Libertarianism After Legitimacy

A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

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Abstract

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This thesis rejects the position, dominant in political philosophy since Plato that the authority of states may be explained by means of a moral theory of legitimacy. It denies that it is possible even in principle to determine a principle that can endow a state with the moral entitlement to rule and create for its citizens a moral obligation of obedience which thereby authorises it to coerce them. The thesis argues that a Lockean understanding of the state leads more naturally to the position that the state is properly understood as a necessary evil granted qualified justification to coercé in order to protect people from each other. It locates this ambiguity in the moral psychology of the individuals from which a Lockean state must derive its powers and through whom it acts. It further claims that, Government officials being no different in character than the individuals over whom they rule, further coercion may be justified to raise funds by taxation to set up political institutions such as a separation of powers, and to ensure that citizens may equip themselves with the skills needed to avoid being financially dependent on the state. This justification is nonetheless provisional, and the responsibility to weigh the necessity of public coercion against the evil that it involves falls upon individual voters as much as parliamentarians and prime ministers.

Submitted for the degree of Doctor of Philosophy

The University of Manchester

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Introduction

The dominant mode of political philosophy has, at least since Plato, been to explain the authority of states by a moral theory of legitimacy. It aims to discover the principle, or system of principles, according to which a state may command obedience and if necessary back its commands with force.¹ This was the mode in which Plato and Kant, Rousseau and the Utilitarians wrote, and which has, if anything, become more dominant in contemporary analytic philosophy. Nozick as much as Rawls, Joseph Raz as much as T.M. Scanlon, to mention just four prominent figures, all developed theories in this mode. Whatever their disagreements, and there are many, they all share the position that their task is to discover the correct principle and derive from it the kind of society they defend. That principle is held to endow the state with legitimacy — with the moral entitlement to rule

¹There is a position taken by some interpreters of Rawls, that justice is the main focus of A Theory of Justice and legitimacy the subject of his later Political Liberalism. Important though this distinction may be to understanding Rawls’s work, it has no bearing on this thesis. Indeed below (c.f. §2.3.3, pp. 103ff) the argument is made that Rawls’s view of the purpose of justice means that what he terms justice also amounts to a principle of legitimacy as defined here.
— and create for its citizens a moral obligation of obedience. The “Perfect State”\(^2\) can be conceived, and good government consists, if not in putting it into place, at a minimum in its use to guide the practice of politics.

Against this there is a minority more directly political mode. It sees the business of politics as the wielding of power, and rejects the possibility of fully reconciling it with precepts of nonpolitical morality. Machiavelli and Isaiah Berlin, Bernard Williams and Michael Walzer work in this tradition. They do not avail of a concept of legitimacy that in itself is sufficient to confer moral authority on state action. They instead take a pluralist position and accept that the public enforcement of their preferred political arrangements prevents other, also valuable, ones being realised. The state is a necessary evil, and good government is an endless struggle to avoid wielding too much power or too little.

The first mode can be seen as redemptive, or even Christian in character: the imposition of the right kind of state, can, in a sense, redeem society from the injustice perpetrated by unregulated power. The second is almost agonistic: it is predicated on being doomed to an eternal struggle between the necessity of a state’s coercion, and the evil it thereby commits, with political virtue consisting in denying either side victory.

This thesis will argue that a Lockean understanding of the state leads more naturally to the second, agonistic, mode. Yet modern libertarians’ attempts — such

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\(^2\)The ninth century Islamic philosopher Al-Farabi, who wrote in this tradition, so entitled his work of political theory. Abu Nasr al-Farabi, *On the Perfect State* (Oxford: Oxford University Press, 1985 (950))
as Nozick’s and Michael Otsuka’s — to interpret Locke as providing a principle of legitimacy overlook the disquiet with which Locke, a political exile whose *Two Treatises* were published anonymously,\(^3\) came to approach state authority. Managing without such a principle means seeing the state as a necessary evil.

The orthodox libertarian principle of legitimacy may be found expressed in the American *Declaration of Independence* by which people, for a reason taken as an axiom by the theory in question, are endowed with certain natural rights and that “to secure these rights, governments are instituted among men.” The state’s job is rights protection; it is entitled to coerce people to this end, and forbidden from doing so to any other purpose. As befits an argument of the first mode, the bulk of libertarian work involves identifying what those rights should be and what a state charged with upholding them should be allowed to do.

An argument in the second mode has to do more. It has to explain how the principles that provide partial justification for state authority interact with the other values whose worth its advocates recognise. When it suppresses those values it has to account for the necessity of the suppression for it cannot render coercion unproblematic by appealing to a principle of legitimacy. Moreover, in so far as it is Lockean it cannot appeal to the intrinsic value of public authority, because he argues that the state may only possess powers of enforcement and punishment delegated to it by individuals. It therefore has to locate this ambiguity in individual moral psychology. This ambiguity is fundamental to our existence as human

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beings and I will often reflect this by describing the attitude one ought to hold towards political power as “radical ambivalence.” Third, the imposition of a state’s power is offered a qualified justification by virtue of citizens’ need to be protected from their fellows who bear them ill will. Some of these ill-willed individuals will occupy positions of political authority they might be tempted to abuse for their own ends. The arrangement and control of political power in a society is thus vitally important. The second mode lends itself less to the idealistic spirit of the Declaration than to the more hard-bitten Madison of the Federalist No. 51 that “if men were angels, no government would be necessary.”

An inquiry that addresses these questions yields an account that while recognisably Lockean is significantly different from orthodox contemporary libertarianism of Nozick and Otsuka. It stands in the same relation to it as “Bastard Feudalism” did to the orderly hierarchy of lords and vassals stretching from the King at the top all the way down to the serf at the bottom. McFarlane maintained that obligations to serve one’s lord and protect one’s vassals were less fixed by land and fief than by wages and ambition. A bastard is a son in fact but not in law: not entitled to be who he actually is, he lacks legitimacy. Similarly, a knight was not supposed to hawk himself around to whoever would give him the most money or chance to advance in society; he was supposed to serve the lord of his manor. A magnate, meanwhile, was supposed to serve his sovereign liege, not plot his

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removal. Like the practice of bastard feudalism itself, they lacked legitimacy.

Yet legitimacy is the universal solvent of political theory. Legitimate states ought to command allegiance. Legitimate orders should be obeyed. Legitimate authority reassures public officials that their decisions are proper. Individuals had a place in the feudal order, and there were things no person could do to them without violating (their place in) the order.

I shall argue that orthodox libertarianism fails to address the problem legitimacy is meant to solve. It sees states as necessary for the standard Hobbesian reasons: that people will press their own advantage, out of greed or fear, at the expense of others’ freedom. But, and this is a point orthodox libertarians fail to sufficiently acknowledge, that this applies as much to the state as to the people over whom it rules. If we need to be protected from each other, we also need to be protected from the state’s officials. A principle of legitimacy, stipulating what state officials may do is of limited use. If the principle is the standard by which it is to be judged, we have no standard against which the principle may be tested. Even if protecting natural rights is all that is important, a state’s assertion of a monopoly of jurisdiction can only in rare circumstances avoid violating rights; even if it avoids violating rights in establishing its monopoly, the monopoly gives it the power to get away with further violations; and even if rules can be devised to prevent the further violations, corrupt officials can subvert them. Rule even by a nightwatchman state is thus based on a series of necessary, but only partially defensible assertions of power: of power to set oneself up as the arbiter of rights; of ‘higher-order’ power to rule authoritatively on disputes about those rules and of individual officials’ power to use and abuse the instruments of state
at their disposal. I argue that states need to provide two kinds of safeguards: first, familiar-enough oversight mechanisms to ground a separation of powers; and, second, the provision of conditions in which people can make a living independent of the state. Note that these two safeguards do not dispel the paradox so much as restate it. A robust independent legal system and political institutions to oversee the administrative behaviour of state officials cost money. And though most interpretations of Locke’s proviso limiting acquisition (though not Nozick’s) lead to all people having not insignificant resources at their disposal, there is no guarantee that these will be enough to secure them independence from the state. If the state is to provide its subjects with means of protecting themselves from its own power it, paradoxically, has to violate their rights by taxing them.

By rejecting the possibility that states may obtain unqualified legitimacy I do not, of course, intend to disparage or downplay moral reasoning about political societies. Indeed, I will defend a “green libertarian” ideal of my own, which centrally involves such moral reasoning. Moral ideals provide a standard by which societies can be assessed, people’s conduct judged and reforms proposed. They are very much the beginning of political philosophy, although not its end. If we were beings for whom moral commands worked as strongly as the gallows Kant imagines “erected in front of the house” to deter a “lustful man,” moral reasoning, supposing we could all determine the correct answer, would suffice. Because we

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6 c.f. §1, pp. 29ff

are often not so motivated, spurred by greed and fear, we use the power available
to us to impose our will at others’ expense. A perfect state imposing the correct
moral ideal could approximate the force (though one hopes not the lethality)
of Kant’s gallows. But a prefect state cannot, even in principle, exist. At its
most effective, a state gives expression to a pattern of power relationships that
aim to enforce its moral ideal (if indeed it has one); power wielded by people
just like those whose greed and fear it is meant to control, as much part of the
society as everyone else. Any state must fall short; if it didn’t we wouldn’t need
one. Moreover, a state changes the society it governs, by establishing institutions,
practices, incentives, expectations, threats and punishments. I shall consider its
coercive nature particularly important because of the importance the natural
rights tradition gives to freedom. Even as it seeks to install an ideal (such as the
green libertarian ideal I defend) it has to violate its terms to come into being and
maintain itself in existence, and there comes a point where the more energetic its
efforts become, the further away from the ideal it ends up.

I base that ideal on the assumption that human beings ought each to be protected
by “frontiers, not artificially drawn, within which men should be inviolable” but

\[8\]Except of course if the beings in charge of the state were different from the rest of us in some
way (people more virtuous, or divinely inspired, or perfect utilitarian calculating machines, or
philosopher kings or even computers programmed though not by human beings), and omnipotent.
Living under the rule of perfectly just, omnipotent beings that enforced even my preferred moral
ideal against whose rulings there was no recourse (but also because perfectly just, no need for
recourse) so alien as to be incomprehensible. Even Milton’s Satan was able to rebel, and exact
revenge for his punishment, though he of course lost in the end.

do not mount a justification of that here. One of the ways in which these frontiers have often been described is in terms of natural rights, which have, at a minimum, the characteristic that their content is held to be independent of political and social organisation, but it is the underlying assumption about human beings rather than any property of rights *per se* that confers any moral authority I believe they hold.

In recent decades there has been a good deal of debate between the “choice” or “will” theory of rights and the “interest” or “benefit” theory, which lies outside the scope of this thesis and in which I shall not engage beyond the following cursory remarks. Each of the theories describes a different concept: the will theory adheres to the kinds of specific “rights” that private contracts confer on contracting parties, and the interest theory is better suited to the kinds of “rights” expressed in documents like human rights conventions. The difference is perhaps best expressed grammatically: will theory rights entail specific performance or forbearance due to definite sets of people. If Smith has a right that Jones provide her with £5, Jones’s obligation can be discharged by his providing her with £5. Interest theory rights can be more general: Smith could have interest theory right *that the world be arranged so that she be given £5*. Interest theory rights are capable of imposing obligations on the world in general, and leave the specification of the particular actions required to perform them open. This makes them well-suited to describing general constitutional or social rights: to a fair trial, to vote, to education, and so on, but unable to render precise judgements about who may

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University Press, 2002), 211.
do what to whom without an additional account of how correlative obligations are to be assigned. They express the outcome of a political theory and beg the question of its justification.

Choice theory rights\textsuperscript{10} describe the kinds of relations that I address in this thesis. They delineate negative freedom in such a way that every person’s rights are jointly exercisable (or compossible). This allows them to correspond to the uses that members of an ecosystem make of each other.\textsuperscript{11} In ecological theory, an ecosystem is composed of entities that survive by making use of the “natural services,” they provide each other (e.g. as a plant may provide food for a passing ruminant) which are configurations of matter and energy. As a given “natural service” is either used or is not, the right to use it is either exercised or not. The laws of thermodynamics ensure that the same product of a natural service cannot be used twice.

The first, legitimacy-based, mode yields political theory with a statist bias. Legitimacy functions as a pre-authorisation for the use of coercive power. As with the pre-authorised charging of a credit card, limits may be placed on the pre-authorised use of power, which does not have to take the form of a blank cheque. But once authorised, the state, or rather particular officials in the state, become empowered to decide, without appeal to any agency independent of the state, whether, and how, the coercion is employed. Republican institutions, such as the


\textsuperscript{11}c.f. §1, pp. 29ff
separation of powers, may provide internal restraints on political offices and their holders, but judges independent of the executive are still servants of the state as a whole. In contrast, political theory in the second, political, mode rejects the pre-authorisation of political power: the moral status of any act of coercion is assessed on its merits. States are not judged by how they came about, or how they are constituted, but by what they do.

Scope of the Thesis

This thesis focuses on the moral assessment of the authority to use coercive power, and understands a state as anything that claims an entitlement to be the arbiter of the authorisation of force in a given area (or over a determinate set of individuals). At the limit this would define as political one individual claiming the right to coerce another. It accordingly draws upon several different strains of political theory, to obtain insight into coercive — that is, political — authority. These include

- ecologists’ accounts of human relations as part of an ecosystem;
- Lockean theories of acquisition;
- Hofheldian jural relations;
- Rousseauvian and libertarian accounts of state legitimacy;
- value pluralism and pluralist moral psychology;
- political morality;
- Pettit’s revival of “republican” theory;
• Machiavelli’s conception of corruption; and
• the concept political independence in eighteenth century American revolu-
  tionary thought.

In this focus the thesis does not seek to provide a detailed reconstruction of any of
these facets, but rather to press them into service in order to contribute illuminate
my conception of the state as a necessary evil.

In the course of developing its account of the unstable conflict between a liberal
state’s necessity and the evil of the coercion in which it engages, itself original,
the thesis makes five further original contributions.

• a new principle of justice in acquisition that maintains equality in rights to
  acquire property between members of multiple generations without making
  some people liable for the procreative decisions of others;
• an argument that contemporary libertarians are as vulnerable to Berlin’s
  critique of Rousseau-esque positive liberty;
• that Nozick must abandon either a state or his aim of respecting the sepa-
  rateness of persons;
• an explanation for how an apparently separate “political morality” can arise
  from an accumulation of individual morally ambiguous acts; and
• an argument for a limited socioeconomic redistribution, justified on the
  grounds that though the taxation to fund it is a rights violation, people
  should not be dependent on the state to make a living.
Outline of the Thesis

This thesis begins by presenting a Lockean, “Green Libertarian” ideal, from which the monopolistic nature of political power compels four levels of departure. The first, described in Chapter 2, “Liberalism and Legitimacy,” a state’s demand to be recognised as a moral authority, given that it is composed of the same creatures whose excesses it is instituted to control, makes it impossible to independently judge whether its use of coercion, and the inevitable sacrifice of freedom that results, goes too far. The second, discussed in Chapter 3, “Fairy Godfather,” is that because a state must, unavoidably, be imposed on unwilling subjects, and any amount of compensation it unilaterally imposes will be insufficient, its establishment and continued existence involve making its subjects “an offer they can’t refuse;” a crime that can be mitigated, but never eliminated entirely. Third, in Chapter 4, “Subjects to Citizens,” I argue that the state’s assertion of monopoly precludes any truly independent judgement of whether its officials, in practice, exceed the authority they claim. What is more though political arrangements, such as the separation of powers, can limit abuses, paradoxically, their implementation requires further abuses, in the form of rights violating taxation. Finally, in Chapter 5, “A Machiavellianism of Rights,” I argue that the tension between the protection of rights and the need to violate them to that end is to be endured rather than resolved, and that holders of political office require conditions in which their livelihood is independent of the state in order to exercise their duties properly. If political power is held by ordinary citizens for instance as voters or members of juries, the conditions of political independence must extend to them.
In not unusual economic circumstances this may require taxation to ensure they have the opportunity to compete in the labour markets in which they earn their living, causing the conflict to reappear as between securing citizens those means and violating their rights through the taxation needed to do so.

This thesis has five substantive chapters. In what follows I briefly outline the content of each, illustrating how it fits into the overall argument. This thesis develops and argument that a state cannot perfectly implement a regime of rights protection for the same reason that individuals will fail to implement it without one and that any justification of coercive authority must therefore be qualified. Nevertheless, in Chapter 1, “Green Libertarianism,” I outline the scheme of rights against which it is to be assessed. The consensus Lockeans share about people’s entitlement to control their own person is matched by controversy over their entitlement to control things in the world. This controversy is found in differing interpretations of Locke’s proviso that a person’s acquisition is limited by a requirement that “enough and as good” is left for others. In this chapter I defend an original, ecological, version of the proviso, delineated in terms of rights to appropriate the “natural services” that members of an ecosystem provide each other. This account is original in that it is immune from important defects in both right- and left-libertarian accounts. The right-libertarian defect arises from the privilege to appropriate resources it grants people who arrive on the scene of acquisition early, and which is denied to later arrivals. The left-libertarian difficulty lies in its aim of separating choice from circumstances. This founders because two people’s choices to procreate are another person’s circumstances of birth. Though it assumes a world in which resources are finite, the ecological pro-
viso does not consider human ingenuity similarly bounded. It thus allows progress
and improvements in productivity through trading from a roughly equal starting
point while ensuring that each generation starts in at least as good a place as the
last.

While Chapter 1 depicted a stateless ideal, Chapter 2, “Liberalism and Legiti-
macy,” is dedicated to the proposition that a state which aims to enforce this
ideal will inevitably and in principle, through the coercion it employs, distort the
society over which it exercises power. In this chapter I start with a series of for-
mal arguments that illustrate the well-established position that, despite its title,
Berlin’s *Two Concepts of Libery* ranges more broadly into a general defence of plu-
ralism, and against moral systems that aggregate values, impose non-teleological
orderings upon them, or resolve apparent conflicts by appeal either to a single
master value, or an ordered hierarchy of values. The central point here is that
monist accounts cannot take the moral cost of state coercion into account. I apply
this set of formal principles to what I call the “social liberal” project of deriving
the moral authority for rules by which society is to be ordered from a principle.
As expected, it finds Rousseau’s justification for the state inadequate; and by
way of confirmation it also identifies how Rawls’s arguments in *Political Liberal-
ism* fall within its terms. That much is also to be expected, given Rawls’s debt
to Rousseau. New, however, is my subsequent argument that modern Lockeans,
including Nozick and Otsuka also fall within its scope, compliance with their pre-
ferred scheme of rights taking the place of the master value in the pursuit of which
a state ought to be, to use Rawls’s words, “uncompromising.”\footnote{John Rawls, \textit{A Theory of Justice}, Revised (Oxford: Oxford University Press, 1999), 4.} Locke himself can, however, be read as allowing a state to wield authority as a compromise between the evils of it imposing punishment\footnote{Locke, \textit{Two Treatises of Government}, 272 (§8).} and the “inconveniences”\footnote{Ibid., 271 (§7).} of a state of nature. I end with the suggestion, explored more fully in Chapter 3, that public coercion involves the imposition of outcomes to moral conflicts in which not all moral value can be satisfied.

In Chapter 3, “Fairy Godfather,” I argue that while Lockeans hope that states’ authority can be established by consent of the governed, where it cannot, they resort to arguments for why it is in the interest of the governed to accept their rule. I do not address Locke’s own tacit consent, long dispatched by Hume, but focus on Nozick’s invisible hand account of state-formation. I argue that Nozick’s account fails (he adopts the utilitarianism of rights he had hoped to avoid), and in fact evolves into a claim that anyone may impose their coercive authority on anybody else provided they compensate them for the imposition. I also argue that Eric Mack’s attempt to use an aggregation procedure to avoid this weakening of rights does not succeed either. The difficulty here is that the “compensation” has to be imposed, and this cannot be done because a rights-violator imposing compensation is a further violation rather than redress for the previous one. I maintain instead that there is an unavoidable conflict between a state’s claim to a monopoly of jurisdiction and individual whose natural rights include the right to
enforce justice herself. I locate this conflict in the moral ambiguity of individual acts of coercion. Though this might appear to lead to a distinct political morality in the manner of Machiavelli, Weber or Walzer, I reject such a solution because it ascribes moral value to the state independent of its value to individuals. I, by contrast, need to explain how its value might arise from individual acts of coercion. To do so I press into service Susan Wolf’s moral psychology, where individuals act in pursuit of peoples or projects that have intrinsic value to them, to supply a satisfactory explanation of this moral conflict and which holds out hope that normative considerations may nonetheless temper the imposition of state coercion.

Chapter 4, “From Clients to Citizens,” is the first of two chapters addressed to that tempering. States’ assumption of coercive power, even when pledged to protect individual rights puts them in a position to enforce final judgement on whether their own officials have violated their agreement with “clients” who have exchanged their right to enforce justice for the state’s protection. Awareness of this aspect of state authority has most recently been revived by writers in the neo-Republican tradition including Philip Pettit. Although I reject the republican understanding of liberty, its analysis of domination is relevant to a proper understanding of states’ assertion of political power. I argue that a state’s assertion of its monopoly of authority amounts to the expropriation of procedural powers and immunities from its subjects and these put it in a position to dominate them. The will theory of rights’s expression in terms of Hohfeldian incidents allows me to explore how certain classical liberal institutions permit states to go some way to reassuring its subjects that they remain beneficiaries of what had been their rights,
and may thus be classed as “citizens.” Even though the state has expropriated its subjects, these institutions, which have to be paid for through rights-violating taxation, may be defended in a fashion similar to its justice-enforcing nightwatchman functions.

