy, but this should be governed by ordinary legislation and not treated as an outgrowth of some "consumer rights."

The rights in the Charter to high levels of health care, education, environmental protection and the like would seem to require state funding for these activities. Yet, Article 51.2 explicitly precludes the EU from providing such funding.

Article 51.2 This Charter does not establish any new power, or task for the Community or the Union, or modify powers and tasks defined by the treaties. (European Union 2000)

But where then do the resources come from to provide these high levels of public services?

Enough examples have been presented to indicate that many articles in the Charter cannot be defended using the theory of constitutional rights presented above nor, I would argue, by any other criterion for constitutional rights. Thus, as a list of fundamental human rights with some claim to universality, the Charter, like the UN Declaration, is sorely lacking.

One might argue that the Charter is not meant to be a set of rights defensible in court, but merely a statement of European values. Europeans value the elderly, children, families, consumers, the environment, and so on. This interpretation runs into the difficulty that many rights in the Charter, such as freedom of speech and assembly, are enforceable in court. Moreover, in some cases the European Commission is using them to shape policies like those dealing with the free movement of individuals.

## VII. THE RIGHT TO FREE MOVEMENT

The problematic nature of defining rights without considering the externalities caused by the protected actions is illustrated by the rights of EU citizens to free movement.

### *1. The Riviera*

Article 2.2 of the Lisbon Treaty states that “The Union shall offer its citizens an area of freedom . . . in which the free movement of persons is insured . . .” (European Union 2007) This right is restated in the Charter of Fundamental Rights.

Article 45.1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. (European Union 2000)

These rights presumably allow all EU citizens to buy property and live anywhere in the EU. The Riviera is an attractive place to live. Over time we can expect EU citizens from less desirable parts of Europe to migrate to the Riviera. Two possible consequences follow. (1) The stock of accommodation on the Riviera expands to meet demand, and the expanding population causes overcrowding on the beaches, traffic congestion, air and water pollution, and the other ill-effects of overpopulation. Under this option, migration can be expected to continue until the quality of life on the Riviera sinks, due to overcrowding, to the levels in the least desirable parts of Europe.<sup>6</sup> (2) The stock of accommodation is constrained

6. For further discussion of the externalities associated with migration, see Mueller (2003, Ch. 9).

to avoid overcrowding. The price of housing rises due to excess demand. Since there are more wealthy Europeans than wealthy French, the French tend to lose out in bidding for housing, and the Riviera comes to be populated by a cross-section of wealthy Europeans.

Southern California is an example of the first scenario. Blessed with a moderate climate on the Pacific Ocean, it has drawn migrants from all parts of the US. Today, traffic congestion is so bad that the average commuter spends 368 hours a year (the equivalent of 15 24-hour days) just driving to and from work. Water is in short supply, and air pollution can be severe (Diamond 2005). Venice serves as an example of the second scenario. Much of the housing in the canal area is now devoted to hotels or owned by people from other parts of Europe.

The first scenario is clearly not optimal. Both it and the second scenario could be avoided by restricting housing on the Riviera to French citizens. But this would violate the EU's right of free movement. From a European perspective, one might welcome the second scenario. Why should the French have a greater right to live on the Riviera than other Europeans, or the Italians have a greater right to live in Venice? If many French and Italians think they should have such rights, however, resentment of the EU is likely to rise over time.

## 2. *Universities*

In its effort to advance European integration and citizen mobility, the EU Commission requires that all EU universities have the same entrance requirements and charge the same fees to students from other EU countries as apply for domestic students. To see the potential difficulty of this policy, consider what the consequences would be if it were implemented in the United States. Public universities in a few states, such as California, Michigan, and Wisconsin, are among the best in the world. In most other states this is not the case. Every state university charges tuition to its residents that is far below the costs of educating a student. Non-residents are charged much higher tuition. If the Supreme Court were to rule that this discrimination was unconstitutional, the immediate consequence would be a flood of applications for admission to Berkeley, UCLA, Michigan, Wisconsin and the other top public universities. Similar to the Riviera example, two consequences are possible. Budgets remain fixed and enrollments expand to accommodate both in- and out-of-state applicants, and the quality of education at top-ranked universities sinks. Alternatively, enrollments are kept steady to maintain quality, and taxpayers in states with high-quality universities find themselves increasingly subsidizing the education of students from other states.

Mobility across universities in Europe would be unproblematic, if it were balanced. Greek students learn Spanish and study in Spain, Spanish students study in Denmark, and Danes in Hungary. The flow of students across the EU is

not balanced, however. English is the most common second language in non-English speaking countries, and some British universities are among the best in the world. More Greeks travel to Britain for an education than British traveling to Greece. Rising student numbers and budget cuts in recent years have threatened the quality and even the very survival of many British universities.<sup>7</sup> In response, the British government announced at the end of 2010 tuition increases of up to 200 percent, a change that precipitated large and often violent protests. The fees British students must pay for their education could be kept lower, if students from other EU countries were charged higher fees. These students presently make up only five percent of university enrollment in the UK, but their enrollments are increasing at a faster rate than for UK students (Higher Education Statistics Agency). At some point in time, the wrath of British students may be re-channeled toward the EU.

