

DEATH, TAXES, AND MISINTERPRETATIONS OF ROBERT NOZICK: WHY NOZICKIANS CAN OPPOSE THE ESTATE TAX

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IN A RECENT DISCUSSION, Jennifer Bird-Pollan attempts to show that “those who argue that the estate tax is an immoral violation of the private property rights of the deceased are mistaken.”¹ Her argument specifically targets Nozickian libertarianism.² Thus, Bird-Pollan promises to “accept Nozick’s libertarian political philosophical viewpoint, and explore the estate tax from within that perspective.”³ Her fundamental conclusion is that “society can, unrestricted by moral constraints regarding the property rights of the deceased, set a default rule for post-death property rights that reflects that society’s values.”⁴ This paper diagnoses two vital lacunas in Bird-

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CITATION INFORMATION FOR THIS ARTICLE:

Lamont Rodgers. 2015. “Death, Taxes, and Misinterpretations of Robert Nozick: Why Nozickians Can Oppose the Estate Tax.” *Libertarian Papers*. 7 (1): 1-17. ONLINE AT: libertarianpapers.org. THIS ARTICLE IS subject to a Creative Commons Attribution 3.0 License (creativecommons.org/licenses).

¹ Jennifer Bird-Pollan, “Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax,” *Maine L. Rev.* 66 1 (2013).

² Nozick himself suggested the estate tax might licit. See *The Examined Life: Philosophical Meditations* (New York, NY: Rockefeller Center) 1990, 31-32. Thus, when I use the term ‘Nozickian’, I pick out those who endorse most of the views Nozick put forth in *Anarchy, State, and Utopia* (New York, NY: Basic Books) 1970. I do not use ‘Nozickian’ to indicate a strict adherence to everything Nozick the man might have thought.

³ Ibid 3.

⁴ Ibid 3.

Pollan's discussion. First, her argument focuses on the rights benefactors have to bequeath and the rights heirs have to inherit. In response, I demonstrate that state programs to implement the estate tax will violate *other* rights individuals have. Second, Bird-Pollan completely ignores the Nozickian view of political legitimacy. In short, the fact that Nozickians will find our current government to be illegitimate is crucial. Nozickians will deny the government has the authority to use the force required to enforce the estate tax. Nozickians may thus oppose the estate tax as an immoral violation of rights, even if Bird-Pollan's basic arguments are successful.⁵

This paper is structured as follows: the first section offers four arguments from Bird-Pollan. The first two are to show that there are good reasons to believe injustices will arise from free transfers, even if those transfers are not unjust.⁶ Specifically, intergenerational justice is to be a problem for the Nozickian theory of justice in holdings. Intergenerational justice thus allegedly provides a rationale for implementing some policies libertarians tend to oppose. Bird-Pollan's third argument aims to show that would-be heirs do not have a right to the property of their would-be benefactors. Her fourth argument attempts to prove that the deceased have no rights; so it is permissible for the government to tax the estates of the deceased.

The second section of this paper shows that Bird-Pollan's arguments centered on intergenerational justice hinge on an important misreading of Nozick. Thus, if Bird-Pollan is after the internal criticism of Nozick that she promises, she fails. It turns out that this does not matter for her fundamental argument. What ultimately does matter are her arguments to show that heirs and deceased benefactors have no rights to the estates in question. This paper does not challenge these arguments. Instead, the third and final section of this paper demonstrates that even if Bird-Pollan successfully demonstrates that neither heirs nor benefactors have rights to any property subjected to the estate tax, Nozickians may deny that our state has the right to enforce the

⁵ However, this does not imply that her arguments actually are successful.

⁶ Bird-Pollan's argument is distinct from that found in G.A. Cohen's *Self-ownership, Freedom, and Equality* (Cambridge: Cambridge University Press) 1995. However, her argument is susceptible to a rebuttal Eric Mack presses against Cohen: a government that eschews the use of force will find it nearly impossible to implement tax programs. See Mack's "Self-ownership, Marxism, and Egalitarianism Part II: Challenges to the Self-ownership Thesis," *Politics, Philosophy, and Economics* Vol. 1. No.2 (June, 2002), esp. pages 251 to 254.

estate tax. Our state will need to prevent individuals from doing things that, at best, only a legitimate state may prevent individuals from doing.