Yet, institutions are not self-propelled: people have to operate them, and a specific political ethic is required to avoid their corruption. In Chapter 5, “A Machiavellianism of Rights,” I follow Machiavelli in classifying a failure to take the measures needed to ensure the state’s continued existence, as much as dishonesty in office, as corruption. “Office” here is understood broadly to include even ordinary voters, whom I conceive as “mini-magistrates” exercising small amounts of power at infrequent intervals, rather than as holders of political rights. Political offices come with an obligation that their privileges are exercised independently, but unlike the American revolutionary Whigs who used this as a reason to restrict the franchise, I argue that it justifies a further necessary evil of taxation to secure their independence when exercising their political office. The aim of this taxation is nevertheless limited. Its function is to ensure that should people need to augment the income they are able to derive from trading the output of natural services, they are able to participate in the labour market under conditions in which they can avoid being dominated by the state. Mini-magistrates, for instance as voters choosing between competing party platforms, remain under a duty to judge under the conflicting imperatives of their office: to protect people’s liberty, while also violating it in pursuit of that purpose.

This thesis concludes that a concept of political legitimacy holds out misplaced hope of an uncomplicated explanation of why our rulers should have authority over
us. Such a concept seeks to replace the divine right of kings with a rationalistic moral justification to obey suitably constructed political institutions. In contrast, this thesis argued that even if we can derive a scheme of principles that people ought, mutually to respect (such as the ecologically based one set out in Chapter 1), the imposition of the scheme by organised bodies of individuals not different from those on whom it is imposed alters it fundamentally. Government isn’t a frame on which society grows but a structure that imposes itself upon a society and deforms it through its coercion. This leads me to defend an original view of political institutions: that they are, not just in practice as Madison argued, but in principle, a necessary evil because politics consists of acts of coercion. I argue that this coercion deserves qualified justification when carried out to protect us from each other, and to secure us the means to protect ourselves from the state itself. The attitude toward public institutions that this view encourages is one of radical ambivalence: the state’s necessity provides us with strong reasons in its favour; its coercive nature with strong reasons against. It thus reflects the moral ambiguity inherent in its enterprise. States do not derive legitimacy from their origins, but hold their licence to rule on good behaviour. Locke assigned the right to judge this license to God who would exercise His grace on the battlefield. We have to make the judgement ourselves.
Chapter 1

Green Libertarianism

When Cole Porter sang “Birds do it, bees do it, even educated fleas do it,”¹ he may as well have been referring to acquisition. We all, just by eating, convert external objects – be they apples or honey or water – into parts of ourselves, over which we have control, which respond to our intentions and which we use to fulfil our purposes. Ecology generalises this: each organism uses the ‘natural services’ that others afford them for food, shelter and to satisfy their needs and desires. This much describes all animals' behaviour. We human beings, however, are not automata. We are creatures capable of reflection and moral judgment. We can ask ourselves which natural services may we use to fulfil our purposes, which of these people may be entitled to use force to prevent other people using.

I shall argue that the answer can be specified as a sort of “green libertarianism,” in terms of choice, or will, theory rights to natural services. One’s own person

is, as we shall see, a natural service, and I shall take as a starting position that all persons have an immunity against their person being used as a natural service by another without their consent, something which could be understood as an ecological rendering of a loose concept of self-ownership, but not defend this assumption in this thesis. A meta-ethical justification of why we should have this immunity lies outside its scope. I shall however defend the green libertarian principle as avoiding two important objections to existing libertarian conceptions, both of which result from applying Locke’s theory of acquisition, which presumed an infinite world (or at least a population so small that the quantity of land available was to all intents and purposes unlimited) to one that is in fact finite. The first objection concerns Robert Nozick’s highly inegalitarian principle of initial acquisition; the second is that left-libertarians need to make the extent of certain property rights depend on the number of people currently in existence.

The argument in this chapter has three main stages. I first discuss what natural services are, how they compose an ecosystem, and how this allows an ecological principle of permissible acquisition of them and their output to be formulated. I then relate the principle to the Lockean tradition, formulate it as a proviso which everyone can exercise equally, and refine it to adapt to changes in the technology for discovering and exploiting natural services but reject the possibility that it can ground rights to territory or non-ecological natural resources. Thirdly, I present it as a solution to the problem, which any relational proviso, such as a left-libertarian one, suffers, that people’s procreative acts can change the amount other people are entitled to acquire without their consent. The argument in this chapter thus sets up the discussion of how, and if, this stateless ideal ought to be enforced that
1.1 Natural Services

I begin by borrowing a notion from ecological theory, that of a “natural,” or “ecosystem” service. Ecology understands the natural world as a system of interdependent entities that take input from the sun and other natural services, and produce output that is consumed by other entities.\(^2\) The notion of an entity is broad. Depending on the context, it can refer to a tree, an animal, a woodland, a river, a population of animals, bacteria or the atmosphere. So trees absorb sunlight, carbon dioxide, water and nutrients from the soil; a giraffe eats the trees’ leaves, the lion eats the giraffe; the giraffe’s carcass (and some time later the lion’s too) is decomposed by termites and bacteria, the nutrients being taken up by other trees. At a larger scale, the atmosphere maintains the Earth’s temperature in a range to which living things are accustomed by regulating the amount of carbon dioxide in it.

Calling something a natural service is quite different from describing it as a natural resource. A natural resource is conceived as an object; whereas that object may afford different natural services, perhaps to different creatures. To a hydro-

\(^2\)Technically, some of it is wasted as unrecoverable energy, as the system obeys the second law of thermodynamics. Expressed in modern terms as the overall “entropy” of the system increasing in time, this law means that whenever energy is converted from one form to another a portion of it is rendered unusable forever. On the Earth, at least, the Sun provides more than enough energy to outweigh this waste and allow the ecosystem to continue; but in the very long run (4 to 5 billion years), the system will come to an end.
electric engineer, a river is a natural resource that can be harnessed for power generation; conceived ecologically, a river affords a number of natural services to animals and plants that live near or within it. The distinction turns on the relationships between users and the resources and services used, not on whether a service is biological. Thus, a population of seals could be conceived of both as a natural resource and a provider of services — food, pelts for warmth, etc. It affords some to several species: polar bears as well as killer whales and humans would enjoy the food it supplies them. A resource (even when alive) plays the role of an object. A service is something that the “object” provides. The green libertarian argument treats services, not resources, as the primordial entities whose acquisition is subject to moral regulation.

It is an ecological orthodoxy that an ecosystem is in equilibrium in the absence of organised activity by human civilisation. The equilibrium isn’t intentional but occurs because when a species reproduces so much that it runs down the natural services on which it depends, it dies off. If the supply of edible plants suddenly grows, the creatures that eat them will prosper until balance is restored. This is similar to the economic model of perfect competition where supply and demand are held to be in equilibrium absent government intervention. People may, however, choose to act in a manner that disrupts the equilibrium. The

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3Environmentalists believe the disequilibrium caused by humans cannot last; they argue that, unless we change our ways, it will grow so great that our efforts will not be enough to maintain the biosphere’s support for us, and we too will become extinct.

4Herman Daly Toward a Steady State Economy (San Francisco, CA: W. H. Freeman, 1973) provided the seminal analysis of an ecosystem in terms of natural services.
argument that follows shows that if they do so in a way that impairs the natural services that other people use, it violates their rights.

1.1.1 The Ecological Principle

We can say, then, that in a state of nature, before people had thought of property rights, men and women lived off the Earth much as animals did. Hunting animals, gathering fruit, and so on; behaving, in other words, like the rest of the ecosystem in which they lived. Since, in nature, plants, animals and even river systems have a sort of life cycle, this allows us to conceive of natural services as composed of a “stock” that produces a “flow.” Consider a herd of gazelles. Its flow is the gazelles’ young that are born every year. Some of that flow will provide a natural service (food) for their predators. If any gazelles survive, they grow up and expand the size of the herd. The reverse can also happen, if the stock is run down, the flow produced is normally lessened. Take the herd of gazelles again. Its members need to produce a certain number of young to keep the population stable. If they produce more (and more survive), the population can expand. If too many are eaten, or die from accidents or disease, the herd contracts.

A state of nature can also be understood as one where human activity consists of interaction with the natural services that other elements of the ecosystem afford. Where Locke\textsuperscript{5} postulated that “every man has a property in his own person”\textsuperscript{6}, and Kant enjoined that everyone treat “himself and all others never merely as

\textsuperscript{5}I have modernised Locke’s spelling.

\textsuperscript{6}Locke, \textit{Two Treatises of Government}, (§27).
means, but always at the same time as ends in themselves\(^7\), the green libertarian rendering is that everyone has a natural right against being used by other persons merely as a natural service without their consent.\(^8\) To see how this can protect the integrity of the person, consider that members of an ecosystem exert control over some of its other elements to fulfil their purposes (beavers use trees to build dams, for instance). So if you punch someone in the face, you use them as a natural service, to fulfil your end, not theirs. Coercion of people is thus also a matter of the proper use of natural services.

In this chapter, however, we are concerned with property in things. Clearly, creatures in a state of nature appropriate the output of some natural services for their own exclusive use: that is how they eat. They do more than that, however, even non-human animals are known to use sticks and stones as tools. Are there, then, any limits on how the natural services that creatures with moral agency — persons — may put to their own exclusive use? Using the output of a natural service that another member of the ecosystem affords is the central ecological


\(^8\)Arthur Ripstein argues *Force and Freedom: Kant’s Political and Legal Philosophy* (Cambridge, MA: University of California Press, 2009), 164. that Kant considers every person do be under an obligation to avoid being put in a position where it would be prudent to abandon one’s rightful honour and be used as a mere means. Locke’s argument against being allowed to sell oneself into slavery is similar. Both these interpretations are consistent with the choice theory of rights if one postulates that God holds the right to give up your rightful honour (or to bind you over into slavery); a right which, being a loving God, He never exercises.
relation — and therefore the central moral relation — under consideration here. It is acquisitive, whether the output gets used up (once I’ve eaten an apple nobody else can eat the same item of fruit), or its use is only exclusive but transferrable (consider a sheep skin used to make a coat), and may subsequently be given or sold to someone else.

Locke’s starting point was that an act of acquisition should be allowed if it does not “prejudice” another.\(^9\) That is, he held that acquisition was permissible if the person who did not appropriate could continue living her life as she would have done in a parallel world where the acquisition did not take place. “No body could think himself injured by the drinking of another man, though he took a good draught, who has a whole river of the same water left to quench his thirst.”\(^10\) He refined this thought into his famous proviso, that acquisition was limited by a requirement to leave “enough, and as good”\(^11\) for others, in order to allow them to fulfil God’s command “to subdue the Earth...improve it for the benefit of life.”\(^12\) This proviso reflected the equal moral independence of all people under God: they were each to be given the opportunity to make their own way in the world without having to depend on the sufferance of others (though not given any guarantee that they would each be entitled to the same share of God’s bounty).

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\(^9\)Locke, *Two Treatises of Government*, 291 (§33).

\(^10\)Ibid., 291 (§33).

\(^11\)Ibid., 288 (§27).

\(^12\)Ibid., 291 (§31).
proviso, in a world that is no longer bounteous, but is in fact ecologically limited.

Understood ecologically, a proviso like Locke’s would seem to mean that as long as an ecosystem is in equilibrium, everyone can help themselves to the flow from the natural services they use to live without preventing anyone else from doing the same or running down the stock. That so far explains how people may use the flow generated by natural services, but not how they may appropriate the entities stock that generates them. May people appropriate the stock and put it to use in pursuit of their projects?

Since, in the natural rights tradition, persons are the only source of claims of justice, if I am forbidden from interfering with the stock, this means that someone else holds a claim-right that forbids me from doing so. A lot turns on the nature of the correlative duty. Is the power to waive held jointly by all users of the natural service? Or does each individual hold a specific power to waive others’ specific claim-rights? If it is joint, individual property rights to the stock, while not inconceivable, would be exceedingly difficult to come by. Absent universal agreement to allow appropriation of the stock, people would only be able to appropriate the very limited flow. Even then, they would be restricted in what they could do with it. For though they would be entitled to appropriate a plant’s seeds and attempt to cultivate them,\(^\text{13}\) they could only do so if they did not thereby interfere with

\(^{13}\)It is not possible to speak of “appropriated land” at this stage. We shall see later on that what matters is whether someone engages in actions necessary for using a natural service. So, planting something in soil means making use of the soil’s plant-related natural services. Once that has been done (as long, of course, as there is enough and as good left for others who can access the soil) it becomes a rights-violation to interfere with the planting. Another person
the stock underlying another natural service. If, however, each person holds a specific power to waive particular duties, a mechanism may be conceived that, as we shall see from the examples below, could allow property rights to arise.

This helps us see what an ecological understanding of Locke’s proviso would mean. A person faces no restriction in using a natural service that nobody else is using. In ecological equilibrium however, there are no spare natural services to go around. Should she want to use more, she would have to help herself to services other people were already using. This may not be done without their consent, but can it be done if she obtains it?

Observe that many natural services are interchangeable. Clean water from one spring is equivalent to clean water from another. In general, one wild rabbit is as good for dinner as the next. We might call these natural services “commodified:” if a service is commodified, units of it are interchangeable. They can be measured and quantities compared. This means it is possible to divide the output of a commodified natural service into shares (x litres of water per day, or y rabbits per month, and so on).

remains at liberty, however to use the soil for other purposes that are not incompatible with this: she may, for instance, take advantage of its drainage.

It may appear that since the service, not the creature, is the relevant unit, it would be possible to substitute other creatures — perhaps pheasants — for the rabbits. This should not be ruled out but ought to be done with care: as a pheasant inhabits a rather different ecological niche it and the rabbit may provide different services. The rabbit is rather better than the pheasant at providing furs, while the pheasant notably a superior animal from which to obtain feathers.
Suppose \( n \) of us used a certain river, with a total available flow of \( xn \) litres per day. For simplicity, stipulate that each of us uses the same amount, \( x \) litres, and since we are at ecological equilibrium, each of us may exercise our right draw up to \( x \) litres without disrupting the river’s other ecological functions.\(^{15}\) Suppose too that you wanted to install a small turbine on the river to generate electricity, but that in doing so you would reduce the available flow to \( x(n-2) \) litres (suppose some water was needed to cool the mechanism and that it got too dirty for consumption).

It would appear that this would not be allowed, because if you constructed the turbine, there would not be enough water left for others to be able to draw the amount to which they were entitled. But, if your right to draw \( x \) litres fits the definition provided by the choice theory,\(^{16}\) you still retain the power to waive your own right to draw water. If you did so, the total outstanding claims on water would be reduced from \( xn \) litres to \( x(n-1) \) litres. Now imagine you persuaded me to waive my rights to draw water as well (let’s say you offered me some of the electricity for free), then everybody who retained rights to draw water would be able to exercise them. Though you installed the turbine, and drew more water from the river than you were originally entitled to, you violated nobody’s rights. In

\(^{15}\)For simplicity, I have assumed that everyone draws the same amount of water from the river, and therefore that installing the turbine, would require everyone’s equal right to be respected. However, each person does not have to draw an equal amount. If we denote person \( i \)’s ration as \( w_i \) then the total would be \( \sum_{i=1}^{n} w_i \), and you would simply have to obtain enough people’s waivers to account for the water taken by the turbine so that everybody who had not waived their right to draw water would be able to continue to do so.

this way, people may choose to develop the natural world and engage in economic activity without interfering with anyone else’s rights, or *ceteris paribus* disrupting the ecological equilibrium.

Note however that not all natural services are commodified, and non-commodification sets some limits to this process. There may be threshold effects (a minimum number of breeding pairs is needed to sustain an animal population). Should various various springs not be entirely equal, or some rabbits are diseased and some not, Locke’s “as good” requirement would intervene. If I appropriate too many undiseased rabbits, leaving only pox-ridden ones for everyone else, I have actually seized in excess of the share of good rabbits to which I am entitled. Nevertheless, fully non-commodified natural services are rare. To see just how rare consider one that appears non-commodified but on closer inspection to be capable of being broken down into interchangeable units. Whale oil once provided a vital natural service for pre-industrial arctic peoples that could only be obtained by whaling (let us also stipulate that at the level of technology that obtains, there are no substitutes for whale oil). A certain whale population, perhaps 50 breeding pairs, is needed to sustain the herd, among which the community hunts enough for its purposes. This is the level of ecological equilibrium. If there were “spare” whales available, an individual would be at liberty to harpoon an extra calf or two and organise their sale for export, but she would not be allowed to bring the herd’s population below 50 breeding pairs without the unanimous consent of the community of whale-oil users. Reducing it to 49 breeding pairs would impair its genetic diversity, and therefore violate Locke’s proviso.
This unit is large, but not infinitely so. It allows a single hold out to prevent the reduction of the whale population below the sustainable minimum, but that’s necessary to avoid interfering with her right to the natural services it provides. A globally non-commodified natural service would have to be something like the arrangement of the Earth’s orbit. Unlike the equally large, but commodified, regulation of the greenhouse gases in the atmosphere, it is not possible to parcel the orbit up into substitutable bits, and any change to it would be disastrous. The ecological understanding of Locke’s proviso would quite rightly allow even a single individual to interfere with attempts to change it. Bearing these further constraints in mind, we can generalise the example of the turbine in the river to provide a formula for permissible acquisition:

1. in so far as a natural service used to the same extent by \( n \) people is com-modified, nobody may stop someone from acquiring for her exclusive use, a portion of the stock equal to the amount that generates the flow she uses provided she also waives her liberty to use the amount of flow that stock would have produced;\(^{17}\)

2. in so far as a natural service is not commodified, each individual holds a disability to appropriate and the immunity correlative to that disability is jointly held by all.

\(^{17}\)This formulation is consistent with an “Otsukan” ecosystem in which, because people have different capabilities (i.e. some members might be disabled), they require different amounts of certain natural services to survive, as well as a “Steinerian” one where natural service flows are divided equally. See Michael Otsuka, *Libertarianism Without Inequality* (Oxford: Clarendon Press, 2003).
In ecological equilibrium, a person may organise the limited acquisition of stock underlying a commodified flow, but acquisition beyond that necessary to sustain the flow requires the appropriator to obtain the consent of some other people. The more someone hopes to acquire, the larger the number of users whose consent she must obtain, and, it is likely, the higher the total price she must pay. It also makes it possible to create space for more acquisition by reducing one’s own use of natural services through technological advances like agriculture. On our ecological understanding, ‘acquisition’ involves as making use of natural services, so even when natural services are not used to the full, in order to acquire, a person must actually make use of particular services. She may not simply declare that she owns them, for such an action would have no ecological effect.

The turbine-building example has shown that, under these principles, the initial accumulation of property can emerge from bargaining between rough equals. Since people may only acquire through actual use, that is by making a natural service serve their will, holdings are likely to take time to grow. Moreover, there is likely to be a wide range of natural services available. Since people’s tastes, needs and preferences differ, there would be plenty of opportunities for people to trade, increasing the range of substitutable services further. For both these reasons, we could expect the initial distribution of property to be relatively equal. Although luck, different levels of skill, talent and industry might lead to a certain amount of inequality, in excess of that tolerated by left-libertarians, we shall see that unlike Robert Nozick’s theory of acquisition, the argument presented here does not lead to a structural division of the population into two classes: those who may acquire, and those who may only use, unowned things.
1.2 Time, territory and theatre seats

How does this ecological account relate to central modern conceptions of natural property rights, developed in response to what their authors saw as failings in Locke’s? We may compare them with the aid of an arresting image of Cicero’s known through Grotius “in which the seats are common property, yet every spectator claims that which he occupies.”\(^\text{18}\) Thus Locke thought that everyone’s right to acquire land (take a seat from the supply given to people by God) was limited by a proviso that there was “enough and as good” land left for others to do the same.\(^\text{19}\) What if the theatre filled up? Locke did not think that likely. A landless man could, “plant in some in-land vacant places of America.”\(^\text{20}\) Indeed, empty land could be found even in the comparatively developed European societies of the seventeenth century. Locke had “heard it affirmed that in Spain itself, a man may be permitted to plough, sow, and reap, without being disturbed upon land he has no other title to, but only his making use of it.”\(^\text{21}\) But however valid Locke’s contention may have appeared when applied to peasants whose only concern was farming, not defence or trade, then, it cannot be maintained any more. There are, in fact, a limited number of natural services afforded. Nozick sought to take this


\(^{19}\)Locke, *Two Treatises of Government*, 291 (§33).

\(^{20}\)Ibid., 293 (§36)).

