

JUSTIFYING THE STATE FROM RIGHTS-BASED LIBERTARIAN PREMISES

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I. Introduction

THE PROBLEM OF THE (legitimate) authority of the state has historically been seen as an important part of normative political theory (a few would perhaps claim it is the *most* important part). But the perceived acuteness of the problem seems to have diminished over time. This may, in part, be due to the fact that states are such an established part of reality (as compared to the times of theorists such as Hobbes or Rousseau), but it is also, in part, due to intellectual fashions and trends within political theory. In mainstream political theory it is probably still the case—as Leslie Green claimed a couple of decades ago—that “the general problem of political authority is rarely regarded as being of primary importance” (Green 1988, p. 2). Nevertheless, I believe the question of legitimate authority should be revisited now and then by all political theorists because the way one reasons in that area is usually related to how one reasons about other, more “substantial” questions of political philosophy. If one’s standpoints regarding these two areas are not related in any way one may have coherence problems in one’s moral outlook, and if one wants to be consistent in one’s thinking it is important to discuss both areas of theory.

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CITATION INFORMATION FOR THIS ARTICLE:

J. Mikael Olsson. 2016. “Justifying the State from Rights-Based Libertarian Premises.” *Libertarian Papers*. 8 (1): 59-79. ONLINE AT: libertarianpapers.org. THIS ARTICLE IS subject to a Creative Commons Attribution 3.0 License (creativecommons.org/licenses).

How, then, can (or should) the state be justified (or legitimized)? For a start, I believe the political must be explained in terms of the moral, or nonpolitical.¹ Ontologically, the state is simply an aggregation of individuals whose representatives are doing things to other individuals,² and if you believe that what an individual does to another individual must be justified, then you ought to believe—if you want to be consistent—that the state (or the actions of its representatives) must be justified. A common anarchist position is that it is impermissible to do anything against another individual, or her legitimate property, without prior consent (except as rectification for prior violations). Hence, the representatives of an organization called the “state” cannot do so either. A quite different theory such as utilitarianism would claim that whether it is permissible to do things to other people without their consent (including harming them severely) is a matter of aggregate consequences. And if some individuals are sometimes justified in harming “innocent” people or taking away some of their possessions, there is nothing strange about the “state” doing the same thing, too, since—as stated above—the state is simply individual behavior on a larger scale.

In this paper I will argue that the state can be justified from strong libertarian rights-based premises—that it is possible to set up a legitimate government in a state of nature without violating anyone’s rights not to be coerced into doing anything against their wills.³ Furthermore, I will argue that a more-than-minimal state is easier to defend on rights-based grounds than a minimal state—that is, minarchism (either for “strategic” or for “genuine” reasons) may be a more problematic position than what many libertarians think. I will not argue that any *existing* state can be defended on strictly libertarian grounds (which, of course, is the really important question for many libertarians). It will be assumed that we all have a “natural” right (it is natural in the sense that it is not established by any state) not to be coerced and that people can only have things done to them if they have agreed to be treated in that way (hypothetical agreements will be assumed not to count). In essence, this is an assertion of self-ownership. But it will also be assumed that

¹ Cf. Hunt (2008), pp. 3–9.

² This fact is sometimes obscured by the “organic,” or perhaps “Hegelian,” associations that the term “state” sometimes evokes. A term such as “government” might be a better term, but I have opted for the more common term “state,” in spite of the problematic associations.

³ Widerquist (2009) makes an argument that is essentially the same as mine. However, the present article is not simply a rehashing of Widerquist’s, since I have attacked many subjects from different angles. For details on this, see section 7.

we have rights of ownership pertaining to things outside ourselves—rights that, so to speak, flow from the right to self-ownership.

Robert Nozick attempted to justify the state from the same kind of premises in *Anarchy, State, and Utopia*, so I will first describe his arguments and then Murray Rothbard's critique of those arguments. I will also briefly consider a handful of different justifications from similar moral premises to those of Nozick (and Rothbard) and indicate why I think they are inadequate. I will then present my alternative account of how the state can legitimately be established, attempting to bypass Rothbard's critique of Nozick (as well as avoiding the weaknesses of the theories discussed in section 4). Some comparisons to John Locke's political theory will then briefly be made in order to reassure the reader that my account of legitimate state formation is not simply a restatement of Locke's account.

The result of the inquiry is a defense of the state that I believe is harder to refute than Nozick's theory (but it is still necessary to adhere to the unproven rights axiom—which I myself do not—to view my argument as convincing). And although it is not a defense of *existing* states, it might still have relevance when one discusses policies in light of what *might have happened* in a state of nature where all rights were respected. My conclusion is that if (and this might be a very big “if”) one uses the idea of anarchism as a “regulative ideal” in that way, there is no reason why an anarchist (or rights-based libertarian) must defend a minimal state rather than, for instance, a democratic welfare state.

2. Nozick's Theory

Nozick's account of the legitimacy of the (minimal) state is surely the most famous attempt to derive this legitimacy starting from moral principles that seem to approve only of anarchy. He argues that it is possible that “a state would arise from anarchy... even though no one intended this or tried to bring it about, by a process which need not violate anyone's rights” (Nozick 1999, p. xi).⁴ Here I shall not dwell on the moral foundation of the theory (which Nozick does not argue for very much anyway), but simply mention its essential message: people have rights to the effect that they should be inviolable from aggression by other people, and there is no “social entity” (or overall social good), apart from individual persons, that would warrant balancing the benefits of aggression against one person against the benefits to other persons that result from the aggression.

