

PUBLIC PROPERTY AND THE LIBERTARIAN IMMIGRATION DEBATE

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I. Introduction

The question of immigration is one of the most fiercely debated topics in libertarian circles today. To be clear, there is little debate among libertarians as to how immigration would operate in a stateless society: in a world without states there would be no national borders to cross. All property would either be unowned, and thus available to be homesteaded by those living nearby or coming from afar, or privately owned, in which case people would require the owner's permission to occupy or move across such property. In other words, each private property owner would be his or her own border patrol, just as happens today with houses, shopping malls, gated communities, aircraft, ships, etc.¹

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¹ An anonymous referee objects to the claim that there is little debate among libertarians about how immigration would operate in a stateless society by pointing out Roderick Long's argument (1996; 1998) that there would be "public property" in a stateless order. However, although Long uses the phrase "public property," he is quite explicit that he does not mean property owned by a state but rather by a group of individuals who have, in Long's language, collectively homesteaded such land, or to whom such land has been donated by a prior private owner. While this is not the place to debate Long's views, I am in general agreement with Walter Block (2010, 141–46) and, in particular, the following statement (2010, 144; emphasis in original):

The libertarian immigration debate gets most lively when we consider a society governed by a state. One important part of this debate that has developed over the years, as further described in section II, is the divergence of opinion between two leading libertarian anarchists, Hans-Hermann Hoppe and Walter Block. A key but underdeveloped aspect of their debate is how libertarians should consider land that is “public property” controlled by the state, and the consequences of that control. This is important because, in today’s world, such land comprises or hosts many of the key means for immigrants to enter and remain in a society, including the zones on either side of a state-designated national border, as well as roads, waterways, public housing, and state educational institutions.

It is important to note at the outset that there are two very different types of public property. The first type is land seized by the state from a private owner under eminent-domain legislation or other, similar means (I will call this “state-seized land”).² The second type is unowned land that was not seized from any private owner but is simply claimed and physically controlled by the state (I will call this “state-claimed land”).³ Unfortunately,

[T]he problem for Long is that he has not succeeded in demonstrating “public” property. All he has shown is an instance of *private* property owned jointly, or, collectively if you will, by *specific* individuals.

Long (1998) discusses how some or all of these individuals may police such property, and also how conflicts over use among this group can be resolved (on this point, see also Hans-Hermann Hoppe [2011, 3–5]). I believe Long is implicitly accepting that there would be some private party or parties who would (in his view) legitimately control access to and use of such property, in contrast to property that is unowned.

² While under eminent-domain legislation the state technically purchases land from a private owner in return for “just compensation”—as decided by the state’s legislative, executive, or judicial arm—I assume it is uncontroversial within libertarian circles to reject characterizing this transaction as a voluntary exchange, since if the private owner refuses to sell, the state can still forcibly take the land while paying the amount it has stipulated as “just.”

³ An anonymous referee posits that there may also be hybrid versions of public property between seized and claimed land, for instance, if the state uses coercion to drive an owner to abandon his property. My response is that abandonment can only be an effective way to yield title to property if the abandonment is voluntary. Per Stephan Kinsella (2003, 27–29), property can be abandoned by an owner’s manifesting his “consent” or “intent” to yield title, which, if property titles are to mean anything, presumably must mean uncoerced consent or intent. In the scenario suggested by the referee, the abandonment would not be effective, and thus if the state subsequently seized control of the land it would be state-seized land. On the other hand, if a legitimate private

much of the libertarian discussion on immigration conflates these two types of public property, whereas an appreciation of their differences is critical to deriving what I believe to be the correct libertarian position on immigration in today's world—namely, so-called “open borders.”⁴

II. Summary of the Debate

The argument of those libertarians on the Hoppe side of this debate, who oppose “open borders,” is twofold. The first argument is that the legitimate owners of public property are those taxpayers whose income or wealth (hereafter, “income”) was expropriated by the state to fund the state's control of such property (what I will call the “PP ownership theory”). So, for instance, Hoppe (2002, 90; emphasis in original) claims:

Public property is the result of State-government confiscations—of legislative expropriations and/or taxation—of originally privately owned property. While the State does not *recognize* anyone as its private owner, all of government controlled public property has in fact been brought about by the tax-paying members of the domestic public. Austrians, Swiss, and Italians, in accordance with the amount of taxes paid by each citizen, have funded the Austrian, Swiss, and Italian public property. Hence, *they* must be considered its legitimate owners. Foreigners have not been subject to domestic taxation and expropriation; hence, they cannot claim any rights regarding Austrian, Swiss or Italian public property.⁵

owner voluntarily abandons his property and later the state moves in to physically control it, then this would be state-claimed land, since it would be unowned at the time of the state's action.

⁴ I wish to note that I have the greatest respect for the three libertarian theorists whom I mention in this paper but (with some trepidation) with whose reasoning on immigration I disagree, namely, Hoppe, Kinsella, and Block. I have learned much from their writings, and indeed in this paper I believe I am simply applying this knowledge to a particularly thorny issue.

⁵ This last sentence is curious because it is not always true, and thus should lead writers like Hoppe to recognize that, under the PP ownership theory, *some* foreigners could be considered part owners of domestic public property. For instance, what of foreign-business owners who have had to pay license or export fees to a domestic government in order to sell goods in the domestic economy? Or foreign tourists who have had to pay sales or value-added taxes on purchases made while visiting? Or foreign investors who have been subject to domestic withholding taxes on their investment income? In any case, since this paper seeks mainly to refute the PP ownership theory, I will not address this point further.