1. Bird-Pollan's Defense of the Estate Tax

Bird-Pollan first offers a presentation of Nozick's basic position that is worth discussing here, as the textual accuracy of her discussion will matter later. Bird-Pollan sees that Nozick regards justice in holdings as a historical matter. Nozick claims that "[j]ustice in holdings is historical; it depends upon what actually has happened."⁷ He also tells us that "[w]hatever arises from a just situation by just steps is itself just."⁸ Since holdings are generally taken from the earth, the first leg of a proper theory of justice is an account of justice in acquisition. Bird-Pollan correctly observes that Nozick does not offer such an account,⁹ but tells us only that a proper theory will contain it. She claims that "Nozick's only explanation of what he means by "justice in acquisition" is a reference to the Lockean arguments regarding personal property rights."¹⁰

It is somewhat puzzling that Bird-Pollan regards this reference to Locke as an *endorsement* of Locke's famous labor-mixing account. After all, every single one of Nozick's remarks about Locke's labor-mixing account is critical. Still, the point of discussing justice in acquisition is to show how initial acquirers come to have legitimate titles to their holding. Bird-Pollan takes Nozick to endorse Locke's view that one generates a proper right in unowned things by mixing one's labor with those things, provided one's acquisition does not relevantly harm others. As Locke famously puts it, "every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."¹¹ For Locke and Nozick, these acquisitions are subject to a proviso requiring that one's

⁷ Nozick, Robert *Anarchy, State, and Utopia* (New York, NY: Basic Books) 1974, p 43. I refer to this work as *ASU* henceforth.

⁸ *ASU* 151.

⁹ Bird-Pollan 13.

¹⁰ Bird-Pollan 13.

¹¹ Second Treatise, Section 5.

acquisition not relevantly worsen others.¹² The proviso plays no significant role in Bird-Pollan's discussion, so I will not delve into the matter here.

Justice in transfer is settled by appeal to history as well. The second part of the theory is a gesture toward principles of justice in transfer. There is a principle of justice in transfer that specifies the "legitimate means of moving from one distribution to another."¹³ More specifically, the principle of justice in transfer tells us by what processes a person may transfer holdings to others and by what processes a person may acquire holdings from another who holds it.¹⁴ This topic deals with "descriptions of voluntary exchange, and gift and... fraud, as well as reference to particular conventional details fixed upon in a given society."¹⁵

When descriptions of just transfers are at hand, they will fill in the account of justice in transfer fixed for a particular society. Since the descriptions in question will provide an account of the traits any transfer must have in order to be just in that society, it is to be true by definition that transfers bearing those traits are just. The holdings that result from just transfers are to be just, provided the holdings before the transfer were just. It is important to note this point. Just steps for Nozick simply are the steps that tell us how to move from one just situation to another. This interpretation makes sense of Nozick when he states the following:

Whatever arises from a just situation by just steps is itself just... As correct rules of inference are truth preserving, and any conclusion deduced via repeated applications of such rules from only true premises is itself true, so the means of transition from one situation to another specified by the principle of justice in transfer are justice-preserving, and any situation actually arising from repeated transitions in accordance with the principle from a just situation is itself just.¹⁶

Thus, within a given society such a rule will work as follows. Whenever a transacting agent, or agents, goes through a series of steps that are justice-preserving in that society, the resulting holdings are just. The rules themselves

¹² For a good discussion of how to think about acquisitions, see Eric Mack's "The Natural Right of Property" *Social Philosophy & Policy* 27:1 (Winter, 2010).

¹³ ASU 150.

¹⁴ ASU 150.

¹⁵ ASU 151.

¹⁶ ASU 150.

will likely vary. However, as long as one goes through the proper channels one is entitled to the resulting holdings.¹⁷

Speaking of “societies” makes it sound as if rules are limited to specific geographical areas. However, in modern economies many transactions occur on the internet between people in decidedly different societies. There is no reason to regard the rules of transfer as confined to particular geographical locations. Locations can be cyber locations or the like, and as far as I can tell, the groups who trade there can count as societies. What seems to matter for Nozick is that the rules of justice in transfer arise in these forums and are accepted by the individuals engaging in them.