\(^{21}\)Ibid., 293 (§36).
fact into account by distinguishing between the acquisition of resources and their mere use. He accordingly offers a weaker interpretation of Locke’s proviso that limits acquisition by the requirement that there be enough left for others to use, rather than a requirement that there be enough for them to actually appropriate.\footnote{Robert Nozick, \textit{Anarchy, State and Utopia} (Oxford: Blackwell, 1974), p.176.} He argues that if the proviso were not weakened, it would be impermissible for anyone to abide by the proviso, because the second-last person (Y) to be able to appropriate would see that her act would prevent the last person (Z) being able to appropriate and still leave enough and as good for others. The third-last person (X) would then also be unable to appropriate either. The chain “zips back.”\footnote{Ibid., p.176.} We might invoke our analogy and say that Nozick’s proviso merely guarantees that those who can’t get a seat in the theatre can still listen to the play on the radio. Nozick’s argument comes at a high cost. It divides people into classes, those who may appropriate resources and those who may merely use them. Moreover it assigns membership of the advantaged class those lucky enough to have been present at the points in history where the opportunity to acquire new kinds of things was plentiful.\footnote{These points are probably related to technological development. Suppose a new technology is discovered that makes previously useless desert land, valuable (perhaps desalination allows a previously arid desert to be farmed). Until then nobody could have thought it worthwhile to bother appropriating the land, but desalination had been discovered it would begin to be worth staking claims to (using to some means of acquisition, about which Nozick is neutral). Those around at the time of this discovery (not just the original human beings) would be able}
sibly can, before all the opportunities to appropriate have been taken. It is not orderly capitalism, but a scramble as sung by Depeche Mode:

The grabbing hands
Grab all they can
All for themselves
After all
It’s a competitive world
Everything counts in large amounts.\(^{25}\)

Green libertarian acquisition avoids this initial discrimination and the scramble it causes. Its rules depend on whether our ecosystem has reached equilibrium. If we haven’t yet reached the point of ecological equilibrium (the theatre has plenty of spare seats left) then anybody may take the spare ones. If, however, we are in ecological equilibrium (the theatre is full, with just enough seats for everyone) someone who additionally wanted natural services used by others would have to persuade them to give their claims up. This encourages innovation — such as the building of turbines or the planting of crops. If we are permitted to stretch Grotius’s analogy to the limit, we might imagine an entrepreneur buying five people’s seats and constructing a small double-tiered gallery, that offered larger, more comfortable seats, or extra ones so that people could bring their children too. Unlike Nozick’s, ecologically defined property rights can provide a foundation to appropriate under Nozick’s weaker proviso.

for acquisition in a finite world at ecological equilibrium\(^{26}\) without creating two classes of people, through an initial acquisition phase in which people are of equal status.

Several further questions present themselves: Why are rights to natural services limited to those that people can access at the time, rather than global in scope? What if new natural services are discovered? What if new technology enables people to travel further and so use more natural services? Do migrants to an area acquire rights as they move within range of heavily used natural services? Can one arrange the products of a natural service in a way that, in effect, encloses territory? What about ores of no ecological value but nonetheless useful to people? And, most importantly, what claims to natural services do children have when they come of age, and therefore become responsible for their own decisions about how to use natural services in a world already at ecological equilibrium before they

\(^{26}\)If a person causes disruption to ecological equilibrium (e.g. by destroying some natural services that belong to someone else), they may be held responsible for interfering with the rights of people, and required to compensate them. This of course opens the possibility that someone might, like the person who buries the time bomb set to explode a hundred years hence in Derek Parfit’s article on the non-identity problem, devise a plot to cause damage far in the future., “The Non-Identity Problem,” in *Reasons and Persons* (Oxford: Clarendon Press, 1984). Under the choice theory of rights there are two options: either our vandal is still alive, in which case he may be held liable by the people who suffer an interference in their rights; or, he has died, in which case, they, unfortunately, have no redress against him. But since future people do not exist (and in fact we do not know who they would actually be), they, like the dead, according to the choice theory, do not possess rights. This therefore becomes a matter worthy of condemnation, but not strictly speaking, in the ideal formulation appropriate to this chapter, of injustice.
were born?

1.2.1 Accessible versus inaccessible resources

Recall the underlying Lockean principle: only engage in acquisition as long as you leave enough and as good for others to acquire. Easy though this may be when there are plenty of spare natural services to go around, for if you help yourself to one that nobody else has a claim to, you don’t wrong anybody, we have seen that it is subject to strict rules when (uncompensated) acquisition disrupts the natural balance and deprives others of something they are entitled to. The complexity doesn’t end there. The world changes. Events can render new resources accessible. People can find new things to do with existing natural services. How are these changes to be accommodated?

First, imagine two of those uninhabited islands that feature regularly in libertarian thought experiments. On each there lives a Robinson Crusoe. One island boasts an apple tree, the other a coconut palm. Assume it is possible to survive on either apples or coconuts, and that trade, but not travel, is possible. Robinson Apple doesn’t, according to our theory of acquisition, have a natural right to coconuts, nor Robinson Coconut to apples. Now suppose that, due to an earthquake, the sea-level falls, and these two former desert islands became the tops of two hills, located two hours’ walk from each other. Both Robinsons would be able to get to either tree and use the fruit of both because the fruit of each provides the same (or almost the same) natural service. Robinson-Apple does not lose access to any natural services if, Robinson-Coconut being speedier in his apple picking,
he must add coconuts to the remaining apples. If there were a natural service
that one needed to use once a year (perhaps a bear whose fur could be used for
winter clothing) one would have a natural right to the use of bear populations
that one could reach once a year, going about one’s normal business. We would
be in ecological equilibrium if enough bears lived nearby so people could hunt
them and obtain furs to make into coats without affecting the sleuth’s ability
to reproduce itself.27

Let us then divide natural services (and therefore the stocks on which they depend)
into the accessible and the inaccessible. We may call a resource accessible when
a person, in the normal course of her life, can access it sufficiently frequently for
it to contribute to her survival under ecological equilibrium. This means that
some natural services, such as a source of drinking water, need to be much nearer
than others, say, the bearskin in a temperate climate, to count as accessible. If
I discover a new natural service, I may acquire through use any amount that
leaves as much and as good for others to whom it is accessible. I am under no
obligation to tell people where to find it, but cannot of course conceal it if that
means violating other people’s rights. When new people find out about it, they
are treated exactly as people who move near the resource, rendering it accessible

27 A sleuth is a group of bears, as a flock is of sheep.

28 Were fashion to change and demand for bearskins to fall, the bear population might be
expected to increase. This would not affect ecological equilibrium, it would simply be the bears
reacting (without moral agency) to less intense activity by their chief predator.
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would be (the effects of immigration are discussed below.)^{29}

1.2.2 Land and minerals

Many of the things we call natural resources: coal and oil, diamonds and copper, have economic rather than ecological value. May they be acquired? Left-libertarians, for instance, argue that the value of raw land which in a free market would include the natural sub- and super-telluranean resources it is known to include should be equally distributed as, unlike the value of someone’s labour, or an idea that a person invents, it cannot be attributed to anyone.\textsuperscript{30} To a green libertarian, these minerals are just objects that other people want to pay for. The only difference between a pebble and a diamond is what people make of it. Minerals are not likely to be ecologically significant, as they do not usually produce a flow of natural services (where there are exceptions — certain deposits in rock through which water flows can affect its potability — these these can be dealt with in as stocks that provide natural services).

So, suppose someone finds a deposit of ore, providing no ancillary ecological service, that when smelted produces iron, for which people are prepared to pay handsomely, allowing the finder to amass great wealth. At first sight, our green libertarian theory provides no justification either to protect or to interfere with a

\textsuperscript{29}c.f. §1.3.1, pp. 54ff

mineral find. Since the iron ore fulfils no ecological purpose nobody can claim a natural right to own it, or part of it.\textsuperscript{31} There are, however, two circumstances in which I could not interfere with your possession of the ore — if doing so would use you as a natural service, or if it would require me to interfere with other natural services to which I am not entitled. Let us say that our successful prospector holds the piece of iron ore in her hands. In order to take it without her consent, it would be necessary to infringe this right (by moving her hands out of the way; prising the ore from her fingers, etc.)\textsuperscript{32} and make her fulfil my purposes instead of hers.

Now imagine two people in a state of nature, one of whom we shall call Jacob, and the other, his twin sister, Iseult. Jacob finds a lump of ore on the area of former-forest he has cleared while ploughing it up to plant wheat in accordance with the principle of acquisition established above. He picks it up to make space for the plough and leaves it to one side to smelt later. Iseult sees this, and ever keen to get one over on her brother, takes it away to smelt down into something expensive. Did she steal the ore? For the moment, we have to say she did not.

\textsuperscript{31}Since we have not allowed labour-mixing as a means of acquiring title — our formula of permissible interference with natural services does so instead — it does not seem that the person who finds it has a title to it either. Perhaps, adapting Mack Eric Mack, “The Natural Right of Property,” \textit{Social Philosophy and Policy} 27, no. 1 (2010): 53–78, we might say that nobody has a right to interfere with her taking ownership of it.

\textsuperscript{32}Note that I follow Carter in considering threats (“give me the ore or I’ll chop your hands off”) also to be reductions in freedom, because they reduce the total number of options available. See Ian Carter, \textit{A Measure of Freedom} (Oxford: Oxford University Press, 1999), 232–234
Jacob had secured a right to chop down the forest and be left alone to plant his 
wheat there. He did not secure a further right to own anything that he happened 
to find on or underneath the land he cleared. Had he done so, perhaps by offering 
a share in the proceeds of what he found to people willing to give up their right to 
use the natural services the land had formerly provided, then we would be a little 
closer to saying it was stealing. I say a little closer only because Iseult, and the 
other people who did not give up their rights did not consent to this deal. Jacob 
and his confederates who stood to gain from the land’s produce and minerals 
might try and arrange objects already in their possession to undertake to protect 
the land from intruders. But if they did, they would still have to grant Iseult, who 
posed no threat to their rights but who was not part of the deal above, access to 
the land, and therefore the ore. All Jacob could do here would be to use material 
he had acquired to place the ore he had mined in some kind of container that he 
had constructed from legitimately acquired outputs of a natural service (e.g. the 
wood from the trees he had chopped down). Interference with that material would 
violate his rights to dispose of that container, in ways that did not interfere with 
the natural services that others were using. It would thus be as impossible for 
Iseult to get to the ore without violating his rights, as it would be if he held it in 
his hands.

We avoid the difficulties in using-labour mixing to acquire land: we do not need 
to wonder, as Nozick does, whether “if a private astronaut clears a place on Mars, 
has he mixed his labour with...the whole planet, the whole uninhabited universe,
or just a particular plot.”\textsuperscript{33} Yet, as territory does not in itself provide a natural service for people to use, it is not possible for us to identify what natural rights are involved in its acquisition. This has a number of striking implications. If in order to mine iron underneath some land, Jacob would have to acquire title to natural services sufficient to permit him disrupt those natural services to the extent necessary to access the ore, (he might, for instance, need to acquire people’s rights to draw water from a nearby stream, so that he could use the water as part of the mining process) he would not need, or be allowed, to acquire territory itself; or, you might build a palisade out of your own wood to enclose territory, but you would have no right to prevent someone who had scaled it from occupying the territory it encloses; nor would you have the right to the land in which the palisade’s timbers are anchored (you could I suppose plant a hedge; the hedge not only depends on the soil’s natural services, it also produces natural services of its own. Removing the hedge would interfere with those services, and there could be circumstances in which people had come to obtain entitlements to them.) Note too that you could not use the fences to block access to natural services that others used. While you could own a particular quantity of soil, on account of acquiring its natural services, you could not lay claim to the coordinates in space it occupied, as they are an abstract construct that lacks ecological function. For the same reason you could not acquire routes or paths across territory, though you could engage in activity that used natural services in these routes; if people needed to use these routes to get access to a different natural service, you would have to provide them some means to do so. If you moved some soil, you would continue

\textsuperscript{33}Nozick, \textit{Anarchy, State and Utopia}, 174.
to own that clay, but not the territory in which it was no longer to be found. We must conclude that green libertarianism does not allow natural rights to territory as such, because territorial relationships concern beings’ actions and movements in space. Even among non-humans they are enforced by signs — animals mark their territory — rather than by use, and are valid only as long as the authority of the animal who claims the territory is respected. When a rival challenges the local Tom, a fight ensues. A territorial right is a right to exclude others from an area of space that only exists as an abstraction inside the minds of the creatures that understand the abstraction. Cats’ territory does not mean anything to, say, horses, but only to the cats.34

1.2.3 New technology

Iseult, still smarting after being outmanoeuvred by her brother’s strongbox, mounts an expedition of her own, and succeeds in domesticating some wild, unowned, horses. This allows her to travel immense distances and gives her access to a wider range of natural services than had hitherto been possible. She may use these services provided she does not deprive people of services, or stocks underlying services, that they use — e.g. by collecting fruit or hunting game in distant wood. Should she arrive at an ecosystem already in equilibrium, she would not be allowed to use the natural services there (demanding that the local inhabitants reduce their consumption to maintaining equilibrium would

34Territorial markers are a feature of political authorities’ claimed monopolies of jurisdiction, which is a central subject of the “Fairy Godfather” (c.f. §3, pp. 137ff) and “From Clients to Citizens” (c.f. §4, pp. 181ff) chapters.
violate their rights), but could easily travel on somewhere else. This would mean, however, that should someone in a distant village want to appropriate some of the stock of a natural service local to him, but that Iseult used (e.g. a forest in which she hunted for game), that person would have to consider Iseult, after all, also someone able to access the service, entitled keep enough and as good forest to continue her hunting. Were our villager to want to chop down more forest than this would allow, he would have to obtain Iseult’s agreement. This means too that as technology advances, the general tendency is for more and more people to have claims on a wider range of natural services, though they would need less of each individual one (with a horse I can draw water from a wide selection of streams rather than just the one near my hut.) In a society only a little more technologically advanced than ours, it would produce mutual universal claims on many natural services. However complex, entitlement to these claims could in principle be ascribed. We should add, though, that new technology yields a further effect: as knowledge advances it becomes known that certain things that were formerly unknown, or thought to be abundant, are in fact natural services produced by a fixed stock. This category includes fish and the soil’s nitrogen content (reduced by some plants, and topped up with fertiliser or other plants). When this happens, the rules governing rights to natural services kick in, and the matrix of rights duties is rearranged to reflect their conclusions. The procedure

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35It is not just a matter of buying a plane ticket and travelling to a location where a natural service is afforded; we would have to actually use the service, and would have to do so while refraining from undermining the stocks underlying the services and also from usurping those already using them.
would be to tally up the uses of the natural services that people actually made (suppose A, B, and C each use 50 fish a year; while D, a vegetarian does not use any), then see if we were at ecological equilibrium, or if there is in fact spare capacity. If we are at equilibrium, the principles of acquisition would be invoked. Thus were D to abandon vegetarianism, she would have to obtain the consent of A, B, or C (or some combination of the three) to catch her fish.\(^{36}\)

### 1.3 Immigrants and Children

New people come in two forms: immigrants and former children who come of age. If a natural service is abundant, and the new people can use it without preventing anyone else from doing so, then no problem arises. If, however, the service is used up to the point where an additional user would upset ecological equilibrium, things are more difficult.

#### 1.3.1 Immigrants

If the new immigrants’ arrival does not disrupt the equilibrium, then there will be natural services available for them to use, and no problems arise. If, however, it does, the cause of the disruption is morally relevant. If the immigrants are fleeing persecution, responsibility may, in the end, be laid at the door of the persecutor, who would owe the people whose rights to natural services had been violated, and

\(^{36}\text{How this is to be done raises questions of the attribution of responsibility common in the literature on climate justice. Exploring these would be a fruitful avenue for further research.}\)
compensation for the wrong they suffered as a result of the persecution. If they have travelled voluntarily, the immigrants are in the same position as a resident who wishes to use a natural service already used by someone else. They need to obtain the consent of existing users if they are not to violate rights by depriving them of the services they had previously used. This need not be too difficult: one might imagine that they could share technology that used natural services more efficiently, which would allow everyone to be better off; or engage in trade with their countrymen abroad. A third possibility raises more serious problems: what if the immigrants are fleeing an extremely serious natural disaster? In this situation there would simply not be enough natural services both to meet the region’s existing inhabitants’ uses and also supply the newcomers with the means of survival. External events, for which nobody is responsible, have rendered a set of rights that had appeared to be consistent with the Lockean proviso incompatible with it. Though this is a serious problem it is not one unique to green libertarianism. Nozick admitted that rights could be “overridden” to avoid “catastrophic moral horror”,\textsuperscript{37} Steiner could face a situation where the equal distribution of the value of natural resources would be too meagre to support each of the people among whom it had to be disbursed: the choice would then be to violate equality, by giving some enough, and others less than enough, or to have everyone get less than enough. Circumstances have become such that justice could not be done; if the heavens are not to fall\textsuperscript{38} justice must be avoided. The discussion in

\textsuperscript{37}Ibid., 29–30.

“A Machiavellianism of Rights,” addresses how situations like these would be faced in political society. The society’s magistrates would need to formulate a solution that protected rights as far as possible while preserving the state’s ability to endure so it could protect rights in the future.

1.3.2 Former Children Come of Age

Former children, on the other hand, do not of course burst forth out of their fathers’ heads in full armour. They come of age after years of growing up as dependants of parents, an extended family, or of whomever is responsible for their up-bringing in the society into which they are born. People are both products of acts for which their parents ought to take responsibility and moral agents in their own right; the results both of their parents’ choices and who make decisions in circumstances not of their own choosing.

Left-libertarians have given this most attention. They believe that there is a set of natural resources (each left-libertarian defines it in their own way) to which everyone is entitled to an equal share by virtue of their moral agency. In Grotian

\[c.f. \ §5, \ pp. \ 217ff\]

When, precisely, they become moral agents is a matter of debate, but it should be sufficient to say that they do so at some point after they are born, but before that parents have duties towards them (even if we adopt Steiner’s position that it is not possible for them to hold choice theory rights) Steiner, An Essay on Rights, 97, 336, 359.

\[Steiner, \ Vallentyne, \ and \ Otsuka, \ “Why \ Left-Libertarianism \ Is \ Not \ Incoherent, \ Indeterminate, \ or \ Irrelevant.”\]
terms, if natural resources were theatre seats, everyone would be entitled to the same quantity. Think of it as each person being allocated an equal number of theatre tickets to attend performances over the course of a season. In this section, I focus on the arguments of Hillel Steiner, but since they deal with the principle of equal division of resources among all adult inhabitants, my arguments apply to all left-libertarian theory. As Steiner himself accepts, quoting Eric Rakowski, “babies are not brought by storks whose whims are beyond our control. Specific individuals are responsible for their existence.”

Shouldn’t those individuals responsible bear the consequences of their actions (or carelessness)? Yet any egalitarian rule for the distribution of natural resources depends not just on the value of those resources but also on the number of people between whom the resources are to be shared.

Allow for a moment that rights to the entire natural resources of the world have passed, through an impeccable chain of legitimate transfers equally into the hands of two Khans, Genghis and Kubla. Genghis, we should not be surprised to learn, has sired a large number of children (which, being a responsible man he decides, and possessing half the world’s natural resources is rich enough to fulfil, at least his material duties in support of his many children, according to some scheme he agrees with their mothers). Meanwhile Kubla remains childless. Imagine, as well,

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43This is not to say that the other inhabitants of the world are poor; merely that the property they own is equivalent in value to what they had actually earned by their labour and creativity, and they decided (recall that choice theory rights are alienable) to waive their claims to an equal value of natural resources in favour of the Khans.
that through some freak accident, the Khans are the only fertile men left.

Left-libertarians would maintain that as soon as Genghis’s first child comes of age, she stands to gain a claim to an equal share of the value of the Earth’s natural resources. At first this would amount to one third of her father’s portion and one third of Kubla’s. Why should Kubla lose one third of his legitimately acquired property because his brother has had a child? If he indeed ought to lose this third, that would mean that all rights to natural resources, in Steiner’s conception, are provisional and encumbered by a liability to transfer a share of resources to new people that may exist in the future. This would include liabilities to transfer resources to new creatures capable of choice who did not have biological parents, perhaps manufactured exceptionally skilled roboticists, or brought to life by a more successful Dr Frankenstein.