⁴ Furthermore, he claims this morally *should* occur; see Nozick (1999), pp. 52 ff, 199.

In the state of nature people would, according to Nozick, mostly join credible protective associations. The credibility of the associations lies in their rules: clear rules about offenses, internal disputes, subscription fees and other contributions, and so on. Initially, he believes, several different protective associations (or agencies) will offer their services in the same geographical area. Conflicts between them may arise when, for instance, one association is protecting someone that another association is trying to punish. In such situations, Nozick regards three possibilities as worthy of consideration: (i) the associations fight it out, whereby the clients of the losing association start to do business with the (more effective) winning association instead; (ii) people move closer to the territorial center of their associations' control since the peripheries become unsafe; (iii) evenly matched associations, which cannot be sure whether they will be winners or losers in the long run were they to continue fighting, agree to delegate conflict resolution to a third party, most likely a certain type of court, which in the end would be a sort of federation between protective agencies.

It seems, then, that a territory would tend to be dominated by one protective agency or one arbitration court that different protection agencies defer to in cases of conflict. How would a dominant protective association differ from a state? It would differ in two main respects: "(1) it appears to allow some people to enforce their own rights, and (2) it appears not to protect all individuals within its domain" (Nozick 1999, p. 22 ff). There is, thus, no monopoly of force in the geographical area in question (which is commonly thought as necessary for a state to exist), and a protective agency seems not to be able to establish a monopoly without violating rights. Most importantly, perhaps, it cannot force anyone to join its agency and deny them their right to uphold their rights single-handedly if they so choose. In the reverse scenario (where a state exists) people do not have this possibility; but, on the other hand, they are guaranteed protection without having to do very much (except—in most cases—pay taxes). Where there is a dominant protective agency and the two provisos mentioned above hold, there is an "ultraminimal state" (although the choice to call it a "state" at all may be unfortunate).

An attempt to justify the (legitimate) transformation of an ultraminimal state into a minimal one might go like this: if some people are able to refuse membership of the dominant agency in a territory they might pose a danger to the rest of us (threatening our rights). If we forced them to join the dominant agency, and "forced" them to be protected by it (thereby forming a minimal state), we would minimize the amount of rights violations. And since rights are the foundation of our political philosophy, we would presumably want as few violations as possible. This is a sort of "utilitarianism of rights."

Nozick does not, however, adhere to this view. He regards rights as “side constraints” on action, in virtue of the idea that people should not be treated merely as means. Another explanation for the transformation of the ultraminimal state into a minimal state is needed.

At this point Nozick asks us to imagine that “interspersed among a large group of persons who deal with one protective agency lives some miniscule group who do not. These few independents (perhaps even only one) jointly or individually enforce their own rights against one and all, including the clients of the agency” (Nozick 1999, p. 54). One solution to this problem would be to isolate the independents on their own properties, but that would “leave acute problems of relations with independents who had devices enabling them to retaliate across borders, or who had helicopters to travel directly to wrongdoers without trespass upon anyone else’s land, and so on” (ibid., p. 55). More specifically, the problem is that it could potentially be very dangerous to just sit and wait for the independents to act—and when they *do* act they may create too much damage in the process, so that it would appear unsatisfactory to merely (attempt to) punish them afterward. Probably many would be reluctant to join a protective agency that could not guarantee (preemptive) safety from these independents.

One solution to the dilemma with the dangerous independents is to allow violations of people’s rights, provided that full compensation is paid to the victim (this means that, after compensation, the victim should be in a position to appreciate why the violation happened) *and* provided that the violations are of the sort that one *can* compensate for. An example of something that we cannot compensate for is fear, which means that acts that induce it can be prohibited and made punishable. So, for instance, if it is declared that in one month someone will take my car, we do not have to prohibit this behavior as long as I am fully compensated for the taking of my car. This might mean, for example, providing me with a car that—according to me—is a better car than the old one. On the other hand, threats of violence at some undetermined point in time against unspecified persons would create fear among most people that one could not compensate for, making that kind of violence subject to prohibition.

We cannot, however, ban every action that causes fear. There must be some threshold. A problem with this is that although each “individual act’s probability of causing harm falls below the threshold..., the combined totality of the acts may present a significant probability of harm” (Nozick 1999, p. 73). There seems to be no warrant to prohibit the individual acts if we only look at the fear the individual acts cause, so if we want to prohibit these acts we have to make a judgment on a societal level—which a libertarian natural-law theory, according to Nozick, is ill equipped to do. But

if we have a (minimal) state, then it can prohibit independents from exacting private justice, and it can compensate the independents mainly by giving them protection, merely because their “procedure is known to be risky and dangerous—that is, it involves a higher risk (than another procedure) of punishing an innocent person or overpunishing a guilty one—or because the procedure isn’t known not to be risky” (ibid., p. 88). It would be an act of self-defense to stop these independents engaging in this risky behavior. And the point is that a private protective association would have no right to this act of “self-defense.” If an individual cannot violate another individual’s rights just because the second individual is putting people at risk, then a protective association cannot do it either, because it is just a group of individuals and has no rights apart from the individual rights of the members.