Similarly, Kinsella (2005) argues the following:

What I am getting at is that the state does own many resources, even if (as I and other anarcho-libertarians believe) the state has no natural or moral right to own these things. Nonetheless the state does own some resources—roads, ports, buildings and facilities, military bases, etc. We can allow that a road, for example, is actually, or legally, owned by the state, while also recognizing that the “real” owners are the taxpayers or previous expropriated owners of the land who are entitled to it.

The second argument is that since the legitimate owners of public property are the taxpayers, so long as the state is in physical control of such property it ought to act as a sort of trustee for these taxpayers. In this capacity, the state ought to manage public property as taxpayers would manage private property—namely, by only admitting visitors who are personally valued by the taxpayers and/or who would maintain or improve the value of their properties, and excluding everyone else (I will call this the “PP management theory”). This implies a highly restrictive immigration policy. For instance, on this point Hoppe (2001, 148; emphasis in original) asks:

What should one advocate as the relatively correct immigration policy, however, as long as the democratic central state is still in place and successfully arrogates the power to determine a uniform *national* immigration policy? The best one may hope for, even if it goes against the “nature” of a democracy and thus is not very likely to happen, is that the democratic rulers act *as if* they were the personal owners of the country and *as if* they had to decide who to include and who to exclude from their own personal property (into their very own houses). This means following a policy of the strictest discrimination *in favor of the human qualities of skill, character, and cultural compatibility*.

Kinsella (2005) echoes Hoppe’s sentiments, noting that, given the existence of public property, it would not be “unlibertarian” for the state to restrict immigration by setting up usage rules for public property based on rules that a private owner of such property would adopt.

How is the state to deduce how its subjects might manage their private property—that is, what they might want as an immigration policy? Kinsella (2005; emphasis in original) proposes a majoritarian principle:

And since it is impossible for the state to adopt a rule that perfectly satisfies all citizens—this is one problem with having public property in the first place—then, other things being equal, a rule that is favored by the overwhelming majority may be viewed as

providing “more” overall restitution than one that is favored only by a few people...

It is obvious that the overwhelming majority of citizens do not want open borders; which means almost every American taxpayer would prefer that public property *not* be open to everyone...

Given that values are subjective, using property to cater to the subjective preferences of the vast majority would seem to be one way of achieving a more substantial degree of restitution.

It is not clear whether Hoppe would agree with Kinsella on this majoritarian principle. On the one hand, one could infer agreement from some of Hoppe’s writings. To wit:

Once it is made clear that the government actually tolerates or even promotes the intrusion and invasion of masses of aliens who by no stretch of the imagination can be deemed welcome or invited by domestic residents, this is or may become a threat to a government’s legitimacy and exert enough pressure on it to adopt a more restrictive and discriminatory admission policy. (Hoppe 2002, 91; footnote omitted)

On the other hand, however, he has explicitly written that the state, when acting as gatekeeper for its citizens, should look for specific “tickets of admission” to evidence a desire by specific private citizens to admit specific immigrants. Thus, Hoppe (1998, 231) writes:

Hence, in order to fulfill its basic protective function, a high-wage-area government must also be engaged in preventive measures. At all ports of entry and along its borders, the government, as trustee of its citizens, must check all newly arriving persons for an entrance ticket—a valid invitation by a domestic property owner—and everyone not in possession of such a ticket will have to be expelled at his own expense.

It is worth noting that Hoppe and Kinsella do not draw a hard distinction between state-claimed land and state-seized land. It therefore appears that they are asserting that the state ought to manage both types of land according to the same immigration policy, as opposed, for instance, to inquiring of former private owners of state-seized land exactly which immigration policy they would favor for the respective pieces of land of which they have been deprived.⁶

⁶ However, as I note in section III, Hoppe does appear to distinguish between the two types of land when it comes to deciding who should receive the land should the state collapse.

Turning to the other side of the debate, partly in this camp we have Block as a leading “open borders” advocate. I say “partly” because Block’s views on the PP ownership theory are not always consistent, and Block seems to arrive at his “open borders” position by first *adopting* the PP ownership theory and then outlining a principle that builds on it in a different direction than that advocated by Hoppe.

To illustrate the confusion surrounding Block’s position on the PP ownership theory, consider this passage (1998, 180–81; emphasis in original), in which Block appears to disagree with the PP ownership theory, taking the position that public property is unowned:

Take the case of the bum in the library. What, if anything, should be done about him? If this is a private library, then the plumb-line or pure libertarian would agree fully with his paleo cousin: throw the bum out! More specifically, the law should *allow* the owner of the library to forcibly evict such a person, if need be, at his own discretion. Cognizance would be taken of the fact that if the proprietor allowed this smelly person to occupy his premises, he would soon be forced into bankruptcy, as normal paying customers would avoid his establishment like the plague.

But what if it is a public library? Here, the paleos and their libertarian colleagues part company. The latter would argue that the public libraries are *per se* illegitimate. As such, they are akin to an unowned good. Any occupant has as much right to them as any other. If we are in a revolutionary state of war, then the first homesteader may seize control. But if not, as at present, then, given “just war” considerations, any reasonable interference with public property would be legitimate.⁷

In further support of this rendition, see also this statement from Gregory and Block (2007, 35):

Indeed, from Hoppean... and Rothbardian... homesteading theory, we can deduce that much of the land government claims to own is neither private nor public property, but rather no property at all.

Yet, some years later, Block seems to change his position to supporting the PP ownership theory. For instance, he argues (2011, 605–18; emphasis in original):

⁷ Although Block does not take sides in this passage, in the discussion subsequent to it he makes it reasonably clear that he sides with the libertarians and not the “paleos.”