Dr Frankenstein assembled his monster out of the body parts of dead people, which according to Steiner count as natural resources. The monster, upon achieving moral standing, would be entitled to a share of the value of natural resources equal to that enjoyed by other beings capable of choice. This would have to be supplied by all other beings capable of choice at large, and not just Dr Frankenstein alone. Yet, in general, the moral consequences of creating something ought to be borne by their creator. The reverse, attributed to the ex-Nazi rocket scientist Vernher von Braun by Tom Lehrer is surely not right:

\[ \text{Once the rockets are up, who cares where they come down?} \]

\[ ^{44} \text{The dead, argues Steiner, are incapable of choice and therefore cannot bear rights. Ibid., 251} \]
That’s not my department, says Wernher von Braun.\textsuperscript{45}

Instead Steiner would appear to require that though Dr Frankenstein, or an expert proficient in human cloning, would be obliged to pay into the global fund that Steiner proposes to distribute the value of natural resources equally to acquire the genetic germ line information that he used, a skilled roboticist would of course not. In any event, those taxes having been levied the rest of us would owe the new beings a share of the value of natural resources, which since it includes all natural resource values of which germ-line genetic information is only a component, is likely to be rather larger than the value of germ-line genetic information. In what, then, does this duty consist? Offspring, in Steiner’s conception, become entitled to a share of the value of natural resources when they grow up to become full choosers in their own right. They become entitled just at the point they become rights-bearing individuals, immediately before they make any decisions for which they can be held responsible. Though this means that they, not their parents, make the claim for resources, it is the parents who have brought about the situation in which the claim is to be made. Suppose I make a deal with Hermes, who fulfils, among other offices that of the God of Thieves, promising him the right to a portion of your property, which he may exercise in 18 years time. If, in 18 years time, Hermes helped himself to it, you would be entitled to exact compensation for this theft. Hermes would then be entitled to compensation from me, for having deceived him into thinking he was allowed to take the property. We can understand this in two ways. Either the example accurately reflects the

set of property rights in force, or property rights are encumbered in some way. In the first case, it seems that the rest of the world’s population is entitled to exact compensation from children coming of age for the value of natural resources to which they lay claim, and the children may then exact the same amount from their parents or creators. Alternatively, everyone’s property rights are encumbered by a duty to supply this share of resources to new choosers as they come of age. In the first case, the share of natural resources to which people are entitled is not taken from humanity at large, but from people’s own parents. Except for the value of germ-line genetic information, there is no net transfer between families. Steiner would only equalise the value of genetic talents. In the second, everyone’s entitlements depend on the other people’s decisions about how many children to have.

In responding to Serena Olsaretti (who draws out the implications of Rakowski’s argument for responsibility sensitive egalitarianism) Steiner compounds the problem rather than relieving it. Olsaretti, he claims, by focusing on parents’ procreative choices and how they affect the size of the share of natural resource value to which people are entitled, omits consideration of non-procreative choices, which he terms “life-sustaining choices” (such as choosing to continue to eat, etc.)

Since virtually every entitled person is a life-sustainer, imposing that cost on them would necessarily abolish the equal shares entitlement

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altogether. So I take what amounts to this *reductio* to demonstrate that a responsibility-sensitive egalitarianism, though it must impose other child-care costs on procreators, cannot consistently impose on them Olsaretti’s *costs of added members*.47

Rather than being a *reductio*, this argument exposes the effects of a proviso that equalises initial entitlements, which escaped Locke’s attention because he always believed it possible for the next generation to find and develop uncultivated land somewhere else on the planet. He did not think that new people prejudiced those already there. Left-libertarians think that they do.

If that limit on acquisition is related in some way to the total number of people, one’s entitlements are affected by other people’s procreative and life-sustaining choices. A person’s entitlement to appropriate resources needs to be encumbered by a liability for it to be reduced (and increased) subject to other people’s decisions. It’s not so clear to me that the bundle of rights to which this gives rise can really be described as ownership. It is rather more like leasing — a right to use resource value, transfer this right to use that value, and transform it into other forms, but always subject to the amount being increased or reduced by other people’s choices. In fact, should we adopt *any* relational proviso (including an equal share one) we are not then free simply to ignore the costs resulting from procreative as much as life sustaining choices, we need to incorporate liabilities to meet them into our property rights. If we do, we make what happens to each of us very dependent on

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how other people act, and have strayed a good distance from securing independent
spheres of freedom that libertarians since Locke have sought to defend. This is
a different kind of restriction than that placed on rights by the web of claims
to accessible natural services that is spun as technology advances. Those are in
principle capable of being resolved once and for all (although the detail would be
formidable). Having one’s holdings determined by people’s life-sustaining choices
makes them continually dependent on those choices.

By contrast, green libertarians’ rules of acquisition don’t commit them to equalling
the value of natural services people may acquire, they only make initial
acquisition an exercise in bargaining on roughly equal terms. But if green lib-
ertarians need not encumber property rights in order to allocate responsibility
for life-sustaining choices correctly, how should they assign responsibility for chil-
dren; and can they do so in a way that avoids Nozick’s division of people into two
classes? Independently of any obligation having children imposes on the parents
to raise and look after them — matters that lie outside a theory of property rights
or the matters of political legitimacy discussed later in this thesis — do people
have duties to members of the next generation, correlative to the property claims
they make (when they reach the age at which they may make such claims)? This
ecological theory suggests that it depends on whether or not the children disrupt
the ecological equilibrium. If they do not, there will still be as yet unused natural
services that they may use or appropriate, so they will find themselves in the same
position as their parents had been. But if they do, and provided that nobody else
has appropriated to excess, then this is the fault of the people who brought them into the world — their parents. Parents who are therefore under a joint duty to make sure that each of their children's opportunities to use the services afford by nature are at least equivalent to those of their own, though not to ensure equality of opportunity with the children of other parents. All this is, as well, compatible with an increased population, as long as parents take steps, through technological development, to increase the stock of artificial capital, and employ that capital to use, and allow their children to use, natural services more efficiently. In this way people's entitlements to natural services are preserved, rather than encumbered by the children other people choose to have, but the children themselves find themselves in situation a where they have as much and as good, including the opportunity to acquire natural services by using them as their parents did. I should add that it follows from this that parents (and Dr Frankenstein, talented roboticists and cloning specialists) are under a duty to take measures to ensure that they can meet this obligation. One might imagine a Dworkin-style insurance auction, but it is probably sufficient, in the conditions of a state of nature, that members of an extended family see each others' children right.

Though it does not aim to equalise a share of resources, the green libertarian conception of acquisition through the use of natural services nevertheless generates a bargaining process under conditions of rough equality and meets demands to

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48The over-appropriator would owe compensation to all those, including these children, deprived by her actions.

provide for universal acquisition in a finite world. Saints who felt Lockean moral
duty to be an irresistible force would need no overlord other than these principles
and build a thriving commercial society in harmony with nature without resorting
to politics or coercion.
Chapter 2

Liberalism and Legitimacy

The green capitalist utopia sketched in the previous chapter is a fiction squarely in the tradition of state of nature theory. It imagined a world where people cultivated the land, and devised ways to improve their own lives and those of their fellow men and women. They engaged in trade, and increased their own, and their community’s, wealth by their industry, all the while respecting nature and each other. They did so on the basis of a system of property rights that would preserve the Earth’s natural services for future generations while promoting the technological progress required to enable the planet to support the large increase in population that such a prosperous existence is likely to produce. The system of rights defines, exhaustively, the claims that people are entitled to make against each other concerning natural services; that is, it provides both a means to resolve disputes about the use and ownership of things (non-persons), and to regulate persons use of each other as natural services.
In this world there is vigorous, but good-natured business competition in pursuit of the many opportunities to get rich that are available. Trade occurs when it is to the advantage of the parties and the surpluses thus generated are either consumed or invested in new projects. Though some investments might fail, those who are not reckless will make provision for or take out insurance against mistakes and bad luck. Such insurance need not be formal. It is easy to imagine extended families whose members look out for each other, and wise elders dispensing advice to the young, as well as charitable institutions and other philanthropic activity. This picture is I think beguiling to a capitalist minded anarchist.

There is economic inequality, for enterprise is rewarded, but no hardship because the privatisation of resources is limited by a solid principle of acquisition in conditions of rough equality of bargaining power that is robust across generations. This principle prevents the scramble to enclose resources characteristic of Nozick’s theory of property, and provides everyone with a certain minimum quantity of the output from natural services to use as physical capital to which they can add the human capital that they develop as they are educated as they grow up (or continue to educate themselves). On coming of age, as we saw above,¹ people receive an initial entitlement from their parents (who take measures to make sure this can be provided) that they can use to survive and deploy their ingenuity and industry to improve upon. It is a kind of libertarian Eden, in which coercion is ruled out and knowledge of government unknown.

It is, of course, a myth. It pre-supposes that rational men and women would turn

¹c.f. §1.3.2, pp. 56ff
to the authoritative principles regulating the use of natural services to resolve
disputes between them, and abide by the results that those principles directed
them to put in place. And though (most) people possess the faculty of rational
thought, it is far from the only faculty they possess. We also have emotions and
often make judgements or decisions based on how they move us, and these may,
in practice, prove more powerful than rational thought.

For some (including the Kant of the *Critique of Practical Reason*,\(^2\)) this is a matter
of regret, and a system of rational thought is to be preferred. Though I do not
accept that a rationally-based life is one that we all ought to strive for, I do not
attempt to defend this position here. The argument can proceed equally well from
the starting point that as a matter of fact people do behave emotionally and that
a society of beings whose public actions are determined by rational deliberation
alone, though desirable, is out of our reach due to inescapable features of the
human condition.

Real men and women do not always make rational decisions. They love, hate,
fear and covet. They get angry or jubilant, and overstate their abilities; or they
get depressed and dejected and sometimes paranoid. They are partial to their
friends and hostile to their enemies. They can be cruel, or generous, or vengeful,
or timorous. They can be all of these things alternately, and feel many of the
emotions at the same time. Even those who want to behave rationally are not
always sure that it is safe to do so; while other men and women will seek power,
for its own sake, or for the pleasures it brings. Though Hobbes saw conflict arising

\(^2\)Kant, *Practical Philosophy*, 154 (5:20).
from natural equality and self-interest, rather than the inability (or undesirability) of people’s behaving rationally, he was right to conclude that “the nature of war, was itself not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary.”

Libertarians and anarchists have further reason to worry. We would like to imagine an ideal where there was no need for government, and where people dealt with each other in mutual respect without needing public officials to coerce them into behaving justly. It is doubtful if there has ever been a society where order was not kept through power structures backed by violence. Hunting-and-gathering tribes were anything but peaceable. Constant warfare was the norm, and they did not organise themselves internally on the basis of a Lockean theory of rights. To emphasise, when any number of people interact closely, disputes are bound to arise, and there will be some mechanism that produces outcomes of those disputes, even if that mechanism is something as unlikely to yield morally acceptable results, or even the disputes’ enduring resolution, as fighting. Anarchy is not the complete absence of anyone’s authority over anyone else, but a condition of continuous struggle in which power relationships play an important part, and which change as a result of those struggles. Establishing even a minimal, libertarian order over

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this requires a considerable amount of force, and, as we shall see later\(^5\), a certain amount of crime. Limiting and atoning for these crimes will shape the political ethics that this thesis aims to investigate.

In *Two Concepts of Liberty* Isaiah Berlin makes an argument against the kind of legitimacy by which a person or office becomes entitled to wield force not allowed to private individuals. He directed it against Rousseau, whom he accused of providing reasons to restrict freedom under the guise of defending it, but his argument reaches considerably further, setting itself against the possibility of legitimacy explained above, and rejecting any argument for it that relies on what Rawls called an “uncompromising” value.\(^6\) It moreover applies as much to contemporary libertarian accounts, notably Nozick’s and Otsuka’s, though Locke himself may be interpreted to escape the net.

The discussion that follows will, of necessity, take place at a higher level of abstraction — I shall be concerned with similarities in patterns of argument rather than their details except in so far as they are needed to establish fidelity to the pattern. I begin by drawing out the anti-legitimacy argument in Berlin’s essay. Then, after examining how moral remainders and uncompromising values collide, use this analysis to reconstruct Berlin’s argument against Rousseau as an instance of that pattern. I then apply that pattern to Rawlsians, and the work of Nozick and Otsuka, to conclude that they are equally unable to assess the moral cost of

\(^5\)c.f. §3, pp. 137ff

coercion in the service of justice or rights protection, respectively. Though this the pattern of a political theory that was constituted by a duty to uphold the conclusions of the argument above would be adequate as an attempt to work out an idealised polity the assumptions required for the idealisation, if correct, would render political organisation superfluous. Introducing minimally realistic political conditions, which is what I understand by Rousseau’s desire to devise arguments that would apply to “men as they are,” means it is no longer safe, for the standard Hobbesian reasons, to assume that justice will be done or rights protected.

Rousseau and Locke express their replacement of divine authority differently. For Rousseau and his successors there is a process of some kind that determines the boundaries of acceptable political activity and produces the moral obligation to obey state authority. For modern successors of Locke a state is legitimate when it enforces natural rights that people had correlative natural obligations to comply with. The burden falls on the correct interpretation of these natural obligations, but they are, in principle, discoverable by the state’s officials. Though Locke himself relies on consent (including tacit consent) to provide the moral justification for what is for him always qualified obedience, modern libertarians, notably Nozick

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7 Steiner does not how a state should come to exercise a monopoly of jurisdiction, though he does deny it needs to be territorial in “May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: A Response to Nine,” Political Studies 56, no. 4 (2008): 949–56. Elsewhere he applies a concept of justified “conscription” which might be able to ground a Steinerian argument for a state monopoly. He discusses this concept in “Self-Ownership and Conscription,” in The Egalitarian Conscience, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006)

8 c.f. §1, pp. 29ff
and Otsuka, dispense with this requirement. For them, the obligation to obey emerges directly from the moral theory justifying the natural rights: one’s duty to obey the state comes from it being the body engaged in the enforcement of rights.

John Simmons has made an important distinction between the justification and legitimacy of states.\(^9\) Justification explains why a state (or a certain kind of state) might be a good idea, legitimacy that there are moral reasons, independent of the conduct a law or official aims to enjoin or forbid, for obedience. Similarly, Locke argues that well-disposed people will nevertheless, for reasons of perfectly understandable partiality, or ordinary ignorance, even when free of the Hobbesian vices of covetousness, fear and ambition,\(^10\) suffer the “inconveniences”\(^11\) of the state of nature, and would be better served by establishing a state.

Legitimacy is different; it confers moral authority. At its most general, a legitimate state is allowed to do things an illegitimate state, warlord, or private individual may not. Legitimacy appears to provide states with magic moral powers. What these powers concern is at this level of abstraction left open. One can imagine a legitimate theocratic state being one with dispensation to do things an illegitimate one could not: intercede with the divine realm to perform marriages or secure the forgiveness of sins. Here we address however aspects of secular rulership, and in

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\(^11\) Locke, *Two Treatises of Government*, 271 (§7).
particular the state’s claim to tell people what to do and punish them if they don’t. A legitimate state has the moral right to exercise force to achieve its goals.

This right need not always be difficult to establish. King James I of England or someone who believed that states exist to implement God’s law, such as the Islamist writer Abu Al’aa Maudoodi, had no difficulty justifying appropriately directed state coercion. It is uniquely a problem for liberals. Since all liberals believe individual freedom to be of central importance, they require states do more than justify their existence and their use of coercion against their subjects. They must, at a minimum, satisfy something like what Bernard Williams called the “Basic Legitimation Demand.” Yet all states, satisfying Weber’s condition that that states “uphold a monopoly of the legitimate use of physical force” go further. They demand moral obedience and claim that people have moral reasons to obey legitimate states’ legitimate instructions (though the latter stipulation allows the scope of permissible public activity to be circumscribed). Most liberal political thought can be classified by the reason given for the legitimation: some follow Rousseau and attribute it to the moral standing of a correctly be-

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having political community; others, following Locke but not necessarily including Locke himself, more directly liberalise the divine sanction\textsuperscript{16} that James thought anointed his person, and Maudoodi thought found expression in his interpretation of Islamic scripture, and attribute moral authority to a prepolitical set of injunctions normally known as natural rights. I shall on occasion refer to the former as “social liberals” and the latter as “natural liberals.” Each approach thereby hopes to provide moral reasons to obey the state (correctly constituted or natural-rights-enforcing, respectively) and to deny people who reject those reasons cause to claim they were wronged if they refuse to comply and find themselves at the receiving end of the government’s coercive apparatus. Both are vulnerable to an objection that Isaiah Berlin levelled explicitly at Rousseau but which I shall argue also extends to the natural liberals in \textit{Two Concepts of Liberty}; that they set the moral cost of coercion carried out by legitimate states at nought and therefore deny freedom any value independent of the states they hold to be legitimate.\textsuperscript{17}

This matters because far from being instruments that implement moral ideals, states are the arena in which disagreements about how and against whom coercive power is to be used are worked though. The outcomes (not solutions) to such

\textsuperscript{16}The link between Christian theocrats such as Calvin and Knox, and Locke, through their influence on the English parliamentarians is explored in Michael Walzer, \textit{Revolution of the Saints} (New York: Athenaeum, 1972). Maudoodi’s political theology, developed in detail in Maudoodi, \textit{The Islamic Law and Constitution}, is halfway, and mutatis mutandis for Islam, between Locke’s and Calvin’s.

\textsuperscript{17}Ian Carter’s criticism of justice-based conceptions of freedom, Carter, \textit{A Measure of Freedom}, p.69. I think identifies the same problem.
disagreements have serious moral effects.

As the argument in this chapter is rather complex, it may be useful to summarise the argument here. I first illustrate how Isaiah Berlin’s *Two Concepts of Liberty* may be understood as offering an argument of this sort, which he directs against rationalist philosophers who claim to have found, in the guise of various versions of his “positive freedom,” the principle by which men and women may be coerced. I then make a series of formal arguments to show that Berlin’s essay is a more general defence of pluralism, and against moral systems that aggregate values, impose non-teleological orderings upon them, or resolve apparent conflicts by appeal either to a single master value, or an ordered hierarchy of values. The central point here is that they cannot take the moral cost of state coercion into account. I apply this to what I call the “social liberal” project of deriving the moral authority for rules by which society is to be ordered from a principle, which rather unsurprisingly finds Rousseau’s justification for the state inadequate; and by way of confirmation identify how Rawls’s arguments in *Political Liberalism* fall within its terms. That much is to be expected, given Rawls’s debt to Rousseau. New, however, is my subsequent argument that modern Lockeans, including Nozick and Otsuka also fall within its scope, compliance with their preferred scheme of rights taking the place of the master value in the pursuit of which a state ought to be, to use Rawls’s words, “uncompromising.”

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imposing punishment\textsuperscript{19} and the “inconveniences”\textsuperscript{20} of a state of nature. I end with the suggestion, explored more fully at the end of Chapter 3, that public coercion involves a kind of moral scarcity.

2.1 \textit{Two Concepts} against legitimacy

Though Isaiah Berlin’s \textit{Two Concepts of Liberty} is often be read as a conceptual analysis of the meaning of freedom, couched as an exercise in intellectual history; or as a defence of Western liberal democratic ideas against totalitarian, and especially Communist dictatorships; or as a warning of the trouble intellectuals get themselves into when they get carried away by the force of their arguments in the pursuit of an ideal polity, it is also useful to understand \textit{Two Concepts} as an essay on the pluralism that was a major theme of Berlin’s work. This pluralism is prominent in his essays on Machiavelli\textsuperscript{21} and Vico,\textsuperscript{22} his interpretation of Mill’s \textit{Autobiography}\textsuperscript{23} and his study of the Russian journalist and radical Alexander

\textsuperscript{19}Locke, \textit{Two Treatises of Government}, 272 (§8).

\textsuperscript{20}Ibid., 271 (§7).


It appears right at the start of Two Concepts:

If men never disagreed about the ends of life, if our ancestors had remained undisturbed in the Garden of Eden, the studies to which the Chichele Chair of Social and Political Theory is dedicated could scarcely have been conceived. For these studies spring from, and thrive on, discord. Someone may question this on the ground that even in a society of saintly anarchists, where no conflicts about ultimate purposes can take place, political problems, for example constitutional or legislative issues, might still arise. But this objection rests on a mistake. Where ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts of machines, like arguments between engineers or doctors. That is why those who put their faith in some immense, world-transforming phenomenon, like the final triumph of reason or the proletarian revolution, must believe that all political and moral problems can thereby be turned into technological ones. That is the meaning of Engels' famous phrase (paraphrasing Saint-Simon) about “replacing the government of persons by the administration of things.”


Berlin’s point in this passage is that politics is the sphere of human activity where fundamental disagreements take place; where men and women argue and fight about whose ideas and practices are to prevail. The impulse to resolve this sort of conflict forever, with a decisive argument, if not overwhelming force of arms is thus quite understandable — perhaps even an inevitable part of political struggle and political justice, to defend at least in one’s own mind or the community of letters or put in place and protect from hostile forces what one understands to be the correct set of practices by which social institutions are to be organised is surely, then, the purpose of political thought, political philosophy and political action.

Berlin’s thesis is that no such definite victory can be achieved. If the “immense, world-transforming phenomenon” transpires or is brought about and the best and final answers are indeed found, then political argument and combat cease to be. This occurrence is to be feared, not celebrated. For as long as politics goes on, any victories for one set of propositions in our own thought, in scholarly debate or in the building of political institutions can only be temporary. Like a professional boxer, an idea in political philosophy is only as good as its last fight, and that is the way things should be, because for Berlin, the most dangerous possibility is that an argument, or a particular philosopher, or — and this is much worse — a political leader or political ideology, should succeed in winning the day and declare him or herself, like Mohammed, to be the last prophet,\(^\text{26}\) for once the final answer has been revealed or discovered, Berlin believes, there is no scope for political

\(^{26}\text{Surah 33:41 “The Qur’an” (Oxford: Oxford University Press, 2004).}\)
liberty. There may be a sphere within which one is guaranteed non-interference, but, as his remarks about Saint-Simon emphasise, its size and shape is fixed and determined by experts or machines versed in or programmed according to the logic of the theory’s logic.