Thus, a state is born by an “invisible-hand process” (Nozick 1999, *passim*) whereby no individuals’ rights have been violated. The dominant protective agency has transformed itself into a state by prohibiting independent individuals or associations from meting out justice within its territory—something that seems to go against their rights. But all they have done is to prohibit activities that put others at grave risk (e.g., of being innocently punished), and putting people at risk in that way is something that we do not have a right to do anyway.

3. Rothbard’s Critique of Nozick

Rothbard—a philosopher who starts with similar rights-based foundations as Nozick, but is generally more consistent—prefaces his critique of Nozick by remarking that even if a minimal state could be legitimately established, there is no reason to suppose that any existing state did actually evolve that way. Therefore, “it is incumbent upon Nozick to join anarchists in calling for the abolition of all existing States, and *then* to sit back and wait for his alleged invisible hand to operate” (Rothbard 1998, p. 232). The more analytical part of Rothbard’s critique, however, has to do with the invisible-hand justification itself—and his criticism of Nozick’s reasoning on this point indicates that the “even if”-clause above is provided for the sake of argument. In the following I shall briefly describe the analytical argument. I will disregard Rothbard’s empirical criticisms, which claim, for instance, that Nozick exaggerates the level of conflict between protective agencies in the anarchic society and that he, contrary to historical evidence, posits that in an anarchic society there will be dominant protective agencies in most geographical areas.

The question, then, is whether the (however unlikely) dominant agency would be justified in outlawing competitors—because of their risky

behavior—in the field of protection services. Rothbard balks at this because “once one can use force against someone because of his ‘risky’ activities, the sky is then the limit, and there is virtually no limit to aggression against the rights of others” (Rothbard 1999, p. 238). The rights-based libertarian should stand firm in the belief that “no one has the *right* to coerce anyone not himself directly engaged in an *overt* act of aggression against rights. Any loosening of this criterion, to include coercion against remote ‘risks,’ is to sanction impermissible aggression against the rights of others” (ibid., p. 239). In other words, risky behavior itself is not a threat that can legitimize aggression and force against people. In Rothbard’s theory preemptive self-defense is only legitimate when “the threat of aggression” is “palpable, immediate, and direct... Any remote or indirect criterion—any ‘risk’ or ‘threat’—is simply an excuse for invasive action by the supposed ‘defender’ against the alleged ‘threat’” (ibid., p. 78). It seems that self-defense against overt immediate threats must reasonably be allowed in an ownership-centered theory like Rothbard’s or Nozick’s, but Rothbard’s critique that Nozick’s idea of legitimate “self-defense” against “risky” behavior is both unclear in its application and leads to a slippery slope also seems reasonable.

Furthermore, Nozick’s theory of compensation is, according to Rothbard, utterly flawed because there is no way of knowing what the compensation is supposed to be. As an adherent of the Austrian school of economics, Rothbard believes that “people’s utility scales are always subject to change, and that they can neither be measured nor known to any outside observer” (Rothbard 1998, p. 241). What is, for instance, the correct kind of compensation for the psychological trauma caused to the convinced anarchist by watching the state emerge? Perhaps no compensation would be enough. It is, furthermore, hard to know exactly who it is that must be compensated. How does one, in other words, “distinguish... between those who have been deprived of their desired independent agencies and who therefore deserve compensation, and those who wouldn’t have patronized the independents anyway, i.e., who therefore don’t need compensation?” (ibid., p. 243).

Rothbard raises other points as well, but I believe that an account of the legitimacy of the state would be in much better shape—provided one believes rights of self-ownership should be the foundation of political philosophy—than Nozick’s if it can successfully bypass two objections. First (and most importantly), there is the objection that the existence of risk is no legitimate reason to aggress against people, and, second, there is the objection about the impossibility of ascertaining the right kind of compensation.⁵

⁵ Wolff (1977) raises some further problems about compensation in Nozick’s theory.

Furthermore, Rothbard (following Roy Childs) points out that, in Nozick, “there is still no explanation or justification... for the modern form of voting, democracy, checks and balances, etc.” (Rothbard 1998, p. 252). Thus, if an alternative theory can also provide those things, so much the better.

4. Other (Rights-based) Attempts to Justify the State

Besides Nozick, few seem to have attempted to justify the state from similar rights-based premises. John Roger Lee⁶ has pointed out a “conceptual incoherence of libertarian anarchy” that “shines forth most clearly” in light of the following: anarchistic libertarians assume that people in the state of nature would make contracts with defensive agencies, and they will pronounce “laws” that their subscribers must follow. But how can law arise out of contractual relations if there is no “contract law in terms of which the contracts are drawn and through which they bind the parties to the terms contracted?” (Lee 2008, p. 18). Thus, the state cannot be justified by appealing to contracts only. Lee’s solution is to appeal to a (natural) right to life that is “specified and integrated into a body of law” (*ibid.*, p. 20). So, the problem seems to be that just making a contract cannot be of moral significance because there must be a prior moral “law” prescribing that (voluntary) individual contracts must be honored. Therefore, we need a system of law in place prior to the contract-making that says those who do not honor the contract shall be punished.