Let us return, for a moment to an illegal immigrant seizing a bit of Yellowstone Park, which Hoppe and I agree has been stolen from the taxpayers of America...

To return to the illegal immigrant who is now perched on a part of Yellowstone Park and refuses to give it back to a taxpayer, the rightful owner...

My response is that I do not at all claim that property such as government roads or libraries is “unowned.” Rather, I claim these holdings were stolen...

I take it that Kinsella would agree that the hapless taxpayers, and those victimized by eminent domain to build them, are instead the *de jure* owners of the roads, at least from a libertarian perspective...

If we could assume a God’s eye point of view, that is, that we had full knowledge of all past theft, then the patrons and employees of the library would *not* be made the owners of it. Instead, the title to the library would be given to those from whom the money was initially stolen (through taxes) so as to build it and stock it with books.

In any event, as noted previously, Block’s “open borders” position appears to assume the validity of the PP ownership theory.⁸ Block’s key principle is, however, that, since public property was stolen by the state from taxpayers, it is a righteous act for a third party, such as an immigrant, to “liberate” such stolen property from the original thief, namely, the state, and in effect to homestead such property (I will call this the “liberator theory”). Block (2011, 606; emphasis in original) explains:

My response is that I do not at all claim that property such as government roads or libraries is “unowned.” Rather, I claim these holdings were *stolen*. I agree that the state now *possesses* them; I argue, only, that this is unjustified. And, yes, I insist, the *same* libertarian analysis can be applied, in this context, to virgin and stolen land. Why? This is because for the libertarian, at least as I construe him, stolen land is *de jure* virgin land, ready for the next homesteader to seize it (on the assumption that the rightful original owner cannot be

⁸ Block’s version of the PP ownership theory may be different from the one articulated by Hoppe and Kinsella. Sometimes Block explicitly characterizes public property as having been stolen from taxpayers, whereas at other times he takes the same line as Hoppe and Kinsella, who seem more disposed to say that it is *the funds* used by the state to finance its claim to public property that have been stolen, and that this income theft somehow leads to the taxpayers being the legitimate owners of such property. In the end, all three agree that the taxpayers are the rightful owners of public property.

located, or he acquiesces in the state's seizure, or that, *arguendo*, we can ignore this rightful owner.)

To support the liberator theory, Block uses the following example (2011, 603–4; footnotes omitted):

Suppose that the Mafia steals Hoppe's bicycle. Ragnar Danneskjold comes along and takes it back from these hoodlums... At this point Ragnar can do one of two things. Let us consider them in order. First, he could, as he did in [*Atlas Shrugged*] offer to give it back to Hoppe. If so, then, note, he engaged in a two-part act, which I presume was (eminently) justified. First, he took the bicycle from the Mafia; then, second, he gave it back to Hoppe. My contention is that if a complex two-part act is justified, then each and every of its constituent elements must also be licit. There cannot be a two-part act that is warranted where one of its subcategories is acceptable and the other not. Two wrongs cannot make a right, and neither can one wrong and one right which together comprise one complex act consisting of both parts, make a right. If there is one of the former, then the total two-part act is illicit. But we are already on record in assuming that the two-part act is justified. Therefore, the first of them must be so. That is, when Ragnar liberates the bike from the Mafia, that, in and of itself, divorced from anything else, is also a righteous act.

Block then goes on to argue (2011, 605) that even in the second scenario, where Ragnar does not give the bicycle back to Hoppe, Ragnar remains a righteous liberator and cannot be categorized as a thief since he did not take the bicycle from its legitimate owner. I now turn to my critical evaluation of the views summarized above.

III. No Man's Land

My contention, on which I will elaborate below, is that the PP ownership theory is fundamentally at odds with property rights theory as formulated by "natural rights" libertarians in the tradition of Rothbard.⁹ If we

⁹ The comprehensive, modern formulation of this theory was developed by Murray Rothbard (2011, chapter 2; 2002, chapter 9). Hoppe (2010, chapter 2) agreed with the conclusions of Rothbard's "natural rights" formulation insofar as they articulate the means by which one can come to legitimately possess property rights in scarce objects. However, Hoppe subsequently (2010, chapter 7) developed his "argumentation ethics" reasoning, which justifies the same means to acquire such rights, but via a different route, one which he believes avoids one criticism of "natural rights" theory—namely, the use of normative statements within logical reasoning.

focus on the case of state-claimed land, by definition, when the state claims control of previously unowned land using taxes coercively extracted from its citizens, what has been stolen from taxpayers is not that land but the taxpayers' income. Just because the state has stolen the taxpayers' income and used the funds to purchase labor services and materials to lay a road, build a fence, and so on does not in and of itself convert the taxpayers' right to take action against the individuals responsible for the theft into a right to previously unowned land. First, as a general proposition it cannot be the case that if A merely supplies funds to B, enabling B to acquire an asset, A necessarily gains an ownership interest in that asset; donors of money and providers of unsecured loans ordinarily have no claims on the assets their funds are used to acquire, because there is no explicit agreement establishing shared ownership. Second, the land in question never belonged to the taxpayers prior to the expropriation of their income. Third, each taxpayer's right to seek redress as a victim of theft is a right against the rogue individuals of the state and their legitimately-owned property (if any).¹⁰ Such property would not include state-claimed land (as I discuss further below).¹¹

¹⁰ For the right of a victim of theft to corporally punish the thief, see Kinsella (1997, 639; emphasis in original), which argues: "Alternatively, at the victim's option, corporal punishment may be administered by B *instead* of taking back his own \$10,000—indeed, this may be the only option where the thief is penniless or the stolen property is spent or destroyed."