Berlin, of course, believes that achieving such a final answer is not only undesirable, but also impossible. He thinks — he makes the methe-ethical claim — that there are many values, and attempts to describe all of them in terms of a single one, or what amounts to the same thing, to conceive of a single currency in which exchanges between them can be transacted (\(x\) units of freedom being worth \(y\) units of justice, etc.) is a mistake. He never mounted an explicit defence of the claim, and neither will this thesis.\(^{27}\) I do however aim to understand what adopting this kind of pluralism (together with a second, the pluralism of moral sources most usually associated with Susan Wolf\(^{28}\) and discussed below)\(^{29}\) means for the legitimacy of the states and moral conduct in political life. As we shall


\(^{29}\)c.f. §3.5, pp. 173ff
see, it follows from this pluralism that legitimation cannot extinguish the costs associated with working against other values.

In the essay Berlin is particularly exercised by attempts to redefine “positive liberty,” or the question of “what, or who, is the source of control of interference that can determine someone to do, or be, this rather than that”\(^\text{30}\) in a way that the apparently simple answer, “I am free when I control myself,” becomes the emanation of another principle beneath which the political world is to be ordered. It is in the nature of such systems that all other values are deemed to be produced by or always subordinate to their main organising principle. In so far as freedom (or, indeed, anything else) is incompatible with the value underlying the organising principle, it is discounted as worthless. In so far as it is compatible, it is understood to derive from it. For instance, Rawls’s set of “basic liberties” includes freedoms compatible with the ideal of justice he models in his original position; whereas other freedoms are not protected from the reach of the remaining distributional principles.\(^\text{31}\)


\(^{31}\)See his exclusion of right to individually own property as the means of production from the set of basic liberties (and his endorsement of “liberal socialism” as being capable in principle of satisfying the principles of justice) in Justice as Fairness: A Restatement John Rawls, Justice as Fairness: A Restatement (Cambridge, MA: Belknap Press, 2001), 138
2.2 Relations between Moral Principles

To see why this argument does not have to do with the situations in which justice is possible (what Rawls, for instance, called the circumstances of justice), but rather to do with the structure that results from adopting a principle or system of principles that evaluates actions on a single dimension, I shall consider the structure of relations between moral principles in more detail.\textsuperscript{32} Berlin maintained the standard value pluralist position that several irreducible incommensurable values that impinge upon our decision making. In order to realise one value, we might have to sacrifice a second, and that there was no way to convert one value into units of another. This quite straightforwardly rules out systems that aggregate moral value, meaning that Berlin could not say that $x$ units of freedom, were worth, say, $y$ units of equality, and so on. Even freedom, which has special importance for him, may sometimes be sacrificed for the sake of other considerations.\textsuperscript{33} This commits him, however, also to the rejection of other types of moral theory: in particular, to the lexical (lexicographic) ordering of principles; and systems that divide actions into the forbidden, the allowable and prescribed. I shall consider the three in turn, before examining the effect of treating each value as being on a separate dimension, which brings out the special, but not overriding, importance of liberty.

\textsuperscript{32}I should also the argument in this section is independent of any consideration of uncertainty. Uncertainty about moral outcomes complicates moral decisions further, but Berlin’s argument still applies in its absence.

\textsuperscript{33}Berlin, “Two Concepts of Liberty,” 172.
2.2 Relations between Moral Principles

2.2.1 Aggregation

Let us begin with a simplistic act-utilitarian. The \( n \) options available to her could be expressed as a value function whose results correspond to each option \( V(X_1) \), \( V(X_2) \ldots (V_n) \). If we take there to be \( m \) moral agents affected by the decision, and denote the effect, assessed according to the utilitarian’s favoured measure of well-being, of the action as \( p_i \), where \( i \) is the \( i \)th moral agent (out of a total \( m \) moral agents), each of the options would have a function associated with it such that

\[
V(X_j) = \sum_{i=1}^{m} p_i
\]

The utilitarian’s moral rule would be to choose the option that maximised the value of \( V() \).

2.2.2 Non-Teleological Ordering

A moral system of “non-teleological”\(^{34}\) side constraints, obligations and permissions can also be brought within this scheme of analysis. As a first approximation, it suffices to represent obligations and prohibitions by infinite values. An obligation is valued at \( +\infty \), and a prohibition at \( -\infty \).\(^ {35}\) By way of illustration, consider


Nozick’s “utilitarianism for animals, Kantianism for people” thesis. Nozick asks us to think about whether it would be acceptable to prevent a man from clicking his fingers, if him clicking his fingers caused 100,000 contented unowned cows to die a slow and agonising death. Nozick’s position is that it would not be, as preventing him would breach the side-constraint entailed by the man’s right of self-ownership. So, let the moral weight of each cow, to be considered in the utilitarian calculation to be denoted by $w_{cow}$, a non-negligible positive fraction; and the utilitarian moral weight of the man’s wellbeing, to be 1. If the pain inflicted upon each cow is the large and negative $P$ and the pleasure the man gets from clicking his fingers the very small positive $\Delta P$, we can compare the two options: allow the man to click his fingers and cause the cows to die; or violate his rights by preventing him doing so. Thus:

$$V(allow) = 100,000w_{cow}P + \Delta P$$

and

$$V(prevent) = 100,000w_{cow}P + \Delta P - \infty$$

Though $V(allow) < 0$, because the cows’ pain is far greater than the man’s pleasure $V(prevent)$ has an infinitely negative value. That is, the obligation to prevent the violation of the man’s rights will always outweigh the deaths of the cows, no matter how many of them there are, and no matter how slowly and painfully

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36Nozick, Anarchy, State and Utopia, 39.
they are killed. It may be observed that the moral reasoning of a deontologist who thought choice theory rights expressed the relevant of morality would consist of a set of value functions whose members yielded 0, ∞, or −∞, each of which would correspond to the relevant Hohfeldian incidents involved.\textsuperscript{37} To say the set of rights is compossible is also to say that nobody’s set of value functions could contain both ∞ and −∞.\textsuperscript{38} More generally, mathematical infinities express

\begin{itemize}
\item The Hohfeldian incidents may be represented as relations between different people’s sets of value functions. Denote person a’s moral value function with respect to X as \( V_a(X) \), a’ to be anyone but a, and \( X' \) to be the act of preventing X. If a has a claim to X, \( V_a(X) = 0; V_{a'}(X') = −∞ \). While if a has an obligation to X, \( V_a(X) = ∞ \). Finally, if a has a liberty to X, \( V_a(X) = 0; V_{a'}(X) = 0; V_{a'}(X') = −∞ \). Lesser moral considerations can be represented by real numbers provided they are commensurable with each other, and powers and immunities, being themselves rights, ought also to be expressed by conditions limiting the sets of value functions available (one cannot have an immunity against being required to X and at the same time an obligation to X), with the property that they can change the contents of people’s first-order value function sets. The full exploration of these conditions, lies, however, outside the scope of the thesis.

\item A moral remainder occurs when it is acknowledged that a moral decision leads to moral loss. It is usually associated with pluralism (if values are held to be incommensurable, it is very unlikely to be avoided; see Christopher W Gowans, \textit{Innocence Lost: An Examination of Inescapable Moral Wrongdoing} (Oxford: Oxford University Press, 1994), 91.) but can also be understood in a monistic moral system. It is possible to interpret the man’s extermination of the cattle above as being something nobody is entitled to prevent him doing, but still having moral cost, even though, the all-things-considered right thing to do is not to interfere with the clicking of his fingers. It would, of course, be

\[
R = 100,000w_{cow}P + ΔP
\]

Moreover, in general, where some absolute side constraint overrides the other considerations, the
deontological enjoinings and prohibitions rather well. Two obligatory acts are obligatory together and on their own not twice as obligatory. The reverse is true for prohibitions. An option whose function appeared to include both a prohibition and an obligation would produced undefined results for it is not possible to straightforwardly add $\infty$ to $-\infty$ as those symbols do not obey all the axioms that apply to ordinary real numbers\(^{39}\) thus fitting the deontologists’ \textit{a priori} rejection of such conflicts as incompatible with their principle that “ought implies can.”

### 2.2.3 The Effect of Master Values

A master value has important effects on moral reasoning. Suppose we adopted a theory where, subject to any riders about whether this was a situation to which something like Rawls’s “circumstances of justice”\(^{40}\) applied, the value of any alternative course of action was determined by the sum of the values of several independent factors — call them justice, efficiency, well-being, and freedom.

\[
V = \text{justice} + \text{efficiency} + \text{wellbeing} + \text{freedom}
\]

but that we also thought Rawls to be correct in claiming that “being first virtues remainder is by definition the sum of the value of the other considerations, and the magnitude of the remainder is always less than the magnitude of the total value (otherwise a side constraint would not act as an absolute constraint).

\(^{39}\)See the definition on Shilov, \textit{Elementary Real and Complex Analysis}, 23–24.

of human activities, truth and justice are uncompromising. Under such an uncompromising view of justice, the effect of justice always outweighs the effect of other factors. Thus, (where $|x|$ means the absolute magnitude, discarding the sign, of a scalar quantity) always:

$$|\text{justice}| > |\text{efficiency}| + |\text{wellbeing}| + |\text{freedom}|$$

And this means that if justice is relevant to the decision at hand, it, and not the other factors will determine value of $V$ unless it is to break a tie between equally just options. Thus, where two actions carry different implications for justice, the more just act is always ranked higher than the less just, regardless of the implications for well-being or freedom. There is no trade-off between justice and the other values, so that no amount of well-being or freedom can compensate for even a slight reduction in justice. Consequently, something like coercion (the removal of freedom), or indeed any other consideration whatsoever, is ignored when compared against the master value (in this case, justice), and any restriction of other values in the name of the master value is therefore justified. The other values could constitute perhaps a cause for regret, but would have no further bearing on the question at hand: for instance, on the choice of alternative action; or the form of social institutions. Note that this criticism is more pluralist than libertarian. Although state whose master value was freedom might could be limited in its coercion by the liberty it was required to uphold, Berlin would consider that to be excessively libertarian as it rendered other values null, notably

\footnote{Ibid., 3–4.}
justice and equality through its extremism in the pursuit of liberty.

2.2.4 Lexical Ordering

A lexical ordering of moral principles further generalises the situation that obtains when there is only a single master value to a hierarchy of values. If, for instance, equality were to always be more important than serving God, and serving God always more important than liberty, it would necessary to assess each consideration in turn, with the lower-ranked values serving to break ties between options that yielded ties in higher ranked values. Nevertheless, a lexical ordering maintains that the “quantity” of each value can be compared on a scale and that the values themselves form a hierarchy. The latter rules out cycles of values, such as those that might be found in a moral analogue of the Scissors-Paper-Stone game. By definition, however, higher ranked values overwhelm lower-ranked values, such that, in the example above even the smallest possible amount of equality should count for more than the largest possible amount of serving God. That is, if we denote a tiny positive amount of equality as $\delta E$, it would always be evaluated as being greater than any quantity of serving God, $xG$, where $x$ is a positive number. Indeed, the evaluation of a comparison between two situations involving two values, $E$ and $G$, where $E$ is lexically prior to $G$, would be subject to the condition that:

$$|\delta E| > |xG| \forall \delta, x$$

Thus, the relationship that as shown above to have held between the master value,
and subordinate values now occurs at each level of the lexicographical hierarchy, and this it is precisely this kind of relationship between values that Berlin believes dangerous.  

We shall now turn to what I call the “social liberal” family of political theories at which Berlin directed his argument in *Two Concepts,* and see that they perform this act of projection. More surprisingly, perhaps, we shall then conclude that a good deal of natural rights philosophy, including Nozick’s does the same.

### 2.3 Social Liberalism

The family of arguments that I call social liberal aims to delineate rules of political organisation that govern people’s lives in a society. Their stance deserves the name of liberal because they hoped either that each member of the society “remain[s] as free as before” or failing that, that each member’s liberty is compatible with maximum liberty for everyone else but they also attach at least equal importance.

42 Moral action in a moral universe of incommensurable, plural values may be represented by means of a moral space in which agents occupy points and their actions are represented by vectors rather than scalar functions. If freedom is considered a value, acts of coercion have a double effect: they both have a (negative) value in the dimension of freedom, and also move other agents to points in moral space where less of their freedom is realised. As, however, the freedom of the coercing agent is thereby increased, the expression of this situation quickly becomes rather complex, and since it is not strictly necessary for the argument I make in this thesis, I omit further discussion here.

to ensuring that the society’s common product and public aspects can be shared in away that gives its members equal importance. Rousseau thought it possible to reconcile both. Rawls appears to believe he did so in the first edition of *A Theory of Justice*, (though he later, in response to Hart, amended this to indicate that justice only permitted enumerated “basic liberties”). The two parts of the social liberal project are, however independent. If we cannot guarantee that one remains as free as before, one can at least ensure that citizens remain as free as the conception of the common life adopted in the particular version of social liberalism in question allows.

2.3.1 Standing

The problem that social liberals set to solve is why (correctly organised) states have the standing to alter our moral deliberations. “Standing” is the idea that someone, by virtue of something not to do with the merits of the case at hand, is entitled to make a decision that another person could not. It often occurs in legal cases: certain persons may have “standing” to bring a particular kind of case to court, while others may lack it (for instance, military police often have standing to charge soldiers with infractions of the military code that civilian law enforce-

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45For avoidance of doubt, “merits” here refers to features of the situation to do with the facts of the case. Standing is not independent of the substantive details of the case, not all of them. Thus, in the example below, the defence minister is not required to give substantive reasons for his decision (e.g. that joining the alliance would not be in the country’s strategic interest; the allies are unreliable; or would entail unaffordable military commitments).
ment lacks), but it has wider application. Consider the following (fictionalised) exchange at a meeting of the Cabinet.

PM’s Chief of Staff (CoS): We shouldn’t sign up to the defence alliance.
National Security Adviser: Why not?
CoS: The Defence Minister doesn’t like it?
NSA: Yes, but why not?
CoS: I’m sorry, didn’t you year? The Defence Minister doesn’t like it.
NSA: Yes, yes, I know he doesn’t like it, but what’s the reason for his view?

The National Security Adviser is looking for a justification for the decision, but the CoS is providing an argument based on the Defence Minister’s standing: namely, the Minister has, for some reason to do with his person, office, or the informal political arrangements in force in that country, an entitlement to decide this matter that is itself sufficient reason for the decision, *such that he does not need to provide a further justification*. Because he is the Defence Minister, his personal taste — that he doesn’t like the alliance — can override any substantive reasons the National Security Adviser may have for joining it. She lacks the standing to make her objections to the Minister’s decision carry weight. It is the minister’s standing, rather than any reasons for or against joining the alliance that determine whether the government is to accede to it.

Similarly, claims about a state’s legitimacy are claims about it standing. Thus, John Simmons, who, as a philosophical anarchist, denies the full legitimacy of
states,\textsuperscript{46} accepts that any state may punish rapists, but its reasons for doing so have to do with the crime of rape, and have nothing to do with the character of the state. He even argues that an uncontroversially illegitimate state (he uses the Third Reich as an example) may punish them. Legitimacy cannot have any weight, because the state in question has none.\textsuperscript{47} A legitimate state, should one be possible, would have at its disposal additional reasons, independent of the nature of the crime in question for punishing those guilty of committing it, and someone who believes a state is legitimate should have strong moral reasons for complying with a law she believes to be in just.\textsuperscript{48}

A legitimate state goes beyond merely providing incentives for people to abide by its laws and obey its officials (though of course most if not all states do that as well). By claiming legitimacy it claims the right to impose moral, and not just legal, obligations on those that it rules over. If I think a state is legitimate, that means I think that the fact that it has decided to pass a law or perform a particular enforcement action is at least a very important, if not completely

\textsuperscript{46}Simmons, \textit{Justification and Legitimacy}, 156.

\textsuperscript{47}Ibid., 156.

\textsuperscript{48}These reasons may not always be decisive, and can sometimes be outweighed, because another urgent consideration intervenes (e.g. in a state where jaywalking is forbidden, one ought to cross the road even when the light is red in order to rescue a child at risk of being run over), or also break the law as part of a campaign of civil disobedience. Nevertheless, those who consider a decision to engage in civil disobedience a weighty matter to be countenanced only in cases of grave injustice thereby also consider that the state’s legitimacy has significant weight in their deliberations, Michael Walzer, “The Obligation to Disobey,” \textit{Ethics} 77, no. 3 (1967).
overriding, factor in determining whether I may, morally, do, comply with an official’s instructions to do, or refrain from doing, z (where z is an act over which I accept that the state has legitimate authority). This reason is so strong that it is always sufficient on its own to guide me even in the absence of any practical justification for doing z, such as that I might be fined or lose my job if I don’t. It is also quite separate from an independent belief in the law’s aim, or effectiveness. Perhaps the best way to help the needy is to pay my taxes so that the government can redistribute the money, but I could accept that even if I didn’t think the state was legitimate. If I thought the state was legitimate, that means I have reason to pay my taxes, even if I thought I could better fulfil my duties of distributive justice by giving to charities I knew were extremely efficient and honest, than paying taxes to my only tolerably efficient and uncorrupt government.\(^{49}\) Legitimacy may even override moral considerations against the law in question.\(^{50}\) Thus one often hears people say “I think the law is wrong, but it’s been enacted by a legitimate government, so I ought to obey it.” This is a power to alter moral reasoning that states, as though they were religious authorities, claim.

In *Religion Within the Bounds of Mere Reason*,\(^{51}\) Kant introduces the concept of ecclesiastical religion, which he contrasts with true religion. True religion consists in the underlying moral truths to which individual ecclesiastical religions aspire,

\(^{49}\)See Simmons, *Justification and Legitimacy*, 154 for a similar argument.

\(^{50}\)See Walzer, “The Obligation to Disobey.”

and which individual actual revelations approximate. True religion (the resemblance to his analogy with the noumenal world is suggestive) is not fully accessible to human beings, but all real religion attempts to get close to it,\(^5\) and takes the institutional form of a church to propagate its teachings, provide guidance to the faithful, and so on. The pronouncements of the ecclesiastical religious authorities carry weight for the believer: they convey information about whether some action or practice is right or wrong, and the believer assimilates this into her process of practical reason. Membership in an ecclesiastical religious community — a church — takes us out of an ethical state of nature, where each of us tries to reach our own moral decision aided by the light of reason alone, and makes us part of an ethical commonwealth\(^4\) (ultimately, like the community of republican nations to which Kant thinks we should aspire in Towards Perpetual Peace,\(^5\) one that spans the globe and reflects the true religion of which individual faiths are more or less reliable projections). Unlike a political commonwealth — state — the ethical commonwealth cannot use coercion, the faithful have to accept their membership of it through their own free wills. A legitimate state believes it stands in the same kind of relation to its citizens as the ecclesiastical religious “commonwealth” does to its faithful: it claims to impinge upon our process of practical reason by

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\(^5\)Ibid., 119 (6:111).

\(^4\)Ibid., 117 (6:109).

\(^3\)Ibid., (6:99).

altering the moral status of the available actions.

One could imagine a state, perhaps one like France, or the United States, that possessed a strong republican ideology or, what Thomas Jefferson’s biographer called “civil religion,”\footnote{Conor Cruise O’Brien, The Long Affair: Thomas Jefferson and the French Revolution (London: Sinclair-Stevenson, 1996), 301–325.} that, in addition to enforcing laws with fines and imprisonment, offered moral reasons for why people should owe it allegiance: patriotism here providing an element of Kant’s ecclesiastical religion. It could confine itself to using its coercive power to demand obedient outward behaviour but separately making the moral case for willing, internal, acceptance without using coercion.

This however, is not quite enough to satisfy the conditions of legitimacy. The legitimate state does “open windows unto men’s souls”\footnote{J B Black, Reign of Elizabeth 1558–1603 (Oxford: Clarendon Press, 1936), 23.} through which it doesn’t necessarily observe, but instead communicates the moral obligation to obey it, whether those men like having those windows made or not. This thesis does not afford the space to investigate the origins of this moral authority, but it that may be traceable to the divine right of kings can perhaps still be seen in the ceremony whereby the Queen gives royal assent to British legislation. Her function (indicated of course through the royal “we”) is more than the constitutional one of undertaking, as the chief of the country’s executive arm to enforce the legislation just passed by parliament, but is also, as divinely anointed monarch to create a moral obligation for her subjects to obey the new law by claiming to be the power
to whom St Paul’s Epistle to the Romans 13:2 commands obedience.\textsuperscript{58}

In this reading of what Walter Bagehot called the “dignified” aspects of the British constitution, “the monarchy by its religious sanction confirms all our political order.”\textsuperscript{59} God, through His anointed lieutenant on Earth, provides moral authority to acts of parliament, something a collection of people could not do on their own. Without the divine authorisation, rulers would only be able to demand outward obedience to laws, and provide incentives for compliance with them. By invoking God, the Queen-in-Parliament claims to be able to influence her subjects’ moral calculus, and therefore not be guilty of what Kant considered\textsuperscript{60} the metaphysical impossibility of coercively imposing a \textit{moral} obligation.

Absent a divinely anointed monarch, it would seem that the moral authority of states should disappear. Citizens would be free to make their own judgements about whether it was right to obey the law; deciding, in the case of a state capable of enforcing those laws it promulgated, that if some laws reflected other moral principles, and were thus independently justifiable (e.g. laws against murder or fraud), others were not, and should only be obeyed because they feared the state’s coercive power. Obey good laws willingly, and break bad ones if you can

\textsuperscript{58}\textsuperscript{58}“Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation./For the rulers are not terror to good works but to evil.” (King James Version)

\textsuperscript{59}\textsuperscript{59}Walter Bagehot, \textit{The English Constitution} (London, 1905).