Nozick’s entitlement theory is, as I have said, historical in nature. In a historical conception, if a given holding is just it is so because it came about by just steps traceable to a just initial acquisition. However, “not all actual situations are generated in accordance with the two principles of justice.”¹⁸ Since not every holding will arise through just processes, a third principle is required: “the rectification of injustice in holdings.”¹⁹

Bird-Pollan seeks to take this historical conception of justice and provide a reason to believe holdings that are not just might arise through perfectly innocuous means. Her arguments make use of Nozick’s famous Wilt Chamberlain example. Here is the example as Nozick formulates it:

[S]uppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D_1 . Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction... He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket admission goes to him... The season starts, and people cheerfully attend this team’s games; they buy their admission tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain’s name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to his income? Is this new distribution D_2 unjust? ... If D_1 was a just distribution, and people voluntarily moved from it to

¹⁷ I do not mean to suggest that justice in acquisition is not part of the proper channels.

¹⁸ *ASU* 152.

¹⁹ *ASU* 152.

D₂, transferring parts of their shares they were given under D₁... isn't D₂ also just?²⁰

Bird-Pollan's first line of rebuttal attempts to establish that transfers that seem to be justice-preserving may actually yield outcomes that are not just. Specifically, she tries to show that Nozick's position entails this result. To establish her conclusion, she has us imagine that D₁ occurs under one generation G₁. Then, after a series of Chamberlain-esque transfers, there is a new generation, G₂ that comes into being. G₂ consists of the children of G₁, who agreed that D₁ was just. Bird-Pollan observes that G₂ did not agree to the justness of D₂. In fact, G₂ "did not agree to the justness of D₁ either!"²¹

A crucial interpretive point seems to be at work here. Bird-Pollan holds that "Nozick's argument about the justice of particular distributions of wealth depends upon the consent of all involved to the original distribution from which the distribution in question ascends."²² Bird-Pollan's belief that this is so motivates her idea that later generations' inability to agree to any initial distribution is problematic for Nozick. Her argument, then, appears to work as follows: D₁ is just *precisely because* everyone involved agreed to it. In D₂, there is a new generation on the scene, and G₂ did not agree to D₂. Thus, not everyone in D₂ agreed to D₂. So D₂ is not just.

Bird-Pollan also appears to have a separate, though similar, argument focusing on transactional justice. She is concerned that not everyone in D₂, which occurs within G₂, agreed *to the transfers* giving rise to the distribution. She then asks, "So how can we expect the members of G₂ to accept as just the distribution created by others, in which they had no say, either with regard to the original distribution or to the "free transfers" entered into by their forebears?"²³ In other words, the move from any distribution, D₁, to another distribution D₂, is justice-preserving only if everyone subject to D₂ agreed to the transfers giving rise to D₂. People who did not agree to the transfers giving rise to D₂ do not need to see D₂ as just. Later generations, like G₂, did not agree to the transfers giving rise to D₂. Thus, G₂ need not regard D₂ as just.

These arguments are supposed to show that holdings that are not just can arise from a series of free transfers. This would in turn provide a reason to believe something may be done about the resulting holdings. To cut off

²⁰ ASU 116.

²¹ Bird-Pollan 25.

²² Bird-Pollan 4.

²³ Bird-Pollan 24.

the objection that the heirs of would-be benefactors have rights to inherit, Bird-Pollan offers a further argument. Specifically, she believes Nozick would argue that individuals may acquire a right to inherit. They may do so if those who are entitled to holdings transfer them to their children. She envisions Nozick saying something like the following:

Because G_1 (presumably) mixed their labor with the world in order to generate morally meaningful ownership over their goods, they acquired the right to freely transfer those goods. And because G_2 receives the goods as a result of a freely made (post-death) transfer by G_1 , then they too have justly acquired the goods, and may hold them with the same moral authority with which G_1 held them.”²⁴

Bird-Pollan is unmoved by this argument, because at best it resolves transfers between the living. However, in most cases in which the estate tax is implemented, there is no contract between those who would bequeath and those who would inherit. Thus, Bird-Pollan holds that the above argument “may be true with regard to *inter vivos* transfers, but it does not address the second libertarian problem of inheritance.²⁵ In simple terms, G_1 has just titles either because they mixed their labor with unowned resources or because they engaged in free transfers with individuals entitled to their holdings. G_2 neither mixed their labor with unowned resources nor engaged in free transfers with individuals entitled to their holdings. Thus, G_2 has no titles to G_1 ’s holdings.