¹¹ Although to my knowledge no one has suggested this, for completeness I should note that neither can the taxpayers be *forced* to accept state-claimed land as their only restitution. The taxpayers have been deprived of a liquid asset, and it would seem incongruous to claim their only solution is to take possession of an illiquid asset. Imagine if the stolen income had been used to purchase some unusable objects; would we say the taxpayers' only recourse is to take possession of these worthless items? Kinsella (1997, 633–34) addresses more broadly the point that a victim's rights against an aggressor should not be limited (other than by proportionality):

A victim who has been shot in the arm by a robber and who consequently loses his arm is clearly entitled, if he wishes, to amputate the robber's own arm. But this, of course, does not restore the victim's arm; it does not make him whole. Perfect restitution is always an unreachable goal, for crimes cannot be undone.

This is not to say that the right to punish is therefore useless, but we must recognize that the victim remains a victim even after retaliating against the wrongdoer. No punishment can undo the harm done. For this reason, the victim's range of punishment options should not be artificially or easily restricted. This would further victimize him. The victim did not choose to be made a victim and did not choose to be

To illustrate my broader point in a different way, consider state-seized land. In this case the state has still stolen taxpayers' income to pay for the labor and materials used to seize and control such land, but it has also stolen the land itself from the private owner. In the event that the state collapses, the taxpayers cannot claim title to the state-seized land; the private owner would have the only valid claim to it, while the taxpayers would have the aforementioned claim against the individuals within the state regarding their stolen income. Hoppe (2002, 94) agrees with this point about who gets the land: "In the case in which private property was expropriated by local government for purposes of 'eminent domain,' the property is simply returned to its original owner." However, it is unclear what remedy Hoppe believes *the taxpayers* would have for recovering their stolen income. Logic would seem to dictate that whatever the remedy is, it should also apply in the case of state-claimed land, since the same form of aggression would have occurred.

Perhaps in this instance one could argue that if there is a superior claim to a piece of property, then that claim must prevail, as in the case of the prior owner's claim to state-seized land; but in the case of state-claimed land, since there is no superior claim, the land *could* belong to the taxpayers. However, this leaves unanswered the question as to which libertarian property rights principles would support the contention that the taxpayers can claim state-claimed land as a remedy for the theft of their income.

Actually, Hoppe *has* advanced the view that state-claimed land does not belong to the general public, although in a different context than his specific writings on immigration. When discussing how to distribute property titles in the former East Germany, Hoppe (1991, 98–100; footnotes omitted) writes:

More specifically, all original property titles should be immediately recognized, regardless of whether they are presently held by East or West Germans. Insofar as the claims of original private owners or their heirs clash with those of the current asset users, the former should in principle override the latter... Regarding governmentally controlled resources that are not reclaimed in this way, syndicalist

placed in a situation where he has only one narrow punishment option—namely, eye-for-an-eye retaliation. On the contrary, the responsibility for this situation is entirely that of the aggressor who by his action has damaged the victim. Because the aggressor has placed the victim in a no-win situation where being restricted to one narrow type of remedy may recompense the victim even less than other remedies, the aggressor is estopped from complaining if the victim chooses among varying types of punishment.

ideas should be implemented. Assets should become owned immediately by those who use them—the farmland by the farmers, the factories by the workers, the streets by the street workers, the schools by the teachers, the bureaus by the bureaucrats (insofar as they are not subject to criminal prosecution), and so on...

Moreover, our syndicalist proposal is economically more efficient than the only conceivable privatization alternative in line with the basic requirement of justice (that the government does not legitimately own the socialized economy and hence its selling or auctioning it off should be out of the question). According to the latter alternative, the entire population would receive equal shares in all of the country's assets not reclaimed by an original, expropriated owner. Aside from the questionable moral quality of this policy, it would be extremely inefficient.

In other words, public property other than state-seized land should not be distributed to the general population but rather to current users as, in effect, homesteaders. While this situation does not at first sight overlap with the PP-ownership-theory issue, I contend that the general population in a socialist state (such as East Germany) is akin to the taxpayer population in a capitalist-oriented state.¹² Taxes are simply the expropriation by the state of one form of the legitimate property of individuals (most often, their income); in a socialist state, even if there are no explicit taxes as such, by denying individuals the right to own, keep, and exchange the product of their labor—and indeed perhaps also the right to use their bodies for private endeavors—the state expropriates most if not all of the legitimate property of individuals. In effect, the socialist state's conscription of its citizens is analogous to a 100% tax.¹³

¹² Note that Hoppe appears to be making two separate points in asserting that the entire population should not receive equal shares in state-claimed land: first, that the entire population as a group does not have any ownership right in such land (because current users have a better claim); and, second, that each member of the general population should not receive an ownership share equal to every other member's share (presumably, without regard to what each has contributed, on which see Hoppe's footnote 44, discussed below). My concern is with the former; I contend that the PP ownership theory espoused by Hoppe is inconsistent with his first point. The second point does not concern us here, but I would note that Hoppe has elsewhere argued that taxpayers own state-claimed land in proportion to their taxes paid (2002, 94–95; 2011, 11–13), which would be consistent with his second point.

¹³ Ryan McMaken (2015) writes: "Conscription is slavery," Murray Rothbard wrote in 1973, and while temporary conscription is obviously much less bad—assuming one

In this respect, Hoppe's comment near the end of the above passage about the questionable morality of giving the entire population equal shares in relevant assets is accompanied by a curious footnote (1991, 100–1 n44):

How can one justify that ownership of productive assets should be assigned without considering a given individual's actions or inactions in relation to the owned asset? More specifically, how can it be justified, for instance, that someone who has contributed literally nothing to the existence or maintenance of a particular asset—and who might not even know that any such asset exists—should own it in the same way as someone else who actively, objectifiably contributed to its existence or maintenance?