\textsuperscript{60}\textsuperscript{60}E.g., Kant, \textit{Religion Within the Bounds of Mere Reason}, 110 (6:100) but the claim recurs throughout Kant’s thought.
get away with it.

The claim governments that believe themselves legitimate make, however, is not merely that they are, all things considered, entitled to coerce you into obeying them; it is also that you ought to feel guilty if they need to coerce you into complying with the law. They claim the authority to alter the elements of the moral, and not just the prudential, deliberation in which people subject to their authority engage.

Though this would command the support of a believer in the divine right of kings, or in an illiberal perfectionist account of the good life, it quite evidently presents a problem for liberals, who value the importance of people making their own decisions. Not being anarchists, however, liberals recognise a need to entrust state institutions with authority, yet object to the state imposing particular moral claims upon them. This was the problem to which Rousseau believed he had found the solution.

### 2.3.2 As Free as Before

To find a form of association that will defend and protect the person and goods of each associate with the full common force, and by means of which, each uniting with all, nevertheless obey only himself and remain as free as before.\(^6^1\)

This is the principal aim of Rousseau’s political philosophy: it relies on social rules having a particular purpose, while also making a controversial claim about freedom. The purpose is to find a set of rules such that each obeys only himself; the claim is to identify obeying yourself — i.e., not someone else — with liberty. Without taking a position on what counts as freedom, let’s focus on the aim of finding a form of social organisation in which each obeys “only himself.” This may be attempted by consent, on the familiar grounds that consenting is like making a promise, which is a rule voluntarily undertaken. By keeping it one obeys only oneself. But this almost Lockean solution founders because it is not universal. It cannot explain why people should be put under states’ authority against their will.

The alternative is, as Berlin showed in Two Concepts to narrow down what counts as true obedience: to define conditions under which it would be irrational, or unreasonable, or perhaps contrary to intuition not to obey and then argue that obedience is compulsory for all rational, or reasonable or correctly-intuiting people. If we demonstrate that all \( \phi \)-thinking people would obey, then the force of the argument is generated by maintaining that if you accept \( \phi \) (or that people, in society, ought to \( \phi \)) then you should obey. The fundamental problem then becomes “to find a form of association that will defence the person and goods of each \( \phi \)-thinking associate”. If the non- \( \phi \)-thinking — the irrational, the unreasonable, the insane, etc. can be shown not to deserve or not to be trusted with liberty (in every society there are some such people, even if they are limited to criminals and the

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insane), it might be better to for them if they are treated with paternal concern or corrective punishment, or perhaps merely to be condemned as beyond help. Humankind is thus split into sheep and goats. The burden of the argument is then shifted to the definition of those categories and is amenable to an immensely broad range of interpretations — the division could be saints and sinners, the elect and the damned, law-abiding citizens and criminals, even the workers and Kulaks, as much as between the reasonable and unreasonable. The moral content, and any justification for membership of the liberal family of political theories is to be found elsewhere. Thus, as will be discussed below\textsuperscript{63} when Rawls writes, in *Political Liberalism* that

> our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason\textsuperscript{64}

the content is supplied by the notion of persons seeing themselves as free and equal members of a project of social co-operation. In Rousseau, it is done through the general will. Rousseau’s formulation of the general will provides ample material for those minded to accuse him of totalitarian tendencies. Not only does he insist that

\textsuperscript{63}c.f. §2.3.3, pp. 103ff

Each of us puts his person and his full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.\(^{65}\)

he later asserts that the general will has “absolute power over all of its members”\(^{66}\) in the areas of its competence. Yet, it is not untrammelled. Rousseau conceives of it being limited by the purpose for which it is constituted, that is, pursuing the common interest\(^{67}\) of the political community, as understood according to the definition of \(\phi\) above:

it is agreed that each man alienates by the social pact only that portion of his power, his goods, his freedom, which it is important for the community to be able to use, but it should also be agreed to that the sovereign is alone judge of that importance.\(^{68}\)

The chief weakness is in the ascription to the sovereign body of the power to judge whether a matter is of public importance, but, as we shall see below\(^{69}\)


\(^{66}\)Ibid., 61 (372).

\(^{67}\)Ibid., 62 (374).

\(^{68}\)Ibid., 61(373).

\(^{69}\)c.f. §4, pp. 181ff
this criticism applies to any state claiming a monopoly of jurisdiction, including Nozick’s. Rousseau is just more ingenuous in avowing it.

Though an act of sovereignty is “a convention of the body which each one of its members,”70 the body is not a separate entity, but something that its members constitute. Thus if the social body is something that acts, there needs so be a mechanism to describe what this membership means. In principle this mechanism can then be reduced to duties and rights that each member has (even if mediated through participation in a political procedure). It is analogous to the legal fiction whereby a corporation is ascribed rights, obligations and intentions in law, which can in the end always be described in terms of rights obligations and intentions held by real persons. That Rousseau doesn’t see this opens the way for conceptual confusion. Thus:

So long as subjects are subjected only to conventions such as these [i.e. between the body and its members], they obey no one, but only their own will; and to ask how far the respective rights of Sovereign and Citizens extend is to ask how far the Citizens can commit themselves to one another, each to all, and all to each.71

Here, Rousseau is in error. After handing power over to the body, individuals then obey this body, which is a body in which they have a share, rather than to nobody. It is as though I owned a ship, and decided to sell 90% of this ship to

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70Ibid., 63 (374).

71Ibid., 63 (375).
other investors. After the sale I would no longer own the ship. Its owners now control it collectively, and I only control have a tenth of the votes. He compounds this error by writing

it is so [evidently] false that the social contract involves any renunciation on the part of individuals, that [rather] as a result of the contract their situation really proves to be preferable to what it had been before.\textsuperscript{72}

If these errors are discounted, what remains is a somewhat weaker claim about the general will. It is limited by its underlying purpose and the interpretation of the common interest that is contained in the assumptions underlying the master value that underpins political theory of this form. It is necessary to use the underlying justification for there being a common interest to explain why in so far as they act in accordance with that justification their will has value, and in so far as it does not it is to be discounted.

2.3.2.1 Is freedom fungible?

Even if we accept the force of the principles used to determine the form of reasoning that generates binding decisions, this is not enough to show that each person in the political community remains “as free as before.” For Rousseau, the required criteria

\textsuperscript{72}Ibid., 63 (375).
all come down to just one, namely the total alienation of each associate with all of his rights to the whole community.\footnote{Ibid., 50 (360–361).}

He claims that freedom is protected under this rather expansive, if not potentially totalitarian, view of the scope of legitimate public authority on two grounds — that the association is equal,\footnote{Ibid., 50 (360–361).} and that the fact of this equality means that “no one has any interest in making it burdensome to the rest.”\footnote{Ibid., 50 (360–361).} His argument is more plausible than it might appear. The definition of binding political reasoning is such that the constraints make this last clause true. This would allow Rousseau to stipulate for instance, in a manner that anticipates Scanlon that only reasoning that met criteria which ensured that no one would advocate rules that imposed a harsher burden on anyone else than she accepted for herself would be accepted. Though this would not rule out a Spartan republic in which heavy burdens were placed upon everyone equally — indeed, it should not be expected to for Rousseau admired greatly Spartan political organisation as applied to Spartans, though not Helots\footnote{Joshua Cohen, \textit{Rousseau: A Free Community of Equals} (Oxford: Oxford University Press, 2010), 21.} — it would exclude a hierarchy among those considered eligible for citizenship. In any event, the model is to put oneself and one’s rights at the disposal of the political community, whose deliberation is then constrained by certain principles reflecting the equality of citizens.

\footnote{Ibid., 50 (360–361).}
Sufficient though this might be at the level of what is now called “ideal theory,” it is not enough to meet Rousseau’s needs. Rousseau aimed to establish social institutions that take “men as they are” and thus sets himself a standard more difficult to meet. Men as they are engage in political struggles that depart from a rational or deliberative ideal of the general will. In later chapters I address how the effects of such political urges might be limited by the distribution of political power and personal ethics.

Suppose, however, that we were to limit ourselves to describing a realistic utopia and that we can therefore stipulate that the “social pot” into which persons and their rights were alienated was to be cooked up in such a way that precluded political vice and partiality. Rousseau’s argument still suffers from a conceptual mistake. “Finally,” he writes,

> each, by giving himself to all, gives himself to no one, and since the there is no associate over whom one does not acquire the same right as one grants him over oneself, one gains the equivalent of all one loses, and more force to preserve what one has.\(^\text{80}\)

Yet even in conditions of equality if each person gives himself to all, he doesn’t give himself to no-one, but puts himself under the control of a body in which he

\(^{77}\) c.f. §4, pp. 181ff

\(^{78}\) c.f. §5, pp. 217ff

\(^{79}\) Nozick, *Anarchy, State and Utopia*, 195.

has an equal share of collectively exercised power. Rousseau’s identity only holds true for certain kinds of things and rights and persons are not among them. If ten of use each have £100 and put it in a common pot, and then withdraw a tenth of the total sum, we each indeed get back the same as we gave up. Other decisions about the common pot are, however, inevitably collective ones. Rousseau actually describes a situation like one where we had to invest the whole pot (£1000) in a single project, and could not split our investment up. If each of us had equal voting rights we would certainly have an equal say about where the money was to be put, but we wouldn’t each have our own say over our own amount. If six of us voted to invest in a certain company, the other four would simply have been outvoted.

Some decisions are indeed necessarily collective, or best made collectively, but a collective decision is not the same as a set of individual decisions over which each of us has our own control. As Berlin wrote, “Hobbes was at any rate more candid: he did not pretend that a sovereign does not enslave; he justified his slavery but at least did not have the effrontery to call it freedom.”

2.3.3 Replacing Freedom with Justice

Effrontery or not, though he does claim to want citizens to remain as “free as before,” this is a point on which Rousseau is inconsistent. At other times he maintains that his citizens lose their original freedom, but gain “moral freedom”

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in exchange. This apparent confusion might perhaps be dispelled if Rousseau is understood as trying to work out how we are to live together as rational beings: reason, for him dictates that as members of a social body, we are free and equal, and giving effect to these to aspects of our life in society is “the greatest good of all” and “ought to be the end of every system of legislation.” Thus, to use Berlin’s rendering, we are required to demarcate “the frontier that lies between my (rationally determined) rights and the identical rights of others.” Indeed Berlin, in expounding the line that his opponents take, summarises their starting point as follows

A rational (or free) State would be a State governed by such laws as all rational men would freely accept; that is to say, such laws as they would themselves have enacted had they been asked what, as rational beings, they demanded; hence the frontiers would be as all rational men would consider to be the right frontiers for rational beings.

This formulation, which is strikingly similar to Rawls’s defence of Rousseau in his Lectures on the History of Political Philosophy, has three elements. First, a claim

83 P. 54 (365) Ibid., 54 (365).
84 Ibid., 78 (391).
86 Ibid., 191.
that the correct boundaries are the boundaries that all rational beings would freely accept — subject to the rider that to accept boundaries freely would be, under the definition of freedom that Rousseau comes to adopt, to accept the boundaries that reason determined. Second, there is a constructivist element, the laws would be the laws that would have been enacted, if, as rational beings, the citizens had been asked to determine them; the final element is a condition of universality that ensures the frontiers would be what rational beings would consider the right frontiers for a society of also rational beings.

Rationality is the central concept here. Appropriate rules are the ones that rational beings or people acting as rational beings would accept. The judgement made is not an actual intentional one, and its force doesn’t come from what people actually do decide; it derives its moral authority from conformity to reason rather than an act of promising. Thus this is a claim that there exist standards from which the rules governing political society can be derived and that the capacity in each of us to perceive or acknowledge these standards is the source of the moral duty to obey the rules they entail. Human beings are held equally to be able to access common reason which is what grounds the political institutions (that is, laws) by which we live together.

Suppose we were to modify Berlin’s terms, as though to update it for a contemporary audience:

A *just project of social co-operation* would be a state governed by such *principles of justice* as all *rational and reasonable* men would freely accept; that is to say, such *principles of justice* as they would
themselves have enacted had they been asked what, as rational and reasonable beings, they demanded; hence the frontiers would be as all rational and reasonable men would consider to be the right frontiers for rational and reasonable beings.

This not unexpectedly produces a statement suggestive of Rawls’s political liberalism. Yet though superficially similar, this formulation appears to contain an important change. It drops any claim that the ensuing state is to be assessed according to the freedom it offers its citizens. In liberty’s place, the justice of social institutions, plus what rational and reasonable people, who see each other as just as rational and reasonable as they are, demanded, as members of the scheme of social cooperation, are invoked. Does this change allow an escape from Berlin’s charge that Rousseau, Kant and Fichte end up, however unwittingly, twisting the definition of freedom so much that its reduction ends up getting portrayed as an increase in the thing being reduced?

2.3.4 Example: Rawls’s Political Liberalism

Though a full treatment of Rawls’s political philosophy lies far outside the scope of this thesis, it is worthwhile by way of illustration considering as detailed example a the version of his philosophy expressed in Political Liberalism. For Rawls, “the legitimacy of the government’s structure of authority” is established according

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88Rawls, Political Liberalism.

89Ibid., 136.
to the “liberal principle of legitimacy” that

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals accessible to their common human reason.

Three concepts the principle relies upon have very specific meanings for Rawls: political power, citizens understood as free and equal and reasonableness. When their meanings are elucidated by reference to other passages in *Political Liberalism*, Rawls’s understanding of legitimacy can be expressed in terms of facts about social organisation and people’s capacities to participate in them.

First, the propriety of the exercise of political power can be understood only in terms of the relationships in which citizens, as free and equal, find themselves. Political power (at least in a “constitutional regime”) is “ultimately the power of the public, that is, the power of free and equal citizens as a collective body.”

As “our” quite clearly refers to the subject of the sentence, we may reconstruct the above paragraph as follows:

\[ \text{The exercise of power by free and equal citizens as a collective body} \]

\[^{90}\text{Ibid., 137.}\]

\[^{91}\text{Ibid., 137.}\]

\[^{92}\text{Ibid., 136.}\]

\[^{93}\text{Ibid., p.136.}\]
is fully proper only when done in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals accessible to their common human reason.

Second, Rawls has a very specific definition of what counts as reasonable — reasonableness has to do with an understanding that all members of a society stand in the same sort of relationship to each other as citizens. This passage is a typical example:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of social cooperation (defined by principles and ideals) and they agree to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms.\textsuperscript{94}

Using this definition we can reformulate the liberal principle of legitimacy as follows:

The exercise of power by free and equal citizens as a collective body is fully proper only when done so in accordance with a constitution the essentials of which all citizens as free and equal may be expected to endorse, viewing one another as free and equal in a system of social

\textsuperscript{94}Ibid., p. xlii.
co-operation over generations and prepared to offer one another fair terms of social cooperation, and agreeing to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms, in the light of principles and ideals accessible to their common human reason.

Third, the notion of citizens as free and equal requires more explanation. Rather than defining what free and equal citizens should be, Rawls provides reasons for why they ought to be considered as such. Thus persons are free “in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgement, thought and inference connected with those powers)”95.

The good, in this iteration of Rawls’s philosophy, means “each participant’s rational advantage,”96 so rather than for instance a worked out idea of what constitutes a valuable life, it expresses the understanding of those aspects of a person’s personality that are captured by what has often been called “rational economic man” and involve the development of preferences, the choosing of means to satisfy them and to their revision. Meanwhile, the sense of justice has an equally specific meaning. To have a sense of justice is to “understand, to apply and to act from the public conception of justice which characterises the fair terms of social cooper-

95Ibid., 19.

96Ibid., 16.
Hence, a person is considered free in virtue of her two capacities: to formulate ends and means, and her capacity to act according to the fair terms of cooperation that characterise justice — in other words, to constrain her pursuit of her rational advantage by a requirement that other people willing to accept fair terms be offered them. The sense of justice is a side-constraint that restricts the pursuit of rational self-interest. A person is is treated as free, then, because she has the capacity to make the correct decisions: that is, to circumscribe her rational self-interests by the requirements of membership of a fair scheme of social cooperation.

Rawls’s notion of “equality” is also unusual. People are to be considered as equal because they possess the capacities to have a sense of justice and for a conception of the good to a sufficient extent to take part in the project of social cooperation. Rather than being a comparative measure of a quantity, equality here describes a threshold condition for full membership of the political community. It is another reason to treat people according to the fair terms: because we know that they know, or ought to know that they should accept and act on those fair terms. It is analogous to Rousseau’s requirement that citizens possess reason.

“Citizens as free and equal” then actually means that citizens that are in some sense suitably qualified to participate in a Rawlsian scheme of social cooperation; they have certain properties that qualify them for citizenship, namely that they are able to formulate and pursue their own rational advantage and are also able to understand that this pursuit ought to be limited by the conditions that a fair

\[97\] Ibid., 19.
system of social cooperation demands. This allows a further revision of the liberal principle of legitimacy:

The exercise of power by citizens who possess the capacity to formulate their rational advantage and to limit their pursuit of it by the requirements of a fair system of social cooperation, as a collective body, is fully proper only when done so in accordance with a constitution the essentials of which all citizens so conceived may be expected to endorse viewing one another as such in a system of social cooperation over generations and prepared to offer one another fair terms of social cooperation and agreeing to act in those terms even at the cost of their own interests in particular situations provided that others also accept those terms in the light of principles accessible to their common human reason.

This rather complex formulation can be simplified, because the reflexive condition contained in the clause “and prepared...others also accept these terms” is implied by the one that insists that citizens are conceived of as, in Rawls’s terms, reasonable, leaving us with:

The exercise of power by citizens who possess the capacity to formulate their rational advantage and to limit their pursuit of it by the requirements of a fair system of social cooperation, as a collective body, is fully proper only when done so in accordance with a constitution the essentials of which all citizens so conceived may be expected to endorse viewing one another as such in a system of social cooperation
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over generations in the light of principles accessible to their common human reason.

So formulated, this principle contains seven elements:

1. a claim about the capacity of citizens to pursue their rational advantage and limit this pursuit by the requirements of a fair system of cooperation;
2. a claim about the collective nature of politics: citizens can exercise coercive power as part of an authoritative political body, not as individuals (contrast this with the Lockean view that citizens hand prepolitical powers over to a governing authority);
3. this body’s conduct is restricted by certain rules (which is a property that any non-arbitrary government must possess);
4. an expectation of endorsement by the citizens. Rather than a non-moral “ought” predicting citizens’ behaviour, this is a further restriction on how they exercise their moral power and is determined by the properties of a fair system of cooperation;
5. mutual recognition of all citizens as being parts of this system of social cooperation;
6. an understanding that this project and the principles underlying it exist over the long term; and finally,
7. an appeal to principles of common human reason to anchor the project of social cooperation.
Accordingly, Rawls's principle of political legitimacy consists of a series of claims about

1. the capacity to understand what living as part of a project of social cooperation is and to be held morally responsible for behaviour (1, 4 and 7);
2. the fact of political institutions being collective and enduring; (2, 3, 6) and
3. an understanding that citizens see each other as taking part in the project of social cooperation (5)

That is, all features of his theory emerge from an underlying claim that there are truths concerning the nature of social cooperation that are accessible to people, who may be coerced by a political authority that aims to implement such terms, if they do not of their own accord accede to them. The core of the principle of legitimacy is this:

If you are worthy of citizenship, you ought to know what you ought to do, and because you ought to know what it is, you deserve to be coerced if you don’t act as you ought.

This is exactly the kind of argument for justifying coercion to which Berlin was so trenchantly opposed because it is capable of being deployed (however insincerely, or worse, sincerely) by people who believe they have discovered “what you ought to do” and whose frameworks provide no mechanism within themselves to challenge the substance of this claim. What is perhaps surprising is that, as I shall now argue, it is also the kind of argument to which contemporary libertarians,
including Nozick (his caveat for “catastrophic moral horror”\textsuperscript{98} notwithstanding) and Otsuka below\textsuperscript{99}, deploy.

### 2.4 Natural Liberalism

In the previous section we identified the crux of Berlin’s argument: that to claim people may be coerced by political authority, because they ought to behave according to the principle the authority puts in practice, is not so much an argument as an elaborate assertion. Stripped of convolutions it comes down to:

\[
X \text{ is right}; \text{ You ought to } X; \text{ therefore we don’t wrong you when we force you to } X.
\]

If the authorities then claim, as Rousseau did, that you are therefore free when you are coerced is an extra insult; but even without this, the burden argument that “social liberals” make is borne by its first premise. More surprisingly perhaps, Berlin also draws philosophy in the “natural liberal” tradition into his net.

#### 2.4.1 The generality of Berlin’s argument

Though developed as part of his attack upon the perversion of rationalistic ideas of freedom to disguise paternalism, oppression and tyranny, Berlin’s argument in fact

\textsuperscript{98}Nozick, \textit{Anarchy, State and Utopia}, 29 footnote.