Bird-Pollan offers a different line of argument to show that the estate tax does not violate rights. The focus in this argument is on the rights of those who wish to bequeath property. The fundamental point, at least as Bird-Pollan sees it, is that rights to transfer one’s property require the existence of a property owner. This is where we encounter the problem of bequest and post-death property rights. While a property owner may write a will and have the intention to make a post-death transfer during her lifetime, the effect of that will happens only after her death. But in what sense does she continue to have the property right after her death, such that she has the authority to transfer that property?

The argument here is straightforward. One can have a right only if one is alive. Estate taxes are enforced only after death. Thus, the estate tax cannot violate the rights of the estate-holder. As Bird-Pollan puts it, “the libertarian view of morally justified property rights does not entail the right to transfer

²⁴ Bird-Pollan 24.

²⁵ Bird-Pollan 24.

assets after death. Once she dies, her moral rights end. She no longer has a moral claim of ownership over the goods in question.”²⁶

As a result of these arguments, Bird-Pollan concludes that “those who argue that the estate tax is an immoral violation of the private property rights of the deceased are mistaken... We would need to determine as a society what rule to set (with respect to the estate tax), having no moral absolutes that would determine how we must set the rule.”²⁷

The following section cuts off Bird-Pollan’s first two arguments. If she seeks to offer an internal criticism of Nozick, Bird-Pollan fails to demonstrate that a historical conception of justice is subject to the problem of intergenerational justice as she construes it. Special attention is devoted to this issue, because if Bird-Pollan’s argument is successful, she would have a much stronger argument against Nozick than she seems to realize. If her argument works, the whole doctrine of historical entitlement is refuted. Fortunately for Nozickians, Bird-Pollan’s argument is unsuccessful. What is more, her argument to show that the deceased have no rights is question-begging. However, the next section continues by showing that Bird-Pollan can still press her basic claim without employing her first two arguments.

2. Historical Entitlement and Intergenerational Justice

Bird-Pollan’s first argument centers on the claim, which she must take to be Nozick’s, that D_1 is just precisely because all the individuals in it agreed that it was just. Bird-Pollan needs this claim in order for her criticism of Nozick to be an internal one. However, a close inspection of Nozick’s passage reveals that he does not suggest D_1 is just because all the individuals in it agreed to the distribution. Here is what he actually claims:

It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings. For suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D_1 . Perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure.²⁸

Nowhere in this passage does Nozick suggest that everyone *in the distribution* believes D_1 is just. Instead, the individual identifying D_1 as just is

²⁶ Bird-Pollan 4.

²⁷ Bird-Pollan 4.

²⁸ ASU 160.

simply the reader, who endorses a non-entitlement conception of justice.²⁹ But Bird-Pollan writes that the generation G_2 , arriving at D_2 , agreed neither to the justness of D_1 nor D_2 . She takes this to be a problem for Nozick, because D_2 might be unjust, given that the members of G_2 did not agree to its justness, let alone that of D_1 . But Nozick does not ask us to imagine that the individuals in G_1 agree to D_1 . Instead, he asks the *reader*, as a proponent of a non-entitlement view, to imagine that D_1 is whatever the reader wishes it to be. This is compatible with the individuals in G_1 *not* agreeing that D_1 is just.³⁰

There is a second important error in Bird-Pollan's discussion³¹ that appears in her attempt to show that D_2 is not just. As she frames it, Nozick sees D_2 as just "because it was arrived at justly, in a way freely agreed to by all parties involved in the creation of D_1 and the transfers that resulted in D_2 ."³² The phrase 'all parties' is ambiguous; and Bird-Pollan reads in it a way Nozick would not. Nozick informs us that there will be people living in D_2 who did not engage in the Chamberlain transfers. These non-participants do not need to agree to allow *others* to pay Chamberlain. As Nozick puts it, "After someone transfers something to Wilt Chamberlain, third parties *still* have

²⁹ ASU 161.