This line of thinking also does not appear to sit well with the PP ownership theory advocated by Hoppe. It seems manifestly inaccurate to say that the citizen of a socialist state, who is in effect completely enslaved to the state, has “contributed literally nothing” to the state's seizure and continued occupation of state-claimed land. By what means could the state identify, gain access to, take control of, and maintain and use this property other than through the expropriated labor and/or income of the general citizenry? Accordingly, how can Hoppe assert that, in the context of immigration, taxpayers in a capitalist-oriented state are legitimate owners of state-claimed land but, in the context of de-socialization, the citizens of a socialist state are not? Can it really be convincingly argued that a taxpayer in a capitalist-oriented state whose stolen income is put into the state's general-revenue bucket, to be used, among other things, to take control of state-claimed land—much of which the taxpayer is unaware of—has a more direct link to such property than the citizen of a socialist state who suffers almost complete expropriation to support the state's endeavors?

This discussion highlights one critical issue in the Hoppe-Block libertarian immigration debate that has been insufficiently explored in the literature: the question of who owns state-claimed land. Much of the writing in this debate simply assumes the PP ownership theory without laying out the principles underpinning it.¹⁴ The answer to this question that accords with Rothbardian property rights principles is that neither the state nor the taxpayers, and potentially no one, owns state-claimed land. How can this be

outlives the term of conscription—than many other forms of slavery, conscription is nevertheless a nearly 100-percent tax on the production of one's mind and body.”

¹⁴ Frank van Dun (2008, 12–15) comes close, in distinguishing among different types of public property and noting that Hoppe does not adequately deal with the different implications of each, but van Dun still does not address directly or fully explore the issue of whether the taxpayer, someone else, or no one owns state-claimed land.

so? Pursuant to Rothbardian philosophy, property can only come to be justly owned in one of three ways.

First, someone can homestead previously unowned property using legitimate means. Here, the individuals who compose the state cannot be held to have properly homesteaded state-claimed land because they used illegitimate means (at a minimum, stolen income) and the taxpayers have not performed any homesteading acts of their own.

Second, a person can receive property through consensual transfer from a prior legitimate owner (such as through a gift or purchase). In this case, neither individuals within the state nor the taxpayers received the state-claimed land from a prior legitimate owner, because there was none.

Third, a victim may exercise remedial claims, by force if necessary, to an aggressor's legitimately-owned property. Here, the aggressors (individuals within the state) do not legitimately own the state-claimed land, and thus the victims' (the taxpayers') rights cannot extend to such property (nor can the aggressors offer the victims such property or any benefits arising from it in lieu of other enforcement action).¹⁵

The only way I can see of validating the PP ownership theory is through the idea that (some) taxpayers might consent to their income being used to finance the homesteading of state-claimed land. However, we cannot assume all taxpayers would consent, and thus we would need some objective evidence to differentiate between those who do and those who do not consent and, with respect to those who do, to which specific state-claimed land their consent relates. In addition, there is a temporal issue, since such consent would most likely be retroactive, meaning that taxes would be first

¹⁵ This method of acquiring legitimate ownership of property is not commonly articulated as the third limb of Rothbardian property rights theory, except perhaps by Kinsella (for instance, Kinsella [2014]). This may be because Kinsella has written extensively on *both* property rights and punishment, and thus has been able to integrate the two fields. Note that the libertarian literature characterizes remedial rights in various ways. See for instance, Randy Barnett (1977), Roger Pilon (1978), Kinsella (1997; 1998-99), and Rothbard (2002, chapter 13). In all cases, however, the literature is clear that the victim's enforcement rights are against only *the aggressor's* legitimate property (or person). Note also that the reason these remedial rights can be characterized as a *third* means of acquiring legitimate title to property is because, unlike homesteading and consensual transfer, this method relies on force—the aggressor would not normally yield his property rights absent the threat of force from the victim—with the distinction being that such force in response to initiated aggression is justified.

forcibly extracted and used for multiple, unspecified purposes, and only later might some taxpayers bless the prior use of their funds in homesteading state-claimed land. Until that consent (or, more accurately, ratification) is actually obtained, the extraction of taxes and the claiming of the land by the state would be illegitimate. Unless someone who wishes to pursue this line of argument can point to objective evidence of consent, and a different chronology, it seems that, at a minimum, for long periods of time the general principle outlined earlier would hold—namely, that taxpayers do not legitimately own state-claimed land.

Accordingly, and contrary to the PP ownership theory, I respectfully submit that state-claimed land is not legitimately owned by taxpayers (nor, obviously, by the state) and, without further action upon it, remains unowned. As such, state-claimed land is open to immigrants, or anyone else, to legitimately traverse, occupy, or homestead (in the case of the exception noted above, before ratification is obtained). Thus I would argue that the libertarian immigration position with respect to this type of property can *only* be one of “open borders.”

Indeed, support for this characterization of state-claimed land can be found in Rothbard’s writings on land titles (2002, 71-72; emphasis in original):

What, then, is to be our view toward investment in oil lands, one of the major forms of foreign investment in underdeveloped countries in today’s world? The major error of most analyses is to issue either a blanket approval or a blanket condemnation, for the answer depends on the justice of the property title established in each specific case... Where the government insists on claiming ownership of the land itself, and only leases the oil to the company, then (as we will see further below in discussing the role of government), the government’s claim is illegitimate and invalid, and the company, in the role of homesteader, is properly the owner and not merely the renter of the oil land.