\textsuperscript{99}c.f. §2.4.2, pp. 123ff
Natural Liberalism

holds as a more general kind of statement about the justifiability of state authority. While Berlin *ceteris paribus* abhors coercion and prefers liberty, he is quite aware that all other things are usually not equal. He is prepared to countenance restrictions of freedom in the service of other values. His worry about positive liberty is thus twofold: first, that it provides a justification for what he would consider to be the curtailing of negative freedom, but worse, positive libertarians are unable (consciously or not) to see that this is what they are doing, even if they take care to make something other than freedom their master value, and so avoid being accused of forcing people to be free. By redefining freedom as consistency with some other value, or which, as we saw above, amounts to the same thing, setting it at nought when compared with an “uncompromising” master value, they prevent themselves being able to give any meaning to statements like the following one which might be applied to the imprisonment of a (guilty) convicted criminal: “though his freedom was restricted, justice required that it be done.” This is because they are committed instead to maintaining that either “because justice required that it be done, his freedom, properly considered, *wasn’t*, in fact restricted,” or “because justice required that it be done, his freedom, properly considered didn’t count for anything; it had, all things considered, no value.”

To that must be added what might be the central theme of his work, at least from the point when he ceased to consider himself a philosopher: his bewilderment at the insistent search for a way of demonstrating that all good things are consistent


101c.f. §2.2.3, pp. 84ff
with each other. Because if you do hold such a belief and think it addresses political questions, it follows that people who had worked out the correct way of making them consistent — call them right-thinking people — will be able to establish the correct sort of state, or, alternatively, that the right sort of state would be endorsed by right-thinking people. This is not to say that right thinking people somehow cause the right kind of state to come into being; or even, that the right sort of state is the one that right-thinking people would endorse. The two ideas do not entail, but describe each other. The right kind of state just is the one that-right thinking people endorse. Each may appear to entail the other because they are both reflections of the single underlying principle.

This yields an objection to all political philosophy that fulfils the following conditions. In an abstract form, if $\Phi$ is the master value against which the state is evaluated, and $\Psi$ the condition of right-thinkingness:

$$\text{A } \Phi \text{ state would be a state governed by such laws as all } \Psi \text{ men would freely accept; that is to say such laws as they would themselves have enacted had they been asked what, as } \Psi \text{ beings, they demanded; hence the frontiers would be as all } \Psi \text{ men would consider to be the right frontiers for } \Psi \text{ beings.}$$

The central point is that there is a coercive system in place (governing through principles or laws) and if the theory from which $\Phi$ and $\Psi$ are derived considers itself a liberal one, the $\Phi$ state considers people who live under the system to be

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free; i.e., as free as Ψ people under a Φ state could be and should want to be.

Whether the citizens of this state actually are free enough, is, for Berlin, a different question. He considers them to be less free from state coercion than they would be if they didn’t live under it all.\textsuperscript{103} The Φ state may of course be justifiable for other reasons: if it keeps order, administers justice or enhances material equality, but that is an entirely independent matter, determined by the structure and behaviour of that state. That a state may moreover protect people from coercion by bandits and criminals is a consideration in its favour, but it is not the same as suggesting people are freer than they would be in the state’s absence and at the mercy of very present bandits (whether they are depends on how the relative extent of banditry and the exercise of state power.) In so far as they are ruled by the laws that Φ beings would accept, rather than able to make their own decisions, Berlin argues, they are to that extent oppressed by the Φ state. As we saw in the discussion of Rawls above,\textsuperscript{104} by making the master value (Φ), something other than freedom, an adherent of the social liberal tradition can avoid the absurdity involved in concluding that people may be forced to be free; she cannot however avoid subordinating all other considerations to the principle by which the state’s conduct is to be judged. Social criticism in this tradition is then limited to arguing over what this principle entails, as social criticism in a theocratic tradition is limited by the need to seek the authority, or at least the acquiescence, of holy scripture. Defenders of uncompromising values might well

\textsuperscript{103}Berlin, “Two Concepts of Liberty,” 209.

\textsuperscript{104}c.f. §2.3.4, pp. 106ff
be unperturbed by that, what might appear more surprising, however, is that the
Lockean tradition lends itself to a similar interpretation.

One more objection should be noted that raises metaphysical questions outside the
scope of this thesis. This is the claim that freedom emerges from a social situation
and it does not make sense to conceive of freedom, except in the most trivial sense
of a non-moralised capability,\textsuperscript{105} as a property of individuals; it is instead an
attribute of relations between human beings, and what ought to concern us is less
how much each person has, and more how it is to be distributed between people.
The Lockean reply would be, it seems to me, to claim that the objection begs
the question of whether these social relations ought to be governed by political
authority: shouldn’t whether a person chooses to exit the state of nature and
enter civil society be, as it was for Locke (See below\textsuperscript{106}), at least in principle a
matter of choice?

The natural liberal conception of legitimacy appears different: according to it, a
state derives its moral authority from doing things that any person is allowed to
do, and possesses no special powers by virtue of its construction or fidelity to an
overall principle such as reason. Theories in the natural liberal tradition instead
make a different claim about how a state is to be judged:

A $\Phi$ state would be a state governed by such laws as necessary to
secure $\theta$ that all men possess; the frontiers would be entailed by $\theta$.

\textsuperscript{105}Carter, A Measure of Freedom, 69.

\textsuperscript{106}c.f. §2.4.2, pp. 123ff
While $\theta$ is usually but not always a set of rights, it does not have to be. It must however have two important features: first, be something that can be ascribed to each individual under the state’s power; and, second, not be dependent on a form of thought where people’s political existence has to be harmonious. This would allow $\theta$ to be something else, for instance a set of duties, or a conception of autonomy. Without attempting a detailed interpretation of Raz, it is I think illuminating to consider that a Razian\textsuperscript{107} might want to stipulate that:

An *authoritative* state would be a state governed by such laws as necessary to secure the exercise of autonomy that all men possess; the frontiers would be entailed by the requirements of securing their exercise of autonomy.

The chief difference between the natural and social traditions can be found in the source of the state’s authority to coerce. Social liberals think that the fact that we are $\Psi$ beings living together produces moral obligations, and so defines a state of affairs where we, if we are properly $\Psi$, obey the laws that we set ourselves (i.e. we obey the laws we would set ourselves if we were properly $\Psi$). In contrast, natural liberals argue that the state’s authority derives from moral facts $\theta$ and has no authority separate from them: it’s just an institution that is entitled to coerce in order to enforce the arrangement dictated by $\theta$ which would still hold true (albeit in only haphazardly enforceable fashion if enforceable at all) in the absence of effective political authority. In the natural liberal view the state has

nothing that didn’t belong first to the people; under the social liberal view, the people are only entitled to what is consistent with the right kind of state.

Though those two modes appear opposites, whether they indeed are depends on the moral status of public coercion, which in the natural liberal tradition can be reduced to the sum of individual acts of coercion carried out on behalf of the person whose rights (or autonomy, etc.) the state is seeking to protect. Let us consider an act of enforcement. Imagine that my car has been stolen, and that I have taken steps to recover it from the thief, and exacted compensation for any damage to the car; plus any inconvenience I have suffered as a result (including my enforcement costs), so that I am made whole. Allow for the possibility, though do not require, that the moral theory operating here allows me also to punish the thief, in order to deter her, and, if this is justified (it may need to be justified separately) deter other thieves from committing similar violations of my right to use my car; and allow also that deterrence may be permissible to prevent third parties violating fourth parties’ rights to their vehicles. A variety of answers to the supplementary questions about deterrence may be inserted, although their detail does not concern us here. It is enough to note that matters of deterrence can be included within this framework. Stipulate as well that I have not used excessive force (I leave open how this is to be calculated). There are three ways of understanding the moral dimensions of what has occurred. The first two are either

1. this might be all that is to be said about matters of right. The victim has been compensated, and just the right amount of punishment, but no
more, has been administered to the aggressor to fulfil the requirements of
deterrence. No wrong has been done to the aggressor; or

2. a second position is that this describes what my rights entitle me to do (or,
what a state, in exercising my rights on my behalf is obliged by a social
compact to do) but there may be other, lesser, principles that on which it
is silent.

To identify the third, it is necessary first to refine the example. Suppose that
the thief stole the car to drive her mother to the hospital. A moralist taking
the first position can “give the rights footnotes” such that my right to the car
is encumbered by a duty to allow other people to take it for certain important
purposes if there is no feasible alternative, and, possibly, to provide the victim
compensation the inconvenience caused; in that way one can have a principle (or
system of principles) that provides guidance for complex situations that occur in
the real world, in which case we could return to the situation of the first example
in which no wrongs were done, and the demands of right had been satisfied.

Alternatively, one might say that though I would be entitled to demand compensa-
tion for the theft, I would also have strong moral reasons to waive the entitlement,
particularly if the car was returned in one piece, but these reasons are of a dif-
fferent character to reasons to do with rights. The role of justice though is to
concern itself with rights; other matters are private, and should lead to praise
and blame, rather than punishment or the enforced payment of compensation.
Both of these yield rules to guide state officials’ actions that avoid moral remain-
ders: in the first case because the enforcement of (suitably footnoted) rights is all
there is to morality; in the second because officials need only concern themselves with the enforcement of rights. Other features of the situation, even if repeated frequently, should not affect our judgement about the rightness or wrongness of the enforcement action.

A third, however, is different. This is the position that enforcing the return of the car, and compensation for the theft harms the thief, but that the harm is overridden when she stole it for pleasure, but not overridden when she stole it to drive her mother to the hospital. Even when I am entitled to exact compensation, I still do her a small amount of harm in doing so. Of course, she deserves the harm, which includes an infringement of her freedom, but that doesn’t eliminate it: she is still less free and quite likely poorer than she would have been had I not enforced my right to compensation. There is moral loss because values other than justice have not been respected. When justice overrides the other values it doesn’t extinguish them entirely. If I pursue my entitlements in justice I commit another kind of moral damage.\textsuperscript{108} This view allows for the possibility that when someone pursues justice à l’outrance, all these extra losses may mount up, reflecting the intuition people can have when they say something like “Knock it off, you’ve

\textsuperscript{108}A state can recognise this kind of situation in its judicial system: even if I, insist on standing upon my rights and bring the theft of my car before its judicial apparatus, it can decide not to prosecute; its officials’ sentencing can take mitigating factors into account; even, if it is a system that includes juries, they can refuse to convict her despite the law. If a state charged only with enforcing rights would not have this capacity, one that recognised mercy, as well as justice, would not find it difficult to develop mechanisms to express it institutionally, but it would be a state involved in balancing various considerations beyond justice. It would not see justice, or rights-protection as an uncompromising value.
made your point. Let this one go.” Confronted with these three alternatives, where would Locke stand?

2.4.2 Locke on Political Power

Locke begins his discussion of political legitimacy by asserting that political institutions are artificial, and they need to be justified by reference to people’s moral status in their absence. Thus:

To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending on the Will of any other Man.\textsuperscript{109}

We can understand two things by this. First, that in the absence of political authority, people may follow their own will, without reference to anybody else, and by implication, without reference to any social commands. Second, they are, however, morally bound by the Law of Nature (he later explains that this is accessible to Reason, but laid down by God).\textsuperscript{110} They have the capacity to choose to, obey the Law of Nature, and be judged on that obedience by God; they have no obligation to obey rules laid down by other people. This allows an external

\textsuperscript{109}\textbf{Locke, Two Treatises of Government}, 269 (§4).

\textsuperscript{110}\textit{Ibid.}, 271 (§6).
yardstick against which state power may be compared. The issue then is this: does the state enforce the Law of Nature, or does it not?

It is however open to the interpretation, inconsistent with Berlinian pluralism, but adopted by Nozick and Otuska that “perfect freedom” can be found within the bounds of the Law of Nature, which these contemporary Lockeans conceive as expressed in terms of rights. Steiner performs a move that is similar in respect to Locke as Rawls was to Rousseau. Steiner’s theory of rights explains what he takes to be the requirements that justice imposes upon the distribution of holdings of rights from which an allocation of negative freedom follows. Nevertheless, it is possible to interpret Locke in a way that leaves open the possibility of endorsing a pluralist politics where considerations other than abiding by the law of Nature enter into the practical reason of the authorities.

The State of Nature has a Law of Nature to govern it, which obliges everyone: and Reason which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or possessions.111

Locke’s State of Nature lacks government, but it doesn’t suppose that people will behave in harmony. The Law of Nature is there to regulate conflicts and provide divinely authoritative outcomes to them, but he does not expect people harmoniously to agree to these outcomes, and invokes state authority to overcome these “inconveniences.” Before such authority established, however, Locke argues

111Ibid., 271 (§6).
that “all Men may be restrained from invading others’ rights…everyone has a right to punish the transgressors of that Law [of Nature] to such a Degree as may hinder its violation.”

In formulating his justification for punishment, Locke takes the view that punishment is injury, but that it is an injury justified for weightier reasons.

being a trespass against the whole Species, and the Peace and Safety of it, provided for by the law of Nature, every man upon this score, by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary destroy things noxious to them, and so may bring such evil on any one, who hath transgressed the Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like Mischief.

How this evil is understood has important implications for a state who takes over the powers of punishment, which each person “wholly gives up” to the authorities. In a hierarchical moral system (such as a Kantian or Utilitarian one) proportionate punishment of a correctly identified criminal is is not an evil

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112 Ibid., 271 (§7).
113 Ibid., 272 (§8).
114 Ibid., 272 (§8).
115 Ibid., 353 (§130).
that leaves no mark, it is at least a right, and possibly a duty. Only punishing the wrong person, or the right person, but too harshly, is. Utilitarians acknowledge the harm done through punishment but consider it to be defeated by its beneficial consequences, much as how, in a football league, the losing team, because they scored fewer goals than their opponents, is awarded no points.

Locke is however open to the idea of a state that commits evils necessary for the preservation of the peace and safety of mankind in general, and which (see below\textsuperscript{117}) echoes Machiavelli’s. The state has as its purpose the creation of a secure environment in which people’s rights are respected by neutralising the “ill-nature, passion and revenge that carry them too far”\textsuperscript{118} in the private enforcement of justice, into a “state of war”\textsuperscript{119}. But the state, ruled as it is by officials\textsuperscript{120} who are “but men,”\textsuperscript{121} can exceed this authority and accumulate the commission of evils so great that, even had they been justified individually, its subjects would have cause to revolt against it submitting themselves to the judgement of God.\textsuperscript{122}

\textsuperscript{117}c.f. §5.1, pp. 220ff

\textsuperscript{118}Locke, \textit{Two Treatises of Government}, 275–6 (§13).

\textsuperscript{119}Ibid., 282 (§21).

\textsuperscript{120}Locke here explicitly refers to “monarchs” but it is clear from the context that it applies to all political officials. A point he reinforces in §131 where he lists a series of constitutional expedients and political virtues required to keep the supreme political power to the pursuit of the common good. Ibid., 353 (§131)

\textsuperscript{121}Ibid., 276 (§13).

\textsuperscript{122}Ibid., 282 (§21).
As well as deriving force from consent (including of course tacit consent), Locke limits the state’s functions to the exercise of the natural powers that all people possess in the state of nature, and this imposes obligations on magistrates. Locke imposes no obligation to obey the law *because it is law* other than that generated by consent (tacit or express). Even those obligations are not absolute: they are held on condition that the state overall[^123] protects, not violates the rights it exists to protect.

This interpretation of Locke is at odds, for instance with that adopted by Michael Otsuka in *Libertarianism Without Inequality*.[^124] Otsuka believes that a full right of self-ownership can serve to divide all actions into the allowed and forbidden. He takes this division to be an uncontroversial requirement of moral theory, and accordingly doesn’t explicitly state the assumption. The following examples, part of his argument for a more egalitarian version of the Lockean distributional proviso than that preferred by Robert Nozick are characteristic. For Otsuka “the libertarian must confront the following dilemma: one’s possession of a full and uninfringed right of self-ownership either is or it is not compatible with some incursions upon one’s body (without one’s consent) that result in serious harm.”[^125] He continues: “the libertarian is also committed to the claim that one acts impermissibly if by one’s actions one unforeseeably kills or injures an innocent, even

[^123]: Locke assigns the job of determining what violations are serious enough to undermine state authority to his ever-willing divine factotum.

[^124]: Otsuka, *Libertarianism Without Inequality*.

[^125]: Ibid., 13.
though what one did was not known to carry the risk of harm.”\textsuperscript{126} When discussing the right to self-defence Otsuka’s position is that “I will show that (1) an individual can, on the very ground of a right to self-protection...justify the punishment of an individual as a means of deterring others from committing crimes.”\textsuperscript{127} Otsuka goes on to deploy a brilliantly detailed set of hypothetical examples to invite the conclusion that self-ownership should entail either his preferred form of egalitarian redistribution of equal opportunity for welfare, or the acceptance of impossibly counter-intuitive conclusions relating to the punishment of bystanders, harming of the innocent or allowing people to starve to death because of their inability to weave their own hair.\textsuperscript{128} The conclusions those examples yield allow Otsuka to construct his preferred conception of natural rights and provide an account of the legitimacy of coercion in their enforcement. He believes however that the legitimacy is a matter of providing the correct footnotes to rights, to ensure that they allow a consistent pattern of coercive institutions to emerge. Otsuka claims to endorse what he calls “political voluntarism” that is, “an individual is subject to the legitimate political authority of a government if and only if, and by virtue of the fact that, he has given his free, rational, and informed consent to this subjection.”\textsuperscript{129} In fact he qualifies this significantly because the problems

\textsuperscript{126}Ibid., 13.

\textsuperscript{127}Ibid., 61.

\textsuperscript{128}Ibid., 18.

\textsuperscript{129}Ibid., 90.
with [assigning to individuals] the right of each to legislate and punish in order to uphold the law of nature are, I think, sufficient to establish the following obligation on the part of individuals for the sake of peace and security: an obligation to relinquish these rights to legislate and punish and instead to place themselves under a competent and effective common government whenever they live, intermingle, and interact with others within the confines of a community that is much larger or more complex than a hamlet.\footnote{130}

This obligation is conditional on interpreting Locke’s proviso on legitimate acquisition (which I discuss at length above)\footnote{131} to ensure that should a person not be given “equal opportunity for welfare” in any existing society, he may secede, form a society of his own, and be owed compensation so that he does.\footnote{132}

Otsuka’s argument takes the provision of equal opportunity for welfare, which he believes to be necessary for “robust self-ownership,”\footnote{133} as the uncompromising value. This grounds binding obligations to accept punishment and liability to pay compensation for violating another’s right to this master value of robust self-ownership. As it does so it is very much in line with the thrust, though not

\footnote{130}Ibid., 93–94.
\footnote{131}c.f. §1, pp. 29ff
\footnote{132}Ibid., 104.
\footnote{133}Ibid., 32.
the letter, of Nozick’s *Anarchy State and Utopia*. Though Nozick admits that there are situations where rights should be violated “to avoid catastrophic moral horror,” the work is cast as an exploration of what happens if we treat rights as inviolable side constraints. These two influential readings of Locke thereby fall into the same category as Rousseau’s. They have no way of assessing the moral cost of imposing what they take to be legitimate coercion, which is equivalent to defining the enforcement of the system of rights as determining the moral content of legitimacy:

> If you are worthy of moral agency, you ought to know what you ought to do, and because you ought to know what it is, you deserve to be coerced if you don’t act as you ought.

It is different from Rousseau and Rawls in the source of the authority: citizenship or membership of a project of social cooperation versus natural rights understood as moral facts. But like their argument, it sets the moral cost of coercion in a good cause at zero.

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134 Nozick, *Anarchy, State and Utopia*.

135 Ibid., 29, footnote.

136 For why Nozick doesn’t succeed in this see below (c.f. §3.3, pp. 162ff)
2.5 Liberal Political Judgement Without Legitimacy

We have so far established three things: first that Isaiah Berlin’s argument, phrased as conceptual discussion of the meaning of liberty, is susceptible to interpretation as an argument against the legitimacy of states’ coercive power; second that it can apply as much to the Lockean tradition in which negative liberty plays such an important part, as to the “social liberalism” of Rousseau and Rawls; and third, that Locke himself leaves open the possibility of a qualified legitimacy that Berlin could have perhaps endorsed.

The main question on which Berlin and the others divide is thus the following: when a legitimate state coerces someone, does the fact that the state is legitimate mean the moral cost of the coercion is set at nought, or is the state, on balance thought to be beneficial in virtue of the moral cost of its coercion being outweighed by the moral value of what it thereby achieves?

If the cost of coercion is, in the appropriate circumstances, to be set at nought, this means, as I argued above, the criterion determining legitimacy (be it the enforcement of natural rights, or conformity with a principle of justice) must over-ride all other considerations and become what Rawls called an uncompromising principle. A Rousseauvian principle of legitimacy sweeps natural rights away, while modern Lockeans such as Nozick and Otsuka take refuge in what Ian Carter has called a “justice-based conception of freedom”.

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138 Carter, A Measure of Freedom, 69.
Both provide us with no external standard to judge the extent and proportionality of a state’s coercion. If all one is concerned about is justice über alles — established by principle or by reference to rights — then perhaps there is nothing more to be said. Yet the sense that there is something a little fanatical in taking justice to be an uncompromising value, appears not infrequently in our culture, and is expressed in the aphorism that “hard cases make bad law.” This intuition relies upon a sense described above in Berlin’s introduction to Two Concepts of Liberty that life is too complex to encode into a principle or set of principles, self-referential principles that try to embody their own purpose through a mechanism like reflective equilibrium. For the problem isn’t just that a principle might not live up to its own end, but that in living up to its own end it discounts other ends too easily.