This theory, however, fails because it would lead to an infinite regress: the law saying the breach of contract shall be punished must itself come from somewhere, and where can it come from other than a prior contract to punish contract breakers, and so on. So, who can break this infinite regress and set up an authority that punishes those who do not honor contracts with defensive agencies? It seems coercion must be involved somewhere. If I cannot legitimately force anyone to make a contract with anyone then I cannot, presumably, force anyone to make a contract about contract-breaking. So, an account of state legitimacy that wants to avoid both coercion and the problem with the infinite regress must simply accept that there is no “ultimate” morality that binds people without their agreement. In the state of nature there will be people who claim there is nothing sacred about contracts (e.g., between an individual and a defensive agency), and there is nothing the anarcho-capitalist can do about that, other than simply fight with contract breakers if they attack him, and stand firm in his moral convictions.

⁶ Cf. also Machan (2008) for some similar reflections.

The “Objectivist” tradition of Ayn Rand has—at least for all practical purposes—similar foundations to those of Nozick and Rothbard, namely, the primacy of nonaggression and voluntary interaction. Many Objectivists do, probably, like Rothbard, believe taxation is theft (which is why Rand and other Objectivists have discussed ways of financing the state through voluntary fees). How, then, can a state be justified on Objectivist terms? Well, following Thomas’s (2008) account, the justification seems to be of an empirical nature. Anarchists in the Rothbardian tradition believe the stateless world would work just fine when it comes to reducing crime and keeping people safe, whereas the Objectivists seem to deny this and to claim that competition among protective agencies will not provide a safe environment for exercising our rights. “Anarchy,” writes Rand, “as a political concept, is a naïve floating abstraction... a society without an organized government would be at the mercy of the first criminal who came along and who would precipitate it into the chaos of gang warfare” (quoted in Thomas 2008, p. 43). Thus, “for an Objectivist, a proper government is whatever institution succeeds, in the current context of knowledge, in protecting individual rights and providing objective, rights-based law, secure from threats domestic and foreign” (Thomas 2008, p. 47). In the end, this seems to be the same kind of argument as Nozick’s: if the state of nature is too risky or dangerous then some people’s right to choose who will protect them can be violated because if people can secede into smaller and smaller social units with their own protective schemes, “gang warfare” will soon ensue, which is worse for most people. For *utilitarian* reasons (whether it be a “utilitarianism of rights” or regular utilitarianism), this may be bad; but forcing people to be safe is nevertheless a violation of their natural (libertarian) rights.

Since I do not want to hinge my own account of state justification on contingent empirical matters (i.e., whether the anarchic society would in fact be more “chaotic” than the statist society), I can simply state that the Objectivist position cannot put forward a story about how a state can come about without violating people’s rights. Tannehill & Tannehill (2007, p. 33), who subscribe to the same moral foundation as Rand, appear to be consistent when they say that, in order to exist, a government “must deprive entrepreneurs of the right to go into business in competition with it, and it must compel all its citizens to deal with it exclusively in the areas it has pre-empted.” And since government, “by its very nature, [is] an agency of initiated force,” it has to be condemned on moral grounds. Again, they seem to be more consistent in the application of the Objectivist philosophy than Rand herself, as well as many of her followers, but they are wrong to claim that the monopoly in question has to arise by initiation of force. Nevertheless, since the minimal-state Objectivists have not—as far as I know—provided any account of how a state can come about without

violating rights, Tannehill & Tannehill are, of course, correct in their *internal* critique against them.⁷

Maloberti (2009) defends the state by positing a positive “samaritan” right to avert danger when no voluntary solutions are available. This right—mainly defended on intuitive grounds—could come into effect when, for instance, one is lost in a snow storm, finds a cabin, and forcibly enters it to get out of the (probably quite deadly) storm. In this case, the samaritan right would not punish the freezing stranger for invading the cabin owner’s property. Instead, the cabin owner would be punished if she has refused to help the stranger. Thus, Maloberti posits a positive right to aid that comes into effect when one—through no fault of one’s own—is in perilous circumstances. When it comes to the state, “a samaritan approach to political legitimacy will conceive the legitimate state as a mere enforcer of such rights” (Maloberti 2009, p. 8). Maloberti seems to regard this as a libertarian theory because it cannot legitimize more than a very modest task of samaritanism (due to certain provisos listed by Maloberti) when it comes to the “welfare” ambitions of the state. However, one of the theoretical virtues (from a coherence standpoint) of most libertarian theories is that they rely on negative rights only, and since I wish to avoid the complexities that arise by the introduction of positive rights into the mix, I will avoid it in the theory put forward below.

5. Justifying the State—An Alternative Account

The task, then, is to explain how a state can come about in a way that does not entail any violations of the rights held sacrosanct by philosophers like Rothbard. Presumably, everyone has the right to set rules on one’s own property. On my land, and in my house, I may decide that all guests must obey the dictates of some deity (as interpreted by me) or that we always take a vote on who cooks food and washes the dishes. One’s own property is, in a manner of speaking, one’s own state. Let’s assume, however, that a state of one person or a few co-owners of a piece of property is not a “state” in any meaningful sense. A state should consist of many pieces of property under a common protective agency with a monopoly on force. And the crucial question is how any single property owner can be forbidden to secede from the state and renounce membership of the protective agency.

⁷ A similar refutation of Rand’s argument for the legitimacy of the state can be found in Garner (2009).