On the other hand, there are cases where the oil company uses the government of the undeveloped country to grant it, in advance of drilling, a monopoly concession to all the oil in a vast land area, thereby agreeing to the use of force to squeeze out all competing oil producers who might search for and drill oil in that area. In that case, as in the case above of Crusoe’s arbitrarily using force to squeeze out Friday, the first oil company is illegitimately using the government to become a land-and-oil monopolist. Ethically, any new company that enters the scene to discover and drill oil is the proper owner of *its* “homesteaded” oil area.

Note that there is no mention by Rothbard of the taxpayers' collective right to such land. Similarly, in discussing the settlement of North America, Rothbard notes (2002, 74), "It was unfortunate, of course, that by means of arbitrary claims and governmental grants, land titles were engrossed ahead of settlement. The settlers were consequently forced to pay a price for what should have been free land." Again, there is no mention of taxpayers' rights.

It is important to emphasize, however, that my conclusion does not imply it is legitimate for immigrants on their way to and from state-claimed land to trespass on state-seized land (or privately-owned land not under the control of the state). As Frank van Dun (2008, 13; emphasis in original) notes:

[N]o one has the right to trespass on the property of others even after it has been confiscated from them by a third party. Therefore, conceding that the... state had no right to expropriate the land from its rightful owners in the first place, we can say a priori that its restrictions (if any) on immigration do not wrong *any would-be immigrant* who is unable or unwilling to buy or rent space in the territory from an original, now expropriated owner.

It would not be a legitimate objection to this "open borders" position to argue that such a result might lead to increased conflict and even violence from the clash of cultures or the infiltration of criminals, potential destruction of the incumbent culture, or further state theft of income to fund increased welfare to support new immigrants. Simply because an unfavorable outcome might be one result of a principled approach to an issue should not invalidate the principles used; these need to be refuted from a deontological perspective, not on consequentialist grounds.¹⁶

IV. Democracy, the God That Might Have a Role?

I now turn to the PP management theory. There are several reasons to object to this approach. First, if the PP ownership theory is flawed, as I have asserted in section III, then there is no one on whose behalf the state can act

¹⁶ Libertarians do not, for example, support state-enforced gun control legislation—which is against libertarian principles—out of fear that someone might misuse a gun, so why should libertarians support state-enforced immigration controls—if such controls are against their principles—simply because someone might misuse the right to move across unowned land or abuse an invitation to move across privately-owned property?

in managing state-claimed land, which would thus obviate any trustee or caretaker role for the state in this respect.¹⁷

Second, the PP management theory as articulated in the literature is incomplete. For instance, it is not the case that the *only* thing a private landowner is concerned with is who comes onto his property; at least as important is to what use the property is put. If the state is to act as trustee for the taxpayers with respect to state-claimed land, why only focus on what these taxpayers' preferences might be as to who may enter? Why not also argue that the state should have a much broader role—namely, to try to put the state-claimed land to the use that best mimics what private owners would prefer? In addition, when it comes to managing state-seized land, should not the PP management theory require that the state actually consult the individual owners whose land was seized, to understand their immigration preferences? Why should these individuals get swept up in the perceived preferences of the broader taxpayer population, whose rights, under a narrow interpretation of the PP ownership theory, only allegedly extend to state-claimed land?

Third, I find it odd that libertarian anarchists such as Hoppe and Kinsella have developed an argument for how a state should act to best comport with libertarian principles. To the libertarian anarchist the state is illegitimate, and thus to try to deduce some principle by which the state should “act libertarian” is to excuse this rights aggressor for its ongoing sins and lend it a legitimacy and role it does not deserve; more specifically, to be against “open borders” when we have a state is to legitimate the state’s role as gatekeeper. Instead of defining *how* the state should act, it seems more consistent with libertarian principles to conclude that the state should *not act* at all. When the state acts to restrict immigration it compounds its rights violations: in addition to the original expropriation of income and land to support its operations, state action at the border involves denying would-be immigrants (and mere visitors) the right to move freely across unowned land and across privately-owned land for which they have the owner’s consent,

¹⁷ I concede, however, that under the PP management theory the state could still have an immigration role with respect to state-seized land. Separately, if the PP ownership theory is flawed, I would also challenge Kinsella’s formulation of the PP management theory as a form of restitution (2005). Restitution either involves return of stolen property or its associated benefits to the owner—but in this case the taxpayers never owned state-claimed land to begin with—or compensation paid to the victim from the aggressor’s legitimate property—but here the individuals within the state never owned state-claimed land either.

and denying domestic citizens and would-be immigrants (and visitors) the right to associate personally or commercially. Libertarians ought to argue for fewer rights violations by the state, not more.

If the contention is that, because the state has illegitimately taken control of public property, in immigration matters it should at least try to act as a private owner would act, this same claim could easily be extended to argue that, because the state has stolen our income, it should at least invest in roads, schools, and so on because that is what private owners would do with their income. That would truly be an unusual position for a libertarian anarchist to support.

On the question of whether we should advocate any active role for the state, it is hard to best Rothbard's framing of the issue (2011, 385–86; emphasis in original):

There is another grave flaw in the very idea of a comprehensive planned program toward liberty. For the very care and studied pace, the very all-embracing nature of the program, implies that the State is not really the common enemy of mankind, that it is possible and desirable to *use* the State for engineering a planned and measured pace toward liberty. The insight that the State is the major enemy of mankind, on the other hand, leads to a very different strategic outlook: namely, that libertarians should push for and accept with alacrity *any* reduction of State power or activity on any front. Any such reduction at any time should be a welcome decrease of crime and aggression. Therefore, the libertarian's concern should not be to use the State to embark on a measured course of destatization, but rather to hack away at any and all manifestations of statism whenever and wherever he or she can...