³⁰ It is hard to think of a theory of justice which holds that everyone in the distribution must agree that the distribution is just. If Bird-Pollan holds this view, it is not a problem for Nozick. As Hillel Steiner observes, the Chamberlain example only shows that patterned principles do not give us the titles we expect to have. The question of what makes an initial distribution just requires a separate treatment. See "The Natural Right to the Means of Production," *The Philosophical Quarterly*, Vol. 27, No. 106 (Jan., 1977), pp. 41-49. Of course, if Bird-Pollan does require everyone in D_1 to consider it just, she will presumably have to handle John Locke's objections from *Second Treatise*, Section 28. Locke claims that if an individual needs the permission of everyone before appropriating bits of the unowned world, she would starve. The same is true of transfers, unless we live in a world in which people can meet all their needs without trading. We do not live in that world though.

³¹ There is a third error that I will only note in passing. D_1 does not need to involve labor-mixing. This initial distribution, for the purposes of the Chamberlain example, works even if no labor-mixing occurs. All the Chamberlain example shows is that patterned and end-state theories do not give us the entitlements we expect to have. D_1 is simply some distribution endorsed by readers who also support patterned or end-state theories. D_1 is simply the first distribution upon which we look. It need not be the first—or even among the first—to arise.

³² Bird-Pollan 23.

their legitimate shares. Their shares are not changed.”³³ There is nothing in Nozick’s discussion to suggest he thinks these third parties need to agree to the transfers leading to D_2 , and does not believe everyone in D_2 needs to have agreed to the steps involved in its creation: he only holds that the individuals who actually engaged in the transactions agreed to them.

After all, it is Nozick who explains that the Chamberlain example shows “patterned distributional principles do not give people what entitlement principles do, only better distributed. For they do not give the right to choose what to do with what one has.”³⁴ Nothing in his discussion suggests that individuals in D_1 agreed about how their holdings should be distributed. If it did, Nozick would take each individual’s holdings to be hostage to the approval of all others in both D_1 and any subsequent distribution. But Nozick does not require this. Thus, this portion of Bird-Pollan’s criticism of Nozick is not an internal criticism of *Nozick* at all.

This point is worth stressing because Bird-Pollan believes there is a vital omission in Nozick’s Chamberlain argument. She asks how we can “expect the members of G_2 to accept as just the distribution created by others, in which they had no say.”³⁵ If this is to serve as an internal criticism of Nozick, one he himself should find compelling, it fails. Nozick’s whole point is that that if individuals employ their holdings in the way we can expect them to, there will be no reason to regard any particular distribution as uniquely just. For D_2 to be just, what matters is that the individuals who had titles transferred them in the right way. There is no reason to require the permission of third parties. This is the whole point of having a title to something. For Nozick to ask people to agree to distributions would be a serious problem for his position. He undermines rival theories of justice by arguing that they do not ultimately give us the titles we expect to have. He could not himself endorse the view that an individual’s transfer is just if and only if *everyone* agrees it is.

To drive this point home, notice that in moving from D_1 to D_2 , there will be individuals who have no say in creating the resulting D_2 . This is true even within a single generation. Those who oppose market transactions, for example, might have no say in whether others engage in them. Individuals who believe profiting from basketball is immoral might have no say in the resulting holdings. If this were the case, there would be an easy rebuttal of

³³ ASU 162.

³⁴ ASU 167.

³⁵ Bird-Pollan 24.

Nozick and the whole doctrine of historical entitlement: some people will not agree to D_2 . Thus, there is no reason to believe D_2 is just.

It is lucky for Nozick that he does not ask the third parties in D_1 to regard the resulting distribution as just. He only asks proponents of rival theories to do so; moreover, the purpose of his request is to show those theories do not grant us the titles we expect to have.

Insofar as Bird-Pollan aims to show that, given Nozick's framework, there are good reasons to expect injustices to arise from what appear to be justice-preserving transfers, she fails. Nozick simply does not have the commitments she takes him to have. However, Bird-Pollan's other arguments remain. She concludes both that deceased benefactors and living heirs have no rights to the property dealt with by the estate tax. If she is correct in these judgments, there remains an argument to be made in favor of the estate tax: if there is some unowned thing to which no one has a title, what does the entitlement theory say about that thing? Bird-Pollan suggests it may be taxed and distributed in some way.