I think we would have to imagine the following scenario: a number of landowners (including “guests,” such as family members and hired workers) whose properties together form a coherent territory⁸ decide that any person who lives on any of these properties shall be designated as a “citizen” of the United Properties. They may of course make further stipulations—for example, that only adults should be regarded as citizens, or only people who have resided in the UP for a number of years. Furthermore, they may decide that everyone who lives in the UP must subscribe to one protective agency (just like I may decide that if you want to live under my roof you are forbidden to shop at Walmart, for example)—henceforth called the “police force” of the UP. All this they may legitimately do, provided they are clear about when this “revolution” is to occur, so that their guests have a chance to leave before that time (their hired workers might, for instance, have contracts that the revolution would violate, in which case the landowners would have to wait for the contracts to expire).

Nevertheless, we would probably hesitate to call this a state because any of the landowners may withdraw from this treaty, or if the treaty is signed for life, their heirs might withdraw, since they have signed no contracts about obeying the rules of the UP. So, if the original landowners (the “founding fathers”) want to secure the perpetuation of the UP they have to stipulate in their wills that their heirs can only assume ownership of the properties if they agree to follow the rules (or the “laws”) of the UP, and they can only transfer the properties to their heirs on the same terms. If they choose not to accept these terms it may be stipulated that the land shall, for instance, be in control of the board of the UP Police (which may be democratically appointed by the citizens of the UP) and, for instance, sold to the highest bidder who accepts the terms in question (alternatively, it may be stipulated that these lands shall be owned by all citizens indefinitely). It seems, then, that all the land within the borders of the UP is perpetually controlled by the “rulers” of the UP, and that people can only become “owners” (we may call it quasi ownership in order to distinguish it from “true” ownership) of land within the borders provided that they accept the laws of the UP.

When the founding fathers decided that anyone who resides in their territory must obey the UP Police they did in fact create a state without violating anyone’s rights. What powers the UP police force gets would be up to those who control the board. The possibilities are virtually endless, just as the possibilities are endless for individual homeowners who want to set

⁸ Whether the territory actually needs to be geographically coherent for the theory to work is something I shall leave for others to discuss.

“crazy” rules under their own roofs. Of course, it would probably be the case that the founding fathers would make some kind of “constitution” that constrains what the UP Police board may do; otherwise, it would be hard to find any considerable amount of people who would be willing to unite their properties into a state.⁹ Besides, a small state like the UP would probably do well to treat its citizens well because they would probably not have many resources to oppress the population or stop them from leaving. It is not outrageous to assume a state that comes into being in the way I describe would be somewhat democratic (or “polyarchic”).¹⁰ It is, in any case, less plausible to believe that we would agree to “turn over all of our guns and all of our ultimate decision-making power and power to define and enforce our rights to the Jones family over there”—an example Rothbard (1998, p. 175) uses to prove the absurdity of the state. It is more plausible to assume the founding fathers would like to secure a great deal of popular control over the UP Police.

This explanation of the legitimate birth of the state is not—like Nozick’s—an invisible-hand explanation. It is, rather, a *visible-hand* explanation. The state comes into being because of deliberate acts by free people who have the express intention of forming a state, and it can only be dissolved if its constitution contains provisions for how this could be done (but it could, of course, dissolve if it runs out of citizens).

It should be obvious that the key to the whole argument is that the rulers of the UP legitimately control—that is, are the “real” owners of—the whole territory within its borders. Legitimate state-ownership is what we

⁹ This does not, of course, preclude that the state may be later “captured” by interests of which the founding fathers would not have approved. Such capture might be within the bounds of the constitution, but ultimately the state might completely lose its legitimacy if, for example, the UP Police was taken over by a tyrannical clique in a coup d’état. Such things can, for instance, be prevented by an active citizenry devoted to their political system. But if we assume citizens are generally unable to display that kind of vigilance, then we probably cannot assume people would be able to defend their rights in an anarcho-capitalist society either. A slippery-slope argument is, in this case, difficult to use without casting doubt on one’s own “utopia.”

¹⁰ And if the citizens want their state to grow they have to show it to be attractive to people who would be ready to adjoin their territories to the state (and agree to relinquish the full ownership of their properties). Of course, the state may also grow if citizens buy new land outside of the original territory (if the citizens choose to make laws to that effect, that is), and perhaps the board of the UP itself may also increase the state’s territory by purchases and keep the new land under collective control.

must have been searching for all along in order to justify the state, since if we cannot establish it then there is no legitimate jurisdiction over the territory in question. But if one really can prove the state owns its territory then we might really have a justified state. Rothbard admits as much himself: “If the State may be said to properly *own* its territory, then it is proper for it to make rules for anyone who presumes to live in that area” (Rothbard 1998, p. 172). However, Rothbard does not (as far as I know) seem to be able to imagine a scenario in which the state legitimately becomes the owner of its territory (making the citizens nothing but quasi owners of their “properties”).

Now, it may be claimed that even though a state might be formed in this way, it does not offer a robust-enough right to leave the state that one resides in. For instance, someone who is born within the borders of the UP has not signed any contract to be a “citizen” of this state, so that person would be illegitimately forced to live by the UP’s laws. This, however, would be no different from the case where someone is born on a private homestead that is not part of any state. The child would have to accept the rules of the homestead as long as he or she chose to stay there as a guest, just as they would have to accept the laws of the UP as long as they chose to stay there (and in both cases deciding to leave could involve great emotional and/or financial drawbacks). In other words, the fact that one cannot easily leave a state is not a sufficient condition to call the state coercive: “The situation would resemble the competition evident among gated housing or apartment complexes” (Machan 2008, p. 81).¹¹

5. Notes on Locke

A further question about the account or theory in section 4 should be raised: is it, in essence, so similar to Locke’s theory of the legitimate state that one might just as well refer readers to him? In one important respect, my account is not similar to Locke’s, in that it does not include the famous “proviso,” which causes a great deal of theoretical problems in both Locke and Nozick (and which many modern libertarians therefore reject). According to Locke, the abundance of the world makes it (or once made it) possible for everyone to appropriate enough land to live through their labor, but they could not appropriate so much that other people would not have as good land (etc.) left for their part—because “God gave the world to men in common” (Locke 1823, second treatise, chap. 5). Contrary to Locke, I have

¹¹ Cf. Rothbard 1998, p. 178: “*So long* as the State permits its subjects to leave its territory, then, it can be said to act as does any other owner who sets down rules for people living on his property.”

simply assumed—in line with Rothbard—that from the beginning, the earth has been unowned rather than owned by everyone in common (or given to us by a supernatural being in stewardship, etc.). This means there is no duty to make sure that after appropriating unused resources there are as good resources left for everyone else. Defending the establishment of a state through other means than people’s actual agreement might be a possibility once the proviso is accepted, but the task I set before myself was to bar that resort.

In other respects, Locke’s theory may have some similarities with the theory contemplated in this paper, although it is hard to know exactly how Locke did conceive of the actual founding of the state. Several passages in his *Second Treatise* seem to indicate that his stance was more “lax” on this point than the constrictions I have assumed. Of course, he claims that a “political or civil society” can only exist where “any number of men... unite into one society as to quit every one of his executive power of the law of Nature, and to resign it to the public” (Locke 1823, second treatise, chap. 7). If Locke means to say the people who unite into political society do this through a process of adding their own properties together, then there is hardly any divergence between my account and Locke’s.

Locke is not, however, entirely clear on this matter. The interesting thing for him seems to be the *result* of the compact, rather than the details of the compact itself. The compact must lead to an impartial judiciary system whereby no one is allowed to be judge in his own case. Furthermore, Locke states that “when any number of men have... consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest” (ibid., chap. 8). But surely we can conclude neither that the state must be (roughly) democratic nor that it must have the sort of impartial judges Locke assumes. All this depends on what the founders of the state decide.

In the end, it remains unclear whether only property owners can create a state, or simply “any number of freemen capable of majority” (ibid.). It may be the case that by “freemen” Locke actually means property owners, but his historical examples of legitimate states seem to speak against this. He appears to hold the view that many ancient states arose legitimately by people choosing, for instance, some general to defend them; when these states become corrupted (and rebellion may then, as a consequence, become legitimate) it is because the leaders take greater powers than those with which they were entrusted, not because of any realization that the circumstances of the founding were unjust. All this seems to entail that the “freemen” who

established political society in the first place could not—and, apparently, *need not*, according to Locke’s theory—have been property owners only.

6. The Relevance of the Alternative Account

Now, it might be asked what the relevance of all this is. After all, the main duty of an anarchist would (as Rothbard pointed out) be to insist that all existing states be abolished. Then we must wait and see what kind of social organizations arise, whether they are states like the UP or not.

In reality, however, the assumptions of what can or would happen in an anarchic state of nature sometimes seem to serve as a sort of regulative ideal in assessing real-world policies.¹² Of course, if it were claimed that a democracy (and its usual methods, such as taxation) could not “logically” be established from a state of nature where everyone’s rights are respected, then an anarchist would have to be hostile to contemporary democratic politics. In other words, if we are to regulate our present existence in the statist world in accordance with the anarcho-capitalist benchmark (i.e., in accordance with what can actually happen in this state of nature) we can endorse neither a democratic welfare state nor a minimal *laissez-faire* state. But perhaps we can claim that the latter is, after all, closer to the anarcho-capitalist society, so we can adopt *laissez-faire* as something we can live with. If the democratic welfare state can be said to be further from what would (and morally can) happen in the state of nature, there does not seem to be any major harm in taking this stance. If, however, a democratic state (which might include regulations approaching modern welfare states, albeit on a smaller geographical scale) *is* a possibility in the state of nature, then *that* might serve equally well as a regulative ideal.¹³

Perhaps the “traditional” anarcho-capitalist would reply that although it is possible (and permissible) to found a democratic state in the state of nature it would probably not happen, since it would be too difficult to gather

¹² An example of this kind of thinking can be found in Hoppe (2001, p. 248; emphasis in original) when he proposes that—in the context of immigration policy—“the democratic rulers act *as if* they were personal owners of the country and *as if* they had to decide who to include and who to exclude from their own personal property... This means following a policy of the strictest discrimination *in favor of the human qualities of skill, character, and cultural compatibility.*”

¹³ Nozick (1999, pp. 292–94) largely rejects the use of “hypothetical histories,” except for a few special cases—for example, a massive boycott against nonparticipants in the more-than-minimal state—something he deems highly unlikely to succeed.

together the “founding fathers” discussed above. It is more likely that people would continue in a stateless condition; therefore laissez-faire “minarchism” is a more apt regulative ideal in our imperfect world, where the abolition of the state seems an impossible goal. This seems to disregard, however, that most people today who actually live in democracies appear to support democratic rule. And if it is so easy to gather a large amount of democracy supporters in our own world, why should it be so impossible to gather together a decent amount of democracy supporters (and property owners) in an anarcho-capitalist world? To assume otherwise would be to assume that in the latter world people would think differently because they have not been reared to support democracy. This, however, is a problematic assumption because anarcho-capitalist theory itself seems to imagine that people in the state of nature would be just like modern people who have learned the principles of anarcho-capitalism (as well as numerous other modern intellectual concepts). This appears to be necessary to posit since if we imagine people in a state of nature who have *not* learned anything about either democracy or anarcho-capitalism (they would, in other words, be just the sort of “primitive” people whom we know from archeological excavations and the like), we would simply rerun human history and end up exactly where we are today. But if we want to “restart” history with modern intellectual ideas we must surely include the idea of democracy as well as the idea of libertarian rights, and there is no warrant to assume that the second would be much more popular than the first, even among wealthy property owners.

In short, if we want to be “pure” anarchists we should simply reject the state and all its policies and fight for the abolition of the state—that is, we should not settle for a policy that seems to be the lesser evil, because any social organization that does *legitimately* arise from the state of nature must be regarded as morally permissible and we cannot know beforehand what social organizations would arise—hence we cannot really know what a “less evil” policy might mean.¹⁴ The other alternative is to accept that the state cannot realistically be abolished, but to regulate our behavior and policy suggestion after what we think would be *likely* to happen in the state of nature. And in that case, the appearance of a state could be as good a guess as a society of “pure capitalism”; so, there is nothing wrong with endorsing the state (as well as taxation, redistribution, etc.) as an anarchist—or at least it is not more

¹⁴ A moral consequentialist has ample opportunities to argue that some policies are more evil than others, even though no “natural rights,” or the like, have been violated in either case. The rights-based libertarian, on the other hand, must presumably accept what other people do, as long as all interactions are voluntary.

wrong than to assume that (nonminimal) states would *not* be formed in the state of nature.

An anarchist might, however, be inclined to say that minarchism is less evil than the welfare state because there is simply less coercion; and the less coercion there is, the closer one gets to the anarcho-capitalist ideal. But this, again, assumes we know exactly how much state intervention there would be under a government that has legitimately arisen from the state of nature. States like the UP might have a lot of laws regulating people's behavior as well as very high taxes; so, if we believe that something like the UP is a more realistic scenario than the nonappearance of the state we might just as well say that *minarchism* takes us further away from the anarchist ideal. This, of course, presumes we are talking about anarchistic scenarios solely as regulative ideals; if the anarchist wants a minarchist state rather than a welfare state because it would then be easier to finally abolish the state, the matter would be different—that is, simply a matter of strategy (and regulative ideals, as I have defined them here, are not a matter of strategy).¹⁵

Another possibility to defend laissez-faire over the welfare state is to use a sort of utilitarianism of rights, whereby rights violations are graded on a scale and then we can use this (cardinal) scale to assess society. I think many anarcho-capitalists would be reluctant to go down that road since it has some problems that cannot really be resolved without turning to *actual* utilitarianism. How do we, for instance, compare rights violations such as (a) gun control, (b) compulsory health insurance, (c) military conscription, (d) laws against blasphemy, (e) minimum wages, or (f) drug prohibitions? Is a society that has many regulations on (a), (b), and (c) and few regulations on (d), (e), and (f) more rights-friendly than the other way around? Furthermore, if we could reduce one kind of rights violation (for instance, the number of robberies) by introducing more rights violations in some other area (e.g., introducing gun control), would that be all right?

¹⁵ If it is just a question of strategy it seems to entail that you can only support reducing the state if you honestly believe (and can argue) that a smaller state has a better chance of leading to the abolition of the state. That this should be the case may not, however, be totally obvious. If you, for instance, believe a smaller state will be more efficient than a larger one, then support for the state may *rise* if you reduce its size. The right strategic choice might be to reduce the legitimacy of the state by making it an utterly inefficient redistributive behemoth (just like some politicians seem to believe that the best way to reduce welfare services is not by making such proposals directly, but by driving the state deeper into debt so that cutbacks will appear necessary later on).

7. Widerquist's Dilemma for Libertarianism

One might claim that my argument has—at least in essence—been very similar to that of Karl Widerquist, in his article “A Dilemma for Libertarianism” (2009). Like me, he argues that “the inviolability of property rights does not necessarily imply a libertarian state” (Widerquist 2009, p. 44). He asks us to imagine an island called “Britain” that is in the state of nature. As time goes by the land on the island is appropriated in ways of which any libertarian would approve (but we may also imagine *some* rights violations—see below). Some landowners might choose to sell titles of quasi ownership on their own land—that is, to keep tenants on their land who must live by the proprietor's rules. Over the generations it might happen that “estates become larger until one proprietor owns the entire island of Britain. At this time she decides to call herself ‘Queen’ rather than ‘proprietor’. She refers to her ‘estate’ as her ‘realm’, her ‘tenants’ as ‘subjects’, and her ‘royalties’ as ‘taxes’” (ibid., p. 48).

It should be evident that this account is similar to mine. Instead of the *visible-hand* explanation whereby a state is created by several property owners coming together to explicitly create a state with a polyarchic constitution, Widerquist imagines an *invisible-hand* explanation that permits a large (absolute) monarchy to exist after several generations of property merging. Both explanations are logically possible when it comes to creating a state without violating anyone's rights. Perhaps one could claim that Widerquist's account is more devastating for the antistatist libertarian than mine. If the libertarian must concede that even an absolute monarchy is logically possible, it seems unnecessary to consider the possibility of more “benign” (pace Hoppe 2001) forms of government.

There are, however, reasons to regard the more “modest” example of a polyarchic state as more interesting. As discussed above, libertarian anarchists usually assume people in the state of nature to have similar thoughts and conceptual knowledge as ours. It seems likely, then, that those people would be careful to avoid the possibility of the kind of power concentration that Widerquist imagines. *As a regulative ideal*, a polyarchic state, created by visible-hand processes, seems more convincing than a monarchy that evolves through the ages through legitimate transfers of land.

Furthermore, Widerquist presupposes a “statute of limitations” that he claims any libertarian theory must adhere to in some form. The statute of limitations states that there is a point when one does not have to prove the legitimacy of one's title of ownership—namely, when it is impossible to find the *specific* persons who had their land stolen from them in long-gone times. Widerquist observes that this argument is sometimes used “to defend current

titleholders against claims by the descendants of slaves and native peoples,” but adds that “it also defends government property rights against those wishing to establish a libertarian state as general social policy.” The Queen of Britain can say that the statute of limitations does not make her government any more illegitimate than any other property title (remember, her government is nothing but a huge property title), except possibly for the properties of “a few native peoples in out-of-the-way places” (ibid., p. 52).

In my own argument, however, I have avoided the discussion about the statute of limitations altogether, because I wanted to imagine how a state could come about without *any* violations of rights (i.e., the kind of scenario Nozick contemplated in his theory). Widerquist’s aim was, to a large extent, to show “that there is good reason to believe modern governments hold at least some rights of taxation and regulation consistent with [libertarian] principles” (ibid., p. 65), thanks to the statute of limitations. I, however, have made no claims about modern governments’ *actual* rights—or, rather, I have (for the sake of argument) granted the libertarian-anarchist claim that *no* modern government has *any* rights of the aforementioned kind. But even if all modern governments lack the right to tax and regulate, the libertarian may still have reasons to support high rather than low taxes—not because of the statute of limitations, but because of the regulative ideal of the libertarian state of nature. And on this line of reasoning the argument for monarchy is surely weaker—easier to refute for libertarians—than the argument for democracy.¹⁶

8. Conclusion

In this paper I have argued that it is possible to imagine a scenario where a state appears in the state of nature without violating strong libertarian rights (i.e., rights not to be coerced). Thus, it is the sort of explanation Rousseau was looking for when he first asserted that “man is born free; and everywhere he is in chains” and then proceeded to explain what could make this chaining of free men legitimate (Rousseau n.d., p. 5).

My alternative account of how a state can be justified avoids criticism raised against Nozick’s theory of justification as well as some other theories.

¹⁶ Rodgers (2009) is a response to Widerquist, but as far as I can tell, there are no counterarguments in this article that serve to refute my central points in any serious way. Rodgers raises empirical problems that I have not discussed, but he also thinks Widerquist has mischaracterized certain libertarian theories—something of which, I hope, I am not guilty.

However, the fact that one can concoct a credible story about how a legitimate state *could have* come about does not mean that any existing state can be considered legitimate; so, the only way it seems this theory would be of relevance is if we considered anarchy to be an unrealistic utopia and adopted the theory as a “regulative ideal” for how life in an unjust world should be organized. In that case, however, it does not seem necessary for the anarchist to propagate a minimal state or *laissez-faire*, since this is not necessarily what people might opt for in a state of anarchy. The state they may legitimately create in the state of nature can be much larger than minimal if its citizens so choose. A state that, for instance, levies high taxes and compulsory military service does not violate anyone’s rights if the state itself came about in a just manner and if the citizens choose to remain within its borders. In light of the preferences and knowledge of modern people, it is also quite likely that they would actually choose a democratic welfare state rather than any other kind of state.

Even though human beings were at one time born free (in the sense that they were born with rights some believe one should have “naturally” before one enters into a state), in the future they may legitimately be “in chains”—that is, born into a state they never consented to—but still have no justified complaint about the moral legitimacy of that state. Now, a state may never come to be legitimated in this way, but insofar as philosophical thought experiments have relevance for real-life politics, the experiment presented here may be no less relevant than other thought experiments. One implication of this particular thought experiment seems to be that minarchism is difficult to defend on the basis of (negative) rights alone—indeed, it may be difficult to defend on any basis. The anarcho-capitalist who defends minarchy as a tactical device to bring us nearer anarchy may be mistaken about the efficiency of this tactic. The libertarian who defends minarchy because it is closer to what would happen in the state of nature may be mistaken about what would be the result of the interactions of genuinely free people in such a state—the libertarian may have to defend a democratic welfare state on these grounds. The libertarian who turns to utilitarian (or quasi-utilitarian) arguments to defend minarchy runs the risk of being philosophically incoherent when right and utility are in conflict, but may also open a statist “floodgate” because other utilitarians are usually not minarchists (at least not nowadays).

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