Imbalances are also possible between French-speaking Belgium and France, Dutch-speaking Belgium and the Netherlands, and Germany and Austria. German universities have entrance exams. Austrian universities have traditionally not had them. Austria limited German enrollments by requiring Germans to prove that they had passed the entry requirements of a German university. The EU ruled that this discriminated against the German students, violating their rights to free mobility within the EU. As a consequence, German enrollments at Austrian universities have increased greatly, producing a steep decline in their quality. At the University of Vienna, for example, enrollment surged by 30 percent, while its position in the QS World University Rankings fell from 65<sup>th</sup> in 2005 to 143<sup>rd</sup> in 2010 (QS Topuniversities). Its London Times ranking fell from 85<sup>th</sup> in 2007 to 195<sup>th</sup> in 2010 (Studium.at).

### 3. *Healthcare*

Every resident of Britain has access to its free, universal healthcare. Someone with an independent income, say a retiree, who lives in an EU country with poor healthcare might easily improve his welfare by moving to Britain and taking advantage of its free healthcare. In July of 2008, the Commission issued a directive to facilitate “medical tourism” and in January of 2011 the EU Parliament passed legislation that endorsed and modified this directive (Health Tourism, *International Medical Travel Journal*). Should large numbers of Europeans choose to migrate in search of better medical care, the same two possible scenarios will arise with respect to health care as for university education: quality

7. A report by the University of College Union, released in December 2010, predicted that as many as a third of British universities might close due to inadequate funding. This report did not take into account the recent tuition hikes, however. See *Academica* group <http://www.academicagroup.ca/top10/stories/11784> (accessed 12.04.11).

deteriorates in countries with high quality health systems, or their taxpayers increasingly subsidize the medical costs of other Europeans.

#### *4. Roma*

Many Roma are educated, hold good jobs and lead lives that do not differ significantly from their non-Roma neighbors. Some, however, are poorly educated, unemployed, and live in what can only be called encampments that are overcrowded and unsightly. These Roma often resort to begging or petty crime to earn a living. It is the migration and expulsion of Roma such as these, which caused a furor in France in 2010, and still earlier in Italy.

To justify a right for the Roma to migrate, under my theory two conditions must be met: the benefits to the Roma from migrating must be great, and the costs imposed on other citizens from their migration must be small. That the Roma benefit from moving from Romania and Bulgaria to richer parts of the EU is obvious. They would not move if it were not the case. It is also obvious that some citizens in the recipient countries sense that they have been made worse off. Are the gains to the Roma sufficiently large to offset the costs on the others? I leave it to the reader to answer this question.

#### *5. Discussion*

In a world of high mobility, people migrate from locations with poor amenities to places with attractive amenities. Attractive amenities created by nature tend to be limited in supply, and free migration either leads to overcrowding and a deterioration of the amenities' quality, or policies to avoid overcrowding, which result in the displacement of local beneficiaries by migrants. When the amenities are manmade, such as universities and hospitals, supply can be increased, but at a cost. If the citizens in a country with high-quality institutions wish to maintain their quality, their taxes will rise to subsidize the consumption of migrants. If they fail to raise taxes, quality will deteriorate.

The EU's right to free movement resembles other rights many deem to be "fundamental" or "universal." An action or, in the case of entitlements, a transfer, which is perceived to have great benefits for the actor/recipient, is justified by claiming it is a fundamental (basic) human right. Any external costs created by the action are ignored, or assumed to be negligible. When these costs are not negligible, a constitutional right cannot be justified.

Migration almost tautologically benefits the migrant, and often does not impose significant costs on the host country. A Roma with an MBA who takes a job in Paris benefits herself and probably the citizens of Paris and France as well. But all forms of migration are not so anodyne. When migration imposes signifi-

cant costs on the recipient community, that community will naturally object to it. In ignoring the possible costs of migration or, as in the case of universities, thwarting efforts to avoid these, the EU Commission risks alienating citizens in countries adversely affected by its forced integration policies. Just as free speech and habeas corpus rights must optimally have exceptions and boundaries, so too must free movement rights. In its zeal to promote EU integration, the Commission is not only producing outcomes that are not Pareto optimal; in the long run, it may be undermining citizen support for the Union itself.

### VIII. CONCLUSIONS

This article makes two claims, one general and one specific. The general claim is that any theory of rights which purports to delineate the rights citizens have and provide guidance as to what rights should go into a constitution should take into account both the benefits to the actor protected by a right and the potential costs of the action on others. The specific claim is that the right to free mobility embedded in EU treaties and the Charter of Fundamental Rights cannot be justified as an unqualified right. The first claim is controversial and so, by implication, is the second.

The philosopher Richard Brandt has made the following claim:

Virtually all philosophers now agree that human beings – and possibly the higher animals – have moral rights in some sense, both special rights against individuals to whom they stand in a special relation (such as a creditor’s right to collect from a debtor), and general rights, against everybody or against the government, just in virtue of their human nature. (Brandt 1992, 196)

Brandt goes on to observe that “some philosophers also think, however, that anyone who is a utilitarian ought not to share this view” (ibid.). Perhaps this explains why I favor a form of utilitarian theory of constitutional rights, and eschew the idea that people possess rights simply because they are humans, or are granted rights by nature.