Thus, the libertarian must never allow himself to be trapped into any sort of proposal for "positive" governmental action; in his perspective, the role of government should only be to remove itself from all spheres of society just as rapidly as it can be pressured to do so.

Neither should there be any contradictions in rhetoric. The libertarian should not indulge in any rhetoric, let alone any policy recommendations, which would work against the eventual goal. Thus, suppose that a libertarian is asked to give his views on a specific tax cut. Even if he does not feel that he can at the moment call loudly for tax abolition, the one thing that he *must not* do is add to his support of a tax cut such unprincipled rhetoric as, "Well, of course, *some* taxation is essential," etc. Only harm to the ultimate objective can be achieved by rhetorical flourishes which confuse the public and contradict and violate principle.

It is no surprise that Hoppe also subscribes to these general principles, not only conceptually but also for practical reasons, given the implications for the advancement of the libertarian philosophy. Hoppe (2006, 395) writes:

Put differently, compromise on the level of theory, as we find it, for instance, among moderate free-marketeers such as Hayek or Friedman or even among the so-called minarchists, is not only philosophically flawed but is also practically ineffective and indeed counterproductive. Their ideas can be—and in fact are—easily co-opted and incorporated by the state rulers and statist ideology. Indeed, how often do we hear nowadays from statist and in defense of a statist agenda cries such as “even Hayek (Friedman) says,” or, “not even Hayek (Friedman) denies that such and such must be done by the state!” Personally, they may not be happy about this, but there is no denying that their work lends itself to this purpose, and hence, that they actually contributed to the continued and unabated growth of state power.

It is therefore all the more surprising that Hoppe would support the PP management theory. One can only imagine anti-immigration statist exclaiming “even Hoppe supports the state’s power to restrict immigration!”

Fourth, the PP management theory (at least Kinsella’s version) indulges the collectivist concept of majoritarian democracy. To argue that a state, when managing public property, should make decisions on behalf of a group of taxpayers as to what is in the best interest of this group, using the majority view as a guide, is to argue for a concept of representative democracy that libertarians have long railed against as the subjugation of individuals’ rights to a faux representative of the collective. Any majoritarian public policy necessarily infringes the rights of a dissenting minority.

Fifth, practically speaking, how can any individual at the state know (a) who the taxpayers are who allegedly have an interest in the relevant public property, (b) what each taxpayer’s preferred immigration policy might be, and (c) how to reconcile what are likely to be a host of competing preferences? Some businesses may want to invite workers or tourists from region A, some universities may want to invite academics from region B, some charities may want to help refugees from region C, some religious groups may want to invite fellow believers from region D, and some families may want to be

reunited with relatives from region E.¹⁸ As Gregory and Block (2007, 37–38; footnote omitted) note:

Because of the socialist economic calculation problem, there is no way for government immigration controls to keep out the “uninvited,” let in the “invited,” or even determine who would fall into each category. The state simply cannot mimic the market, and directing its coercive mechanism in such an attempt will prove ineffective in achieving desired goals, wasteful of wealth created in the private sector, and destructive to liberty.

Finally, even if individuals within the state were omniscient and able to balance all competing demands, what reason do we have to believe that after vesting these individuals with border-control responsibilities they will exercise self-restraint, limit their powers, and perform as private market actors would be motivated to act—that is, to satisfy the preferences of the taxpayers who Hoppe and Kinsella argue are the legitimate owners of state-claimed land? After all, these are statists who are not subject to any market discipline and have at their disposal the state’s coercive powers. As Rothbard (2011, 83–84) has noted, the idea of a limited government has proved to be utopian; even a written constitution has proved to be no limit on the actions of individuals within the state. In fact, it has been a means to ratify the *expansion* of their power.

Of course Hoppe has expressed a very negative view of how people within the state operate, so much so that it is difficult to comprehend why he would advocate that the state have an active role as an immigration gatekeeper. For instance, he (2010, 176) notes that state policy is about playing different groups against each other and “helping to stabilize state income on as high a level as possible by means of popular discrimination and a popular, discriminatory scheme of distributional favors.” Further, Hoppe (2001, 276) notes that the worst rise to the top in democracies:

[T]he politically talented who have little or no inhibition against taking property and lording it over others will have a clear advantage over those with such scruples. That is, open political competition favors aggressive (hence dangerous) rather than defensive (hence harmless) political talents and will thus lead to the cultivation and perfection of the peculiar skills of demagoguery, deception, lying, opportunism, corruption, and bribery. Therefore, entrance into and success within government will become increasingly impossible for

¹⁸ I recognize that, under current tax legislation (at least in the United States), a number of these organizations are technically tax-exempt, but I assume many, if not all, of the acting individuals would be actual taxpayers.

anyone hampered by moral scruples against lying and stealing. Unlike kings then, congressmen, presidents, and Supreme Court judges do not and cannot acquire their positions accidentally. Rather, they reach their position because of their proficiency as morally uninhibited demagogues.

If Hoppe is correct in his assessment of who will rise to the top within the state and, in particular, its immigration-enforcement arm, surely libertarians should take the position that these individuals should have *no* active role in restricting other individuals' movements?

Further, as the history of democratic governments has shown, if we grant the state this power it is highly improbable that bureaucrats will simply sit at the nation's entry points checking identities. Taxes will be levied to fund an ever-growing immigration bureaucracy, regulations will be imposed to compel businesses to report on employees' immigration statuses and to act as enforcement arms of the state, special interest groups will lobby the state to rent its coercive powers, and armed immigration agents of the state will initiate violent acts with legal immunity.