The same should be true of even justified coercion for it carries a cost even though it is a cost that must be paid if justice is to be done. If extremism is sometimes defended by resort to the analogy that “you can’t make an omelette without breaking eggs,” a carefully written uncompromising principle of justice might, as Rawls’s does, contain internal restraints against over-egging. External considerations however are always discounted. That the sacrifices might turn out to be in vain is, of course, another reason not to impose them.

2.6 Moral Scarcity

“So what?” a believer in justice would be entitled to reply. Justice or rights are what matter: they would argue that it is a mistake to judge the weight of jus-
Moral Scarcity

A full defence of the meta-ethics underlying the value pluralist position is, as mentioned above,\(^{139}\) outside the scope of the thesis but it is nevertheless worth indicating the deleterious effects following the pursuit of an uncompromising value through would have on our every day moral judgements. Imagine two brothers, Bill and Ben, who live in a country that practices conscription by lottery. Bill’s name is pulled out of the hat and he is sent to war. Ben’s is not, and he stays a civilian and lives a quiet, apolitical life. If we stipulate that the conflict is just, according to one’s preferred theory of the ethics of war, and stipulate moreover that Bill behaves in exemplary fashion (as far as the circumstances of a just war, justly fought permit), or at least in a fashion as exemplary mutatis mutandis as Ben given the tough and brutal military conditions in which Bill finds himself. Were Saint Peter to decide whether they were to be admitted through the pearly gates, he would make the same decision for each.

But that is not, I think, all we would want to say about their moral characters. Ben has lived a life of moral plenty. By and large, he has been able to go about his life in a well-organised society without confronting situations where each of the options available to him would have involved doing serious wrong. The circumstances that war imposes on those who fight it are however of extreme moral scarcity, where it is impossible to avoid doing wrong, and most (if not all) moral deliberation involves choosing which wrongs it is least bad to commit. War supplies, plentifully, and in acute form, occasions on which people are required to make difficult moral decisions and undergo the kinds of experiences that make a person who they are:

\(^{139}\)c.f. §2.1, pp. 75ff
if someone is fortunate, they develop her character, rather than act destructively upon it. In any event they change it profoundly. If important and weighty moral decisions have a greater effect than trivial ones, and whether to coerce someone ought, for a liberal at least, to count as serious and weighty, politics supplies these experiences as well. Voters, politicians, judges and police make these kinds of decisions all the time, and change as a result.

Berlin’s way of understanding coercion, and assessing its legitimacy, allows us to recognise that kind of growth, while denying officials, citizens and commentators the easy way out that Rousseau, Rawls and Nozick appear to provide them. It means that it is not enough, when judging a policy or deciding to vote for a particular law, or even, reflecting one one’s conduct during the one’s riot squad’s after action review140 to appeal to a theory and apply its outcome. There are always compromises to be made, and because those compromises make us who we are, they impinge on the moral judgement to which we are liable, even when our moral judgement provides us with clear guidance on what compromises are to be made. It requires us to reject in principle the idea that if a state is constituted in a particular way, or restricts itself to a limited set of activities, its actions become morally unproblematic. Rather, public officials’ coercive acts ought to be subject to a continuous assessment of their acceptability.

In this chapter we have seen how traditional views of state legitimacy rely on

140To facilitate speedy decisions, standard operating procedures are developed in advance, but well designed organisations review their behaviour late. For discussion of this, see John A Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (Chicago: University of Chicago Press, 2005).
there being a single uncompromising value to underpin the justification of public coercion, and that this precludes invoking other values to call that justification into question. Though the argument presented so far will appeal to normative pluralists who reject uncompromising values, monist advocates of natural rights will not see anything wrong with the primacy of their uncompromising value. Accordingly, the next chapter will address itself to Nozick’s invisible-hand construction of a state whose authority emerges from the competitive activities of private suppliers of protective services.
Chapter 3

Fairy Godfather

To Robert Nozick we owe what we may call the invisible hand theory of political obligation. It remains faithful to what I have called the natural liberal tradition, while trying to side-step the difficulties involved in legitimating state authority by the consent of the governed.¹ In *Anarchy, State and Utopia*, Nozick sought to justify a minimal, night-watchman, state by showing how it could arise through private acts by consenting adults, without anybody’s rights being violated in the process. We have in mind something like biological evolution, where creatures evolve without aiming to become bears, or lions or eucalyptus trees.² He imagines that in a state of nature, where everyone is entitled to protect their rights on their own, some people will entrust this task to specialists. These specialists


“will be hired to perform protective functions, and some entrepreneurs will go into the business of selling protective services.”

A “protective agency,” as he calls such firms, that commands a monopoly of protection would be indistinguishable from a conventional Weberian state that commands a monopoly of force within a territory. Though he develops a number of arguments for why a single dominant protective agency would emerge (a single judicial process is more reliable, a puis- sient agency can protect rights more effectively, etc), it is enough, for Nozick’s purposes, to argue that a dominant agency could conceivably arise, if “each of the agencies attempts in good faith to act within the limits of Locke’s law of nature.”

He does not use his state of nature to warn Hobbes-style against the dangers of anarchy, but to see whether well-disposed people could, through a series of just steps, institute a government among them by delegating their natural powers to a single state-like entity. Above I denied that such a state could be made legitimate because it resorts to treating rights as an uncompromising value. In this chapter, I ask whether, if rights are given that overriding importance, a state can exercise power legitimately.

The argument in this chapter proceeds as follows. First, I shall claim that while

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3 Ibid., 13.


5 Nozick, Anarchy, State and Utopia, 14–17.

6 Ibid., 17.

7 c.f. §2, pp. 65ff
Lockeans hope that states’ authority can be established by consent of the governed, where it cannot, they resort to arguments for why the governed should have a state imposed upon them. I argue that Nozick’s account of state formation alluded to above fails, and in fact evolves into a claim that anyone may impose their coercive authority on anybody else provided they compensate them for the imposition (Nozick adopts the utilitarianism of rights he had hoped to avoid; while Eric Mack’s attempt to use an aggregation procedure to avoid this weakening of rights does not succeed either). The difficulty is that the “compensation” has to be imposed, and this cannot be done because a rights-violator imposing compensation commits a further violation rather than redressing the previous one. I maintain instead that the conflict between a state that claims a monopoly of jurisdiction and an individual who seeks to enforce justice herself is inevitable and located the moral ambiguity of individual acts of coercion. Though this might appear to lead to a distinct political morality in the manner of Machiavelli, Weber or Walzer, I cannot accept such a solution because they ascribe independent value to the state whereas I need to explain how its value might arise from individual acts of coercion. I press Susan Wolf’s moral psychology, where individuals act in pursuit of peoples or projects that have intrinsic value to them, into service to supply a satisfactory explanation of this moral conflict and which holds out hope that normative considerations may nonetheless temper the imposition.

It is usual to begin a discussion of state authority with Weber’s delineation of its essential features. Some caution is however required, as he uses terms somewhat different to those of normative political philosophy. Weber writes:
a compulsory political association with continuous organisation will be called a “state” if and in so far as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.  

Weber’s “legitimacy” does not have the meaning attributed to the term by political philosophers; for him it is, rather, an empirical matter, whose essence lies in the recognition of an authority or practice within its society. In Weber’s terms a legitimate state is in fact recognised as ruling and its instructions in fact carried out; his use of the word does not indicate moral approval. Second, his requirement for establishing a claim to monopoly of (acknowledged official) physical force sets the bar too high. Many actual states don’t even attempt this. Federal states allow subordinate political entities police and even substantial paramilitary forces. The United States even explicitly recognises the people’s, or at least the individual states’ right to the means to resist the federal government through its Second Amendment. The authority states assert is slightly different. They claim a monopoly of the right to decide who may use force in a given territory. That is, a monopoly of jurisdiction. By asserting a monopoly of jurisdiction, a state gives itself the power to decide whose rights can be enforced, and by what means. A state doesn’t have to exercise force itself, just decide when force may be used.

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9 Combined with the Congress’s right to suspend habeas corpus in wartime, this seems to me to formalise Locke’s right to have a revolution decided on the field of battle.

10 Nozick, Anarchy, State and Utopia, 23.
3.1 Nozick’s Invisible Hand

Could, then, such a state arise by an invisible hand process, without violating rights? Let us grant Nozick’s contention that protective services are a natural monopoly.\(^{11}\) Most people, we may assume, will hire their locally dominant agency. Some, however, will not; they will prefer, for their own independent reasons or perhaps through sheer bloody-mindedness, to enforce justice themselves. But if a state is to be permitted a monopoly of jurisdiction it must be allowed to compel anarchists,\(^{12}\) as I shall call them, to accept its right to decide whose procedures for enforcing justice are to be obeyed.

Nozick’s account of state-formation suffers from confusion in his description of the state of nature arising from his postulate that “our story above assumes that each of the agencies attempts in good faith to act within the limits of Locke’s law of nature.”\(^{13}\) The difficulty here is that the protective agencies are staffed by people, just like those seeking their protection. If there is enough demand in

\(^{11}\)This is contested, for instance by Steiner “May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction.

\(^{12}\)This category could include people who opposed hiring the dominant agency out of fear that it might turn into a state but instead favoured a system of competing private protective agencies instead. They have been called, among other things, “hold-outs” and “independent enforcers of justice.” As they are opposed to a monopoly of coercive authority, and this is not a thesis engaged in a discussion of different ways in which this opposition can be justified and organised (e.g. competing private protective companies versus syndicalist committees), I shall often call them anarchists, as this is most easily understood.

\(^{13}\)Nozick, *Anarchy, State and Utopia*, 16.
the market for protective services that entrepreneurs believe it worthwhile to get into the protection business, it is because people think they might be in need of protection from their fellow men and women — because there are, or probably are, bandits from which they desire to be protected. If there are bandits, it would be most surprising if some of them did not get into the protection (that is, extortion) business themselves. Nozick’s reply to this objection is to note that such bandits would find it difficult to secure willing obedience.\textsuperscript{14} I’m sure he is right, but history attests to the ease with which such “stationary bandits,” to use Mancur Olson’s phrase for predatory despotic states,\textsuperscript{15} compel unwilling obedience. Nozick cannot simply assume that people, like the agencies he suggests some of them would set up, also attempt in good faith to act within the limits of Locke’s law of nature. If they did, and knew that other people would also, they would have no reason not to agree to resolve disputes through an arbitration procedure. They could avoid the need to fight, with or without the help of protective agencies. This is the Nozickian version of the central problem of politics. If people can discern the right way to live together (for Nozick: to respect Locke’s law of nature) and are confident others will as well, there’s no need for protective agencies; but if they do not, and those potentially unreliable or immoral people could staff protective agencies, there’s no way to keep them honest. I discussed this problem at length

\textsuperscript{14}Ibid., 17.

\textsuperscript{15}Mancur Olson, “Dictatorship, Democracy, and Development,” \textit{American Political Science Review} 87, no. 3 (September 1993): 567–76.
above,\textsuperscript{16} and will return to it below.\textsuperscript{17}

Is it enough to refine the Nozickian account state of nature to postulate that people act in good faith, but do not believe others will? These “honourable but suspicious” people would refrain from initiating force when they knew it was not necessary to protect their rights, accept others’ correct demands for compensation for rights violations, and abide by the judgments of decision-making procedures to which they had assented in cases where two or more of them disagreed in good faith. In these situations mistakes can still be made but are easily corrected. Suppose first that someone, call him Joseph, being suspicious and acting under the mistaken impression that his brothers had conspired to take him captive, were to attack them and cause a number of them serious injury. Being honourable, he would willingly pay them compensation for the injury he had caused, in error. He would not need to be coerced.

In these conditions, a state need not employ coercive power. A judicial function is all that would be needed. Where two people genuinely disagreed about whether a rights violation had taken place (perhaps a fence separating neighbours’ property had broken down; or each thought the other had attacked first), they could avoid the need to fight by agreeing to have the matter adjudicated by an impartial authority. Entrepreneurs would set themselves up as judicial authorities. Under these arrangements contracts that included clauses which referred to these authorities would be more secure, it would be easier to agree terms of payment without

\textsuperscript{16}c.f. §2, pp. 65ff

\textsuperscript{17}c.f. §4, pp. 181ff
posting collateral, or demanding hostages.

Were we, for example, to adhere to the green libertarian ideal disposition of property rights outlined above\(^{18}\) we could imagine an entrepreneur using materials she had previously permissibly appropriated to fence off a stockade. She could then only allow in people who agreed, while inside the stockade, to abide by the rulings of her judicial authority. Such areas would boast many advantages: people inside would not need to arm themselves, as fights would not break out, she could allocate plots of territory, and sell them, thus creating rights to landed property (recall that these cannot be generated through ecological acquisition; see above,\(^ {19}\)) and a dispensation where trade could flourish and the the general prosperity increase. As, however, we could imagine many such villages and towns being set up, our entrepreneur would still need to maintain armed forces to deploy in the event of genuine disputes with her town’s neighbours. We might then imagine that a particularly ambitious entrepreneur would promise to place that force at the disposal of those under her judicial authority, should they find themselves in genuine dispute with someone living outside a town, or an inhabitant of another centre of population. People mostly being honourable, and conflict being costly, it would not be unreasonable to expect the towns generally to conclude agreements to resolve their disputes. Then, as a panel drawn from a confederation of towns would exercise jurisdiction within their walls, it seems we have proceeded apace towards the development of things that resemble states.

\(^{18}\) c.f. §1, pp. 29ff

\(^{19}\) c.f. §1.2.2, pp. 48ff
This story deserves closer inspection however. While it is true that the more peaceable, scholarly or commercially minded person might be attracted by the tranquility and conviviality of urban life, others will prefer the rugged life of the individualist, or perhaps of the extended family. The countryside outside the towns, could, we might imagine, be dotted with homesteads like the American prairie, or family compounds like the districts on either side of the Durand Line that separates Afghanistan from Pakistan. Their hardy inhabitants would spurn the decadent ways of city life, prefer the open spaces of the countryside to its bustle, and fear the urban risk of disease and the loss of independence involved in submitting their disputes to the judgement of panels of stolid aldermen. The inhabitants of these homesteads or compounds would believe they could stand up for their rights perfectly well on their own, perhaps assisted by some friends from the next valley; in the spirit of the Arab proverb:

I against my brother,
I and my brother and against my cousin
I, my brother and my cousin and I against the world.

Its sentiment is the refrain of traditionalists and conservatives of the Frontier. They consider themselves the salt of the earth. Their virtues: self-reliance, thrift and resourcefulness. Their vices: stubbornness, xenophobia, and resistance to change. No appeal to progress, modernity, opportunity, knowledge and wealth will move them. “You build your town over there, we’ll have nothing to do with it,” they might say; “and,” they would continue “we don’t like those men you’ve armed and send on expeditions beyond its walls. We think you’ll use them to
subdue us, keep us in control, foist those urban ways of yours upon us."

This is simply a new version of the problem facing anarchists, hold-outs, or independent enforcers of justice. Suppose our town-building entrepreneur, whom we shall call Catherine\(^{20}\) decides to extend her jurisdiction to a piece of land in between two of her towns, allowing her townspeople to travel between the two in the same conditions of peace. In the way, however, is property belonging to a particularly cantankerous individual, Laurence. Laurence first of all refuses to sell the access plus road-building rights through his\(^{21}\) land, no matter what compensation Catherine offers. No offer, however generous, is enough. She is not allowed to confine him there. The green libertarian interpretation would be that while the people who live in other parts of the countryside have agreed to abide by her jurisdiction, they do not own territory inside, and are required to provide rights of way across it; any plausible Lockean proviso can be expected to yield similar conclusions, with even Nozick’s requiring potential enclosers to allow passage through their territory to access unowned natural resources for use. This means that Catherine has to allow anyone Laurence invites into his compound to pass through. The continuous to-ing and fro-ing of Laurence’s ruritarian relatives not only, in the opinion of the townsfolk, lowers the tone. Disputes between

\(^{20}\)I use a personal name, rather than something more corporate or official to emphasise that she only exercises the powers of a private individual.

\(^{21}\)If we hold to the green libertarian property theory above, (c.f. §1.2.2, pp. 48ff) Laurence cannot of course claim title to land. He can, however, claim title to buildings he has constructed on it, or crops he has planted in it. Catherine could not exclude him from their use without violating his rights.
Catherine’s more settled population and the Laurence’s nomadic clan are likely to escalate into fighting because there is no authority with the jurisdiction to impose a settlement. Only the town limits define zones of peace.

We have this problem because there is a fundamental opposition between a natural, choice theory right to enforce your own rights, and a state having the monopoly on deciding whether you can do so. If I have a choice theory right, it means that, unless I waive it, others are under a duty to respect it. The power to waive, however, is mine, whereas a territorial monopoly of jurisdiction denies me this right within the territory to which it applies. Indeed, in practice the monopoly — not me — now exercises my principal right, leaving me to make do with sub-rights underneath its overall discretion. Having excluded arguments based on collective, hypothetical consent (unlikely in any case to convince the rugged-minded individualists of the Frontier) believers in choice theory natural rights appear to be stuck with something very close to Simmons’s philosophical anarchism.\(^{22}\) Though a monopoly of jurisdiction could, in principle, be possible, it would require unanimous consent from people within a territory; even if it got that, although people holding choice-theory rights could bind themselves to a state’s jurisdiction in perpetuity, they couldn’t bind their children\(^ {23}\). Those seeking to justify even a minimal state are forced to ask — what could an agency

\(^{22}\)This is the view that, in practice, no state is fully legitimate. Though there may be good reasons to obey laws, there are no reasons to obey them “because they are laws” See A. John Simmons, “Philosophical Anarchism,” in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 102–21 for an extended argument.

\(^{23}\)c.f. §4.1.2, pp. 190ff
seeking to become a state be entitled to impose on people within the territory
the seek control of, without obtaining their consent? May it “make them an offer
they can’t refuse”?

3.1.1 Nozick goes to the Bullingdon Club

At the time Nozick was writing *Anarchy, State and Utopia*, a student society
known as the Bullingdon Club existed at Oxford University. Its members would
hire out a restaurant, get disorderly and drunk, and then lay waste to the premises.
However they, unlike less pecunious hooligans would then pay not only the bill but
also for any damage they caused and loss of business that might have occurred
while fixing the premises. The Club, as we know from the photographs of the
current British Prime Minister in his student days, required members to wear a
garish and expensive uniform. This fulfilled at least two functions, first, that only
young men able to afford to pay compensation would be admitted, and second,
the sight of the boys’ distinctive dress could assure restaurateurs that there was
no need to eject them as they got rowdy because they would pay for any damage
they caused.\(^{24}\) This second function addresses one of Nozick’s central concerns:
that while infringements of rights could be compensated for, leaving the victim
no worse off than they would have been if the crossing had not occurred, the fear
generated by the possibility that boundaries might be crossed (i.e. that rights
might be violated) even with retrospective compensation, could not. As Oxonian

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\(^{24}\) The brash uniforms and outrageous behaviour were a rather crude form of signalling that
the club’s members were so wealthy that they could afford to engage in such costly activity, and
wear such pointless regalia.
reftaurauteurs had no need to fear, they were in the same position as Nozick himself, who wrote:

If told my automobile may be taken during the next month, and I will be compensated fully afterwards for the taking and for any inconvenience being without the car causes me, I do not spend the month nervous, apprehensive and fearful.\(^\text{25}\)

But where such fear is present, Nozick argues, compensation is impossible (or so prohibitively expensive as to be impossible),\(^\text{26}\) so infringements should be forbidden. This still raises the question however of why we should allow compensation at all. Why not simply forbid infringements outright?

Nozick claims compensation is needed because, if infringements were forbidden, people would be liable for punishment for all kinds of accidental though insignificant rights-violations, and this would “incorporate all kinds of risk and insecurity into people’s lives.”\(^\text{27}\) That there is also a category of interventions that are clearly in the interests of the people whose rights are, technically, violated, and which it would be absurd to prohibit makes this more plausible still. Suppose I were to throw you out of the path of an oncoming train. Even if I thereby broke your arm it would be very odd indeed if you then sued me and demanded compensation (though the argument in this chapter proceeds from the assumption that


\(^{26}\)Ibid., 72.

\(^{27}\)Ibid., 72.
the protection of natural rights is an uncompromising value; this is, to my mind, an occasion where treating justice as an uncompromising value, rather than the specification of natural rights, is at fault.

It is possible to imagine alternatives to Nozick’s general weakening of rights. It might be enough to require the compensation to be paid by the person who would have been responsible for the greater violation of rights that the unconsented infringement was designed to prevent (perhaps the train driver, or the person who failed to maintain the signal that would have stopped the train). Or, could there not be a justification for urgent paternalistic interventions against something for which no agent is responsible, such as a brain disease or a flooding river out of whose reach I moved your car? Just as one has no recourse in tort against Acts of God, perhaps in this case nobody owes you compensation.28 Had I been negligent with your car (or your brain), I could be liable for that; but it seems to me that a general presumption that if it is impossible to communicate with someone, or identify exactly whom it is I