The main advantage of my utilitarian theory is that it gives some criteria for judging whether a particular claimed right would or should find its way into a constitution. Slavery is often invoked in attacks on utilitarianism by its critics, because utilities could be assigned to slaves and slave owners to make slavery optimal under a utilitarian calculus. I argue just the opposite. Interpersonal comparisons are always somewhat subjective, but most people would probably agree that the loss of utility to someone forced into slavery would far outweigh any utility gain to the slave owner.<sup>8</sup> The problem with human or natural rights claims is that one has no benchmark for comparison. Slaves and slave owners are both humans. The right to own property usually makes its way onto lists of

8. Should progress continue in the measurement of *happiness* levels, an objective basis for making interpersonal comparisons may yet become available. See Frey (2008).

human rights. Slaves have traditionally been viewed as forms of property. How does one decide whether a human right to be free trumps a human right to own property without making utility comparisons? Today it seems obvious that freedom trumps property, but this was not always so. A philosopher as astute as Aristotle claimed that slavery was a “natural condition.” Thomas Jefferson and James Madison each owned slaves, and they were not obviously lacking in ethical convictions. Almost any action can be defended as a human or natural right, if one does not have to examine the likely gains and losses from it.

This point is nicely illustrated by Amartya Sen’s “liberal paradox.” (Sen 1970, 1992, 1996; see also Mueller 2003, ch.27). In his original illustration of the paradox, Sen used the example of reading *Lady Chatterley’s Lover* to create preferences for two people which could lead to an outcome that is not Pareto optimal if each person exercises the liberal right to read or not read the book. Such a right might be defended as part of a free-speech right and could easily meet the conditions set forth for a constitutional right by my theory. In subsequent discussions of the liberal paradox, however, Sen has used the examples of choosing the color of tiles in one’s bathroom, or whether one sleeps on one’s stomach or back. The protection of such actions by a constitutional right is difficult to justify using my theory. A law banning red tiles in bathrooms would be unlikely to cause a great loss of utility to those wishing to install red tiles, and it is highly doubtful that anyone would propose such a law. These additional examples serve to illustrate Sen’s main argument, that almost any action might cause an externality and lead to an outcome which is not Pareto optimal, but they also illustrate the disadvantage of defining rights without regard to the magnitudes of their utility consequences, as advocates of human and natural rights generally do.

Thus, somewhat ironically, this broad latitude for defining human or natural rights makes these rights inherently relative. Unlike the constitutional rights defined by my theory, however, which are relative to the preferences and perceptions of the citizens in the community, definitions of human or natural rights are relative to the values of the person or committee propounding them. This elastic nature of the human rights concept is illustrated by comparing the EU’s Charter of Fundamental Rights written in 2000, and its predecessor, the Convention for the Protection of Human Rights and Fundamental Freedoms written in 1950. The Convention is much shorter than the Charter and the rights in it are easier to defend using utilitarian criteria. With the passage of time, more and more actions or entitlements benefitting some group of individuals are thought of, and the list of fundamental human rights grows. A new list of fundamental human rights written 50 years from now will most certainly be longer than today’s Charter.

I have given several examples of negative externalities that can arise from free mobility. The undesirable effects of mobility can arise in any country, of course,



and southern California is a parallel case to the Riviera. There is, however, an important difference between the ill effects of mobility in the US and the EU. The US's federalist institutions are defined by a constitution, which most Americans accept as legitimate. This constitution protects the rights of states to adopt policies, which avoid some of the costs of high mobility, such as higher university tuition for out-of-state students. The EU has no constitution, and when it tried to adopt one, the voters of France and the Netherlands rejected it. Thus, EU political institutions do not possess the same degree of legitimacy as those in the US in the eyes of many EU citizens. The Charter of Fundamental Rights came into force without EU citizens contributing to either its drafting or its adoption, and by and large without their knowledge of its content. The directives regarding mobility within the EU, which are imposing unwanted costs on citizens in some countries, are issued by unelected administrators in the EU Commission. This democratic deficit in the EU, combined with the Commission's zeal to foster integration through enforcing rights to free movement, may eventually pose a threat to the Union itself, as more and more EU citizens become aware of the costs they bear from these policies.

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#### SUMMARY

The recent conflict between the French government and the EU over Roma motivates a more general examination of the EU's free mobility policies. The article describes three additional situations, access to land in desirable locations, access to universities, and access to health care, in which the EU's policies with respect to mobility can lead to Pareto sub-optimal outcomes. More generally, the article challenges the now widely held presumption, which underlies debates like these over rights, that there exists some set of universal human rights of which free movement is a member. A utilitarian theory of constitutional rights is offered instead. The article demonstrates that some constitutional rights, as those contained in the U.S. Bill of Rights, do fit the theory rather well. The UN's Universal Declaration of Human Rights, and the EU's Charter of Fundamental Rights are used as examples of universal human rights, which are difficult to defend under the theory proposed here, or under any other theory.