As it turns out, Bird-Pollan's argument to establish the claim that the deceased lack rights is question-begging. She argues as follows: In order to have a moral claim, or to have a right that is recognizable by society, there must be an individual, a subject, who can exert that right, or that claim. After death, the individual ceases to exist. There is therefore no subject available to claim the property right, and no subject available to enact the transfer.

This argument hinges on the claim that an individual must exist to exert a claim. For this premise to appear without defense is startling. After all, those who argue the estate tax violates the rights of the deceased have not failed to notice the deceased are dead. Rather, opponents of the estate tax challenge the claim that an individual must exist in order to exert a claim. What is more, Bird-Pollan does not delve into what it means to exert a right; a will could simply be a means of doing just that. To read her in a way that excludes this possibility, we must take the idea to mean an individual must be able to perform an act of exerting a right sometime in the present or foreseeable future. Even this seems dubious. It is a common moral judgment to consider comatose individuals as enjoying bodily rights, at the very least. And they enjoy these rights irrespective of whether they can exert them.

Despite this, the following section sets aside the shortcomings in Bird-Pollan's arguments. Assume neither would-be heirs nor would-be benefactors have titles to the goods subject to estate taxes. By granting these claims, I show that Nozickians can oppose the implementation of the estate tax even if Bird-Pollan's remaining arguments are successful. She is simply wrong to assert that the would-be benefactor's and would-be heir's lack of entitlement

to holdings shows, by itself, that “we would need to determine as a society what rule to set, having no moral absolutes that would determine how we *must* set the rule.”³⁶ There are, it turns out, moral absolutes constraining how we as a society may behave.

3. Legitimacy, Threats and the Estate Tax

Even if neither would-be benefactors nor would-be heirs have a right to holdings subject to the estate tax, a discussion of the legitimacy of the tax must not lose sight of the fact that it will be enforced against the living. This matters for two distinct reasons. First, significant estate taxes are likely to encourage individuals to engage in substantial pre-death transfers to avoid the tax.³⁷ Further, it is clear Nozickians will oppose the gift tax, which is one means by which the government hinders people from transferring a large quantity of resources to a specific individual. The gift tax is enforced upon the living and it is a *transfer* tax. Thus, the estate tax is both evitable and supported by other taxes Nozickians oppose.

A second reason enforcement against the living matters is that additional force might be required to back up the initial force. To see this, consider two simple means by which individuals might attempt to have their wills enforced. First, private probates could arise to meet the demand. Alternatively, those who wish to have their wills enforced might just sign contracts with their potential heirs. If the content of the will is to be secret, the contracts could be caveat emptor.

Now, to enforce the estate tax in the first case, benefactors, probates or beneficiaries might be required to notify the state of the value of the estate. In the second case, the state will need to preclude contracts between benefactors and potential beneficiaries. In either case, the state will need to threaten to initiate force or enforce penalties in order to gain compliance. The question we should ask is: *What Nozickian justification is there for such threats and penalties?* The remainder of this paper shows that no such justification is to be had. Indeed, there are at least three reasons why Nozickians should oppose the estate tax, even if Bird-Pollan is right that neither donors nor recipients are entitled to holdings.

First, the use of force or threat is legitimate for Nozickians only to protect rights, and Nozick’s minimal state does not initiate force against those who do not violate rights. More precisely, it uses force only to protect

³⁶ Bird-Pollan 4.

³⁷ I thank an anonymous referee for this point.

rights. This may include preventing risky activities, but it does not justify initiating force to facilitate the estate tax.³⁸ Nozick's state also does not initiate or threaten violence against individuals in order to oblige them to aid others.³⁹ But the implementation of the estate tax will require the use of force, unless either those subjected to it simply agree to pay it or the tax is really just a form of rectification or compensation for wrongs individuals have suffered. However, Bird-Pollan does not attempt to establish a claim to rectification or compensation on anyone's part. What is more, if her discussion of intergenerational justice is an attempt to establish such a claim, the previous section demonstrated her failure to do so.