If libertarians are to support an active role for the state in immigration matters, as suggested by the PP management theory, why stop there? Why not advocate that the state, while we have it, have an active role more generally in controlling the movement of the domestic population over public property *within* a country or a village? What is the principle that distinguishes advocating an active role for the state in immigration but not in migration?

V. Rethinking Ragnar

While I arrive at the same conclusion as Block in terms of "open borders," I respectfully submit that his reasoning incorrectly assumes the validity of the PP ownership theory, and I also have trouble reconciling his subsequent argument with Rothbardian property rights principles.¹⁹ Since I have dealt with the former of these two issues in section III, in the discussion below I will address only the latter and, for the sake of argument, will assume the validity of the PP ownership theory.

To reiterate Block's liberator theory, his core contention is that if B (the state) steals property from A (the taxpayer), and C (the immigrant) then seizes this property from B, C's act is righteous even if he does not return the property to A, since C has "liberated" stolen property from the original thief.

¹⁹ I also have an additional, minor quibble with another aspect of Block's arguments that I discuss below.

Block notes that C cannot be held liable as a thief since he has not taken the property from the original owner.

Block appears to rely on two arguments to justify C's action when C does not return the property to A. First, there is the idea that it is simply better to relieve a thief of his ill-gotten gains than not. Block (2006, 100; emphasis in original) writes:

Must C return the stolen property back to its rightful owner, A? And the libertarian answer to this question is, Yes, but...

Yes, but what? There are several complications. First of all, let us get one thing straight. Even if Danneskjold does *not* return the property to the rightful owner, the situation is far improved, from a libertarian point of view, compared to the one where he does not get into the act at all and the government, B, keeps the entire swag. Let us put this into hierarchical order.

I. The best case scenario: B steals money from A; C takes money from B and returns it to A.

II. The next best case: B steals money from A; C takes money from B and keeps it for himself.

III. The worst case: B steals money from A; C does nothing; B keeps its prize.

Yes, we do well to dwell on the fact that I is preferable to II from a libertarian perspective. However, let us spend a little time, also, in contemplation of the undeniable fact that II is also vastly preferable to III, which is the status quo in all too many cases. Surely, it is better that a *non*-thief, Danneskjold, end up with the valuables, than that a *thief*, the government, be placed in this position.

However, lauding C does not accord with Rothbardian property rights principles. As noted previously, pursuant to these principles libertarians recognize only three ways to legitimately come to possess property—namely, homesteading, voluntary transfer, and the exercise of remedial rights. In Block's example, C has not homesteaded previously unowned property, has not received it from A in a voluntary transfer, and has not been wronged and thus has no remedial rights. Therefore, C's possession is illegitimate. I agree with Block that C cannot be deemed a thief, but that is not the end of the matter. Rothbard (1982) has argued, convincingly in my view, that a libertarian legal regime would recognize the tort of trespass, which is how I would characterize C's possession of A's property in the present case. According to Rothbard (1982, 82), a trespass is a "visible and tangible or 'sensible' invasion, which interferes with possession and use of the property." Hence I believe that the liberator theory is at odds with Rothbardian property

rights principles, and, as such, it cannot be a sound basis on which to ground a libertarian “open borders” argument.²⁰

Block’s second argument, already recounted in section II, is based on a convenient but somewhat arbitrary breakdown of the liberator’s actions into two discrete and specific steps, what I call the “Blockean Two-Step.” To derive his principle, Block first considers a situation where Ragnar (C) takes the stolen bicycle from the Mafia (B) and then returns it to its rightful owner, Hoppe (A). The critical logical element seems to be as follows (2011, 604): “My contention is that if a complex two-part act is justified, then each and every of its constituent elements must also be licit.”

Block goes on to use this logic to suggest that the first step—namely, taking the bicycle from the Mafia—is, in and of itself, legitimated by the fact that the Blockean Two-Step is wholly legitimate. However, it is not clear why Block defines his example as having *only* two parts. There are an infinite number of component acts in Block’s example: to pick an arbitrary starting point, Ragnar wakes up, eats breakfast, walks to the Mafia yard, and so on. Let us suppose, instead, that Ragnar kills a Mafioso in cold blood (he was not resisting) to take the bicycle, and then returns it to Hoppe. Depending on how one characterizes the chain of events, it may be difficult to rationalize this scenario as a whole as justified, even though it is still the case that Ragnar took the stolen bicycle from the Mafia and returned it to Hoppe. For instance, if you start with Ragnar murdering the Mafioso, nothing else matters, but if you start with Ragnar prying the bicycle out of the dead Mafioso’s hands, all is well. If Block wants to rely on this approach to justify his conclusion, he needs to explain how we can determine which events belong in the chain and which do not.

VI. Conclusion

In my view, a principled inquiry, based on Rothbardian property rights, into who, if anyone, legitimately owns public property in the form of state-claimed land has been underexplored in the Hoppe-Block immigration debate. The analysis presented in this paper leads inevitably to an “open borders” position. It also obviates the complex contortions to which Block has subjected himself in arriving at a similar conclusion.

²⁰ In this section I assume the validity of the PP ownership theory, the narrow interpretation of which only relates to state-claimed land. Quite apart from this assumption, C would definitely be a trespasser with respect to state-seized land.

An “open borders” position is nothing more than a position that claims the state should *cease* acting in the area of immigration. It is therefore consistent with the libertarian anarchist claim that the state is an illegitimate organization whose role we should seek to reduce or eliminate in every area of society. If we do not see a legitimate role for the state in restricting domestic visitors to our village, we ought not to advocate that the state act as our immigration gatekeeper.

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