

Debate: Property rights, competition and monopoly

A further reply to Prof. Salin

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(HISTORY OF THE DEBATE: 1. [Prof. Salin's interview \(ch. 6 on Monopoly\)](#); 2. [Mr. Birindelli's comment](#); 3. [Prof. Salin's answer](#); 4. [Mr. Birindelli's reply](#); 5. [Prof. Salin's further answer](#); 6. present reply by Mr. Birindelli)

I thank Professor Pascal Salin for this further comment to this debate about property rights and competition. As association, we are honoured to receive this second comment by Professor Salin and I am personally honoured to have the possibility to exchange ideas with him on issues of such an importance.

In my opinion, the first two objections Professor Salin illustrated in his further answer highlight some misunderstandings which, without any doubt, were created by the fact that I did not manage to express

myself precisely in my previous comment. Because of the importance of the consequences that these misunderstandings may produce, I am forced to make some formal clarifications in order to solve them.

A third objection, however, is not produced by what in my opinion is a misunderstanding or a wrong choice of words, but by a possible difference of opinion regarding the important issue of the relation between law, liberty and arbitrariness. I will try to address this third objection in the second part of this answer.

(In apologizing for the length of this reply, I anticipate that, because of reasons of space, I will not address here the objections Professor Salin made to Mr. Water example, leaving them possibly for a further comment).

In my example of the radio frequencies I imagined that Mr. Guglielmo Marconi, when discovering the radio and a commercial use of it, would establish “a TV and radio broadcasting company *using* all frequencies for radio and television for different channels”. In addition, I assumed that, because he was the first person to discover the radio and a commercial use of it, he may have had “a legitimate property right on those frequencies and/or on their commercial use”.

In his further comment, Professor Salin claims that “There is no more basis for Mr Marconi to claim that he is the legitimate owner of all frequencies all over the world than there would be for Mr Christopher Columbus to claim that he is the legitimate owner of all South America and the Caribbean just when he puts one leg on South American land”. In addition, referring to a part of John Locke’s argument on the legitimacy of property rights (the other part is the more delicate issue of the “enough and as good” proviso), Professor Salin continues his argument stressing that “New legitimate property rights are created not only when someone discovers a new use of something, but when he does mix his own work and faculties with some resource in order to transform it and create a new value”, to which I would add the obvious condition that in doing so he should not violate other people’s legitimate rights (e.g., if I discover a new resource and a new use of it in the form of a powerful weapon, and if I mix my own work and faculties in order to build such a weapon, this does not give me the right to use it against another person).

Now, it is true that, in my previous comment, I had linked the legitimacy of Mr. Marconi’s right to those frequencies to the fact that he was the first person to discover the radio and a commercial use of it.

However, I had made this link *only after* assuming that Mr. Marconi was *using* all radio frequencies for different TV and radio channels (that is, after assuming that he was mixing his labour with this new resource). In addition, because of this explicit and preliminary assumption, I had implied (though I had failed to say it explicitly because I wrongly assumed that it was not necessary) that this right was limited to the areas where the use took place (say, in his own country): the fact that he discovered the radio and a commercial use of it did not imply by itself that he had legitimate property rights on all radio frequencies of the world that he did not use.

Having specified this, I believe that this first objection by Professor Salin is solved: in fact, my position does not appear to be in contrast, in any way, with the scheme of the courts he mentions, which “recognized the rights of those who had been the first ones to actually run a radio station, using specific frequencies on a given area. But someone else was the legitimate owner of the same frequency if he was the first one to use it on a different area”. In short, both Professor Salin and I agree, I believe, that the United States are not the owners of the Moon because they were the first ones to set foot on it.

Professor Salin, however, moves a second and more important objection to Mr. Marconi’s example. I believe that this second objection is right in the sense that it highlights a completely wrong choice of words for which I apologize. However, because in my previous comment I had explicitly clarified the sense in which I had used those words, I believe that also this misunderstanding can be solved.

To be more specific, in my previous comment I had claimed that “the fact that a single man is in control of all TV and radio information, for example, may be a violation of my right (if it exists) to *plurality of information*”. In other words, I had claimed that “plurality of information” may be considered as a legitimate right which could be in competition with Mr. Marconi’s legitimate property rights on the radio and TV he controls. Professor Salin rightly points out that members of a free society do not have a right to plurality of information, because this “would imply that each member have a right over other members (including Mr. Marconi) to get something which is called plurality of information”. In other terms, one thing is what is desirable, and an entirely different thing is what is legitimate: it may be desirable that all members of a society have a job, but a coercive action which, to this end, forced me to offer a job to someone would be illegitimate. Law, as liberty, is a negative concept. Professor Salin was absolutely right, in my opinion, to make this objection.

However, in my previous comment, immediately after using the (wrong) word “plurality of information”, I had specified that the way I intended it was to “exclude other individuals from the direct control of all TV and radio information available”. In other words, I explicitly stated that I intended “plurality of information” as something like “absence of total control on all TV and radio information (say, in a country)”. I made this mistake because, practically, in modern societies, the latter often implies the former: but the two are different concepts, which one should be careful to distinguish, and I thank Professor Salin for pointing that out. Therefore, even though the choice of word was wrong, the explicit explanation of what I meant with that word was right. And I believe that the explicit explanation of the meaning of the label I used is sufficient to prove that my position is not comparable to that of those egalitarian thinkers who distinguish between formal freedom and concrete freedom.

In particular, I believe that with a right choice of words (i.e. if one replaces the word “plurality of information” -e.g. the presence of many TV channels- with “absence of total control on all TV and radio information, say in one country”), also this second objection by Professor Salin is solved. In fact, these two concepts are different and even opposite. “Plurality of information” is a positive concept: it implies, as Professor Salin correctly emphasizes, that some members of society have a right that other members do something that is good for them; vice-versa, “absence of total control on all TV and radio information” is a negative concept: it implies that some members of society have a right that other members do not do something that is bad for them, such as for example (and perhaps) exposing the rule of law to a major threat (as the legitimate owner of a car which could go up to 1000 km/h could expose the other drivers of today's roads to a major threat of death if he drove it at that speed).

Having said this, I think that it is important to anticipate here, though I will address this problem more specifically later, that admitting that positive rights are to be avoided because they imply coercion, does not necessarily mean that they are always avoidable, but just that they have to be reduced as much as possible: the person who has to stand trial for a presumed crime has a positive right to a fair trial and to an independent judge, whom I will have to pay with part of my income. This positive right is hardly avoidable.

Going back to Mr. Marconi's example, whether an abstract principle on the grounds of which the members of a society have a legitimate right that no one controls all TV and radio information exists or not, I could not say with certainty, for I believe that what is legitimate does not depend on opinion but on the discovery of a principle which, in its abstract form, is already there. As I had specified in my previous comment, such

discovery requires an extremely delicate and complex intellectual activity (similar to that of an archaeologist), one I am not capable of. However, what I can say is that, in general, the fact that some members of society have a right that other members do not do something that is bad for them, is not incompatible with a free society, but rather the opposite. Not all actions that produce damage to others, of course, are illegitimate, but illegitimate actions are those which produce damage to others, and the law of a free society is that which forbids this kind of actions.

In conclusion, I believe that, after these formal clarifications, the first two objections by Professor Salin are solved. In other words, once these misunderstandings are cleared, so far Professor Salin's argument does not demonstrate that it is impossible that other possible legitimate rights cannot be in competition with Mr. Marconi's legitimate property rights on the frequencies that he uses to control all TV and radio information in his own country. Of course, this does not mean that it is demonstrated that these other competing legitimate rights do exist (even though, the fact that the same courts cited by Professor Salin did not rule against those so-called "anti-trust laws" that, in that common-law country, are designed to prevent any individual from controlling more than a certain quota of the media industry, seems at least not to contradict this latter possibility).

This brings me to the third objection made by Professor Salin: namely, the one concerning arbitrariness. Unlike the previous two objections, this is not the result of what I believe was a misunderstanding or a wrong choice of words, but perhaps of a different vision of the relation between liberty, law and arbitrariness.

In my previous comment I had claimed that, if an abstract principle on the grounds of which the members of a society have a legitimate right that no one controls all TV and radio information in that country existed, then, in Mr. Marconi example, his legitimate property rights to the frequencies he uses to control all TV and radio information in his own country would have to be balanced against that competing legitimate right. Professor Salin argues: 1) that it is impossible that such competing legitimate right may ever exist (as I said, once the misunderstandings created by the wrong choice of words are cleared, I do not believe that so far Professor Salin's argument proves that in Mr. Marconi example such competing legitimate right does not, or cannot, exist); 2) that such "balance" would necessarily "open the way to arbitrary decisions".

Now, on this second point, I do agree with Professor Salin: it is very probable that such balance would open the way to arbitrary decisions. However, this second point depends crucially on the first: because the first point is not proved, it could be that there are (or that there are not) legitimate rights competing with Mr. Marconi's legitimate property rights.

The important point is that, in case there were, arbitrary decisions would be the unavoidable *result* of the *existence* of a competing legitimate right, not one of the reasons *why* that presumed right would not be legitimate, as Professor Salin, claiming to have demonstrated the point (1), appears to suggest.

To clarify this fundamental point, I will make the following example. The nomination of a judge, to some extent, is always arbitrary, as it is the decision regarding his or her annual compensation, or the one regarding how many judges there should be: there are ways to make these decisions as little arbitrary as possible, but arbitrariness can hardly be avoided all together (the very selection of the parameters that should help making those decisions as little arbitrary as possible, is often arbitrary). Now, on the one hand, I clearly have a legitimate property right on my income. On the other hand, however, Mr Smith, who has to stand trial for a presumed crime, has also a legitimate right, at least in the West, to be judged by an independent judge (here I assume that judges can be paid only via taxes: it is not impossible, I believe, to find arguments against this assumption, though a similar assumption could be made anyway for other sectors, such as the police, the prisons, the foreign ministry etc., which, for one reason or for another, fall within the tightest definition of “minimal state”). Therefore, in this case, my legitimate property right on my income has to be balanced against Mr. Smith's right to a fair trial.

In finding this balance, arbitrariness is not avoidable: who selects the judge? Who selects the parameters that should make this decision as little arbitrary as possible? Who selects how much money he or she will earn per year? Who decides how many judges there should be? Etc. etc.

Now, it is important to notice that this arbitrariness is the *result* of the *existence* of a legitimate right (Mr. Smith's right to a fair trial) that is in competition with my legitimate property right: in other terms, this arbitrariness is not one of the reasons *why* Mr. Smith's right is illegitimate (which, of course, it isn't).

Of course, the fact that in Mr. Marconi example I explicitly stated that I do not know whether such a competing legitimate right exists or not, makes this case more uncertain than Mr. Smith's case. However, Mr. Smith's example helps me to emphasize how the question of arbitrariness depends crucially on the question of legitimacy.

Having said this, it is very difficult to emphasize enough that admitting that arbitrariness sometimes is unavoidable does not imply a license to it, but on the contrary a responsibility to make every possible effort to reduce it as much as possible.

Before proceeding further with my argument, and in order to avoid further misunderstandings, I want to stress that a position such as mine according to which arbitrariness is not avoidable, is not only very different, but opposite to a position such as the one of many egalitarian thinkers (such as Amartya Sen, to name one) who, in stating this obvious fact, forget to remember that this is not an excuse not to reduce arbitrariness as much as possible. While their approach is designed to justify institutions and policies which do not have any limit of principle to their recourse to arbitrariness, my approach is designed to identify the problem (unavoidable arbitrariness) in order to find ever tighter limits of principle to the recourse to it by these institutions and their policies.

Having clarified this, I believe that it is important to distinguish between the arbitrariness of the balance and the arbitrariness of the competing rights (which here, for the sake of the argument, I assume to be legitimate).

I think that by now it is sufficiently clear that, in Mr. Smith's example, finding a balance between my legitimate property right and his legitimate right to an impartial judge and a fair trial, unfortunately necessarily requires the recourse to arbitrariness. On the other hand, however, Mr. Smith's legitimate right is not arbitrary, and the proof of it is that an arbitrary decision (say by a fascist government) that he should be judged by a partial judge, even though legal, would be illegitimate, in the sense that it would violate a principle that, such as the one that protects private property, nobody has the power to arbitrarily change because it does not depend on opinion nor on the power to make certain decisions. Because it is the result of a spontaneous evolutionary process that selected those uses and conventions that in time demonstrated to contribute to enhance the chances of survival of society and that gradually transformed these uses and conventions into moral, abstract, universal principles of justice, the principle according to which everyone

should be judged by an independent judge can only be discovered and, once discovered, defended. Because of this, and therefore because nobody can decide that this principle is legitimate or illegitimate, this principle is no more arbitrary than an ancient Roman villa discovered by some archaeologist is (or again than the principle that protects my private property).

Reducing arbitrariness as much as possible, therefore, in my opinion implies, among other things, limiting it to finding a balance between legitimate rights where these are in competition and, in the process of finding that balance, again in reducing arbitrariness as much as possible. In other words, it means that under no circumstances this arbitrariness should be extended to the definition of legitimate rights (i.e. to their definition according to opinion and/or interest and/or power - including of course representative power): that is, it means that under no circumstances laws (i.e. spontaneously grown abstract and reciprocal principles) should be replaced by arbitrary opinions or particular commands. The damage that can be done by the unavoidable arbitrariness used in finding a balance between competing legitimate abstract principles is comparatively irrelevant if compared to the damage that can be done by extending arbitrariness to the law.

The typical example is the case of progressive taxation: when considering a particular form of capital (say wealth) those who are in favour of progressive taxation (or, more in general, of any form of redistribution of resources) assume the existence of so-called “principles” (such as the one according to which who has more should contribute even proportionally more than who has less) whose application to other forms of capital (say intelligence, beauty, relations, even children) they themselves would find totally illegitimate, thus demonstrating that those so-called “principles” were no such thing (by definition a principle is abstract, reciprocal, and universal) but simply arbitrary decisions designed to promote particular interests, and called “laws” in order to give them the same dignity and enforceability of true, non arbitrary laws (that is abstract principles).

Therefore, to go back to the radio frequencies example, I agree with Professor Salin that finding a balance between Mr. Marconi's Legitimate property rights and some (presumed) competing rights (such as the right to defend the rule of law from a major threat) does imply danger deriving from arbitrariness. But, if the competing principle exists, then 1) arbitrariness is not avoidable, and 2) the danger deriving from finding this balance between legitimate rights, tends to be very small (or anyway the minimum possible) as

compared to the danger of claiming the existence of rights (or absence of them) on the grounds of arbitrary opinion.

The decision of the common-law judge who, in the case *Riggs vs Palmer* (New York, 1886), decided that the assassin of his own relative should not inherit the property that the latter had previously left him, was not based on his opinion, nor on the written statutes and regulations concerning the transfer of wills (all assigning without contradiction the property to the murderer), but on the demonstrated and documented discovery of an already existing (but until then hidden under earth) abstract principle (a law) according to which no one can profit from his or her own criminal activity. Even if the judge had had a different opinion, this would have been irrelevant because the law was that abstract principle that was already there and that he discovered, again as an archaeologist would discover a Roman ruin in relation to which his opinion would be irrelevant.

It is the relevance of opinion (for example of those individuals who have political responsibilities) in the definition of which rights are legitimate and which are not (and therefore the confusion about the concept of law) that, I think, is exceedingly dangerous for liberty, not the unavoidable arbitrariness which can emerge and does emerge as a result of trying to find a balance between competing legitimate principles (such as in Mr Smith's example): this is dangerous, but in my opinion much, much less.

As I said more than once, unlike the case of Mr. Smith, I don't know whether in Mr. Marconi's case competing legitimate rights exist. What I do believe is that the existence or inexistence of these presumed rights are not a matter of opinion, and that presuming one or the other requires an archaeological analysis that is obviously beyond my capability and that I have not seen in Professor Salin's argument on Mr. Marconi example.

I agree with Professor Salin when he highlights the dangers for liberty of the French system in which (presumably the parliament) created an independent organization which has discretionary power over the distribution of radio frequencies and treats them as if they were its own private property. But in my opinion the greater danger of this situation does not arise from the fact that this organization uses arbitrariness in fixing some rules or parameters for preventing a concentration of TV and radio frequencies, but by the fact that its activity, as well as that of the institution that constituted it, is not limited by principles but by the arbitrary will and decision of a political majority, as the current case of Italy illustrates very well. If

arbitrariness was limited to finding a balance between non arbitrary principles, damage would be very limited, because the strongest infringements on our liberty come from 'laws' which do not have any basis of principle and are totally arbitrary (and therefore are not laws).

Friedrich von Hayek claimed that liberty is that condition of men in which coercion of some by others is, not eliminated, but reduced as much as possible in society. I think that a different way of saying this is that liberty is that condition of men in which recourse to arbitrariness is, not eliminated, but reduced as much as possible in society. I believe that it is in this imperfection, in this indefinite *tendency* towards an undefined, slowly changing “minimum possible” (which gradually decreases the more we learn the art of liberty, and vice-versa increases the more we lose it, and which regards every form of arbitrariness, from group decisions to coercion), that lies a great part of the humanity and of the beauty of liberalism.