The upshot is that Bird-Pollan's second thesis is too narrow. The fact that there is a good to which no one is entitled does not justify the state's laying a standing claim to the good in question. After all, in Nozick's view, states have no rights that private individuals do not have. Yet no individual could rightly claim that all the estates of the deceased are his. The only Nozickian justification for that sort of behavior—to the extent there is any—is that the individual or one of his clients is entitled to the object in question. Likewise, the enforcement of the estate tax can be justified only by demonstrating there is an individual entitled to some portion of the estate. It is important not to lose track of this when arguing against Nozickians.⁴⁰ Bird-Pollan, however, fails to provide a Nozickian rationale for believing anyone is entitled to the relevant holdings.

Now, Bird-Pollan envisions later generations deciding, perhaps in conjunction with members of earlier generations, how some portion of the estate of the deceased should be distributed. Bird-Pollan takes this approach because she mistakenly believes Nozick considers this sort of agreement a requirement for an initial distribution to be just. Section 2 demonstrated that Nozick believes nothing of the sort. So this justification of the force required to implement the estate tax fails, at least insofar as the justification is to be the Nozickian justification Bird-Pollan promises.

The second reason Nozickians will oppose the estate tax comes from Nozick's historical conception of legitimacy. Bird-Pollan is right to observe that Nozick has a historical conception of justice. However, she ignores the aforementioned conception of legitimacy. Nozick claims a minimal state with the right historical origin is justified. Nozick's minimal state has a monopoly

³⁸ See *ASU* ch. 4.

³⁹ *ASU* ix.

⁴⁰ For a discussion of how this applies to 'nudge paternalism,' see Lamont Rodgers' "Nudging: Libertarian Paternalism's Red Herring," *Philosophical Notes* No. 90 (2014).

on the initiation of force, and private individuals are prevented, save in the case of imminent danger, from enforcing their own rights. The minimal state has the moral authority to its monopoly because it arises in just the right way, by meeting three conditions. First, it arises by an invisible-hand, market-style, non-violent process. Second, it protects the rights of those it precludes from privately enforcing rights. Third, it does not itself violate the rights of those over whom it exercises authority.⁴¹

This excursion into Nozick's view of legitimacy is important precisely because present-day governments are illegitimate in the Nozickian view. Eric Mack has recently put it as follows: "no *actual* minimal state is explained or justified by Nozick's invisible hand explanation. This is no philosophical problem because there is no actual minimal state that Nozick sets out to justify."⁴² Current governments lack the proper origin and are themselves rights violators. In short, they are not minimal states. They thus cannot rightly claim the authority to do what a legitimate minimal state may do. Any private individual or company wishing not to be subjected to the estate tax is at liberty to resist a real-world government's attempts to enforce it. And although these governments will initiate force against those who resist, in the Nozickian model, they lack the authority to do so.⁴³

The third reason Nozickians will oppose the estate tax is related to the second. Bird-Pollan aims to show it is possible for the estate tax to arise in a way that does not violate rights. This, it turns out, is no problem for Nozickians. The problem arises when one moves from this possibility to the claim that a contemporary government may implement the estate tax. From

⁴¹ Some Nozickians have suggested that the minimal state is justified, not because of how it arose, but because of what it does. An example is found in Ellen Paul, "The Time-Frame Theory of Governmental Legitimacy," in *Reading Nozick*, edited by Jeffrey Paul (Totowa, NJ: Rowman and Littlefield, 1981) 270-285, and Eric Mack, "Nozickian Arguments for the More Than Minimal State," in *The Cambridge Companion to Anarchy, State and Utopia*, edited by R. Bader and J. Meadowcroft (Cambridge: Cambridge University Press, 2011) 89-115. I am not convinced either of these accounts abandons a fundamental commitment to a historical conception of legitimacy. Unfortunately, a full discussion is beyond the scope of this paper.

⁴² Eric Mack, "Robert Nozick's Political Philosophy," in *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta (Fall 2014). Available at: <http://plato.stanford.edu/archives/fall2014/entries/nozick-political/>.

⁴³ This does not mean individuals may not do anything they like. Individuals are always constrained by the moral rights of others.

the claim that a policy could arise in the right way, one cannot infer that any state may enforce that policy.

The problem for Bird-Pollan is that she clearly wishes to show her argument carries political implications bearing on what real governments may do. She tells us the subject of her article are “moral claims to post-death property rights made by libertarians when they argue against the estate tax.”⁴⁴ However, she moves from this observation to the judgment that “we would need to determine as a society what rule to set, having no moral absolutes that would determine how we *must* set the rule.”⁴⁵ What is more, Bird-Pollan goes to considerable lengths to show the estate tax is worth retaining because of its role in encouraging charitable giving.⁴⁶ She also attempts to show that the estate tax does not provide the incentive to care for one’s family that opponents of the tax suggest.⁴⁷ Lest there be any lingering doubt that Bird-Pollan believes the government may enforce the estate tax, notice that she claims the tax is worth discussing in a way income tax is not. She writes the following:

[Because] revenues collected from the estate tax represent such a relatively small amount of total tax revenues, discussions of the policy behind the estate tax can happen without the concern that eliminating the tax would hamstring the entire operation of the government. Given the current size of the revenues collected via the individual income tax, it is entirely impractical to talk of eliminating the tax altogether without simultaneously talking about radical shifts in the federal budget. However, one could make a legitimate argument in favor of eliminating the estate tax without the concern that the budget as we know it would entirely fall apart.⁴⁸

Presumably, the idea is that if the estate tax were vital to our government’s budget, there would be no real point in debating its legitimacy. Nozickians will not see it that way, of course. The point, however, is that Bird-Pollan is discussing what our government may do; and not merely what might be compatible with Nozickian libertarianism.

The conceptual compatibility of something like taxation with Nozickian philosophy is unsurprising. The obstacle is that taxes must arise in a manner compatible with individual rights. To illustrate, the third section of *Anarchy*,

⁴⁴ Bird-Pollan 3.

⁴⁵ Bird-Pollan 4.

⁴⁶ Bird-Pollan 6.

⁴⁷ Bird-Pollan 8.

⁴⁸ Bird-Pollan 10.

State, and Utopia shows how individuals can legitimately construct states much more extensive than the minimal state. The fact that individuals may do so, however, does nothing to justify the claim that our current state may act as if we have legitimately constructed a more-than-minimal state. We must *actually* have done so, and we have not. What is more, Nozick tells us states have no rights individuals lack. If individuals cannot force others to pay estate taxes, neither can the government.⁴⁹ Nozick actually considers the question of whether some sort of taxation or regulation could be justified:

A face-to-face community can exist on land jointly owned by its members, where the land of a nation is not so held. The community will be entitled then, as a body, to determine what regulations are to be obeyed on its land; whereas the citizens of a nation do not jointly own its land and so cannot in this way regulate its use. If all the separate individuals who own land coordinate their actions in imposing a common regulation (for example, no one may reside on this land who does not contribute n percent of his income to the poor) the same effect will be achieved as if the nation had passed legislation requiring this. But since unanimity is only as strong as its weakest link, even with the use of secondary boycotts (which are perfectly legitimate) it would be impossible to maintain such a unanimous coalition in the face of the blandishments to some to defect.⁵⁰

It should not be necessary to point out that we do not live on land that is jointly owned. And, on the off chance someone believes we do, our land is not jointly owned via procedures Nozick would regard as legitimate. We live in a nation-state. When speaking of nations in this passage, Nozick does not speak of the top-down implementation of taxes or regulations. Instead, regulations are enforced by private owners. However, unanimity is required to make the system work. If one wishes to argue that the estate tax could be privately and non-coercively enforced, there is no reason to quibble. What matters is that within our current state no threats of violence or the like—at least with respect to the estate tax—are unjustified.

This discussion has demonstrated that a Nozickian can grant to Bird-Pollan that neither the deceased nor their heirs have non-contractual rights over holdings subject to the estate tax. Section 3 showed that Nozickians can remain opposed to the estate tax because its implementation requires the threat of force and penalties, and these penalties are unjustified. The only—admittedly indirect—attempt Bird-Pollan makes to justify these threats and

⁴⁹ ASU 89.

⁵⁰ ASU 322-323.

penalties lies in her arguments from intergenerational justice. Section 2 of this paper showed that these arguments rest on a misreading of Nozick. Thus, insofar as Bird-Pollan seeks to show that Nozickians lack the argumentative ability to oppose our government's implementation of the estate tax, her argument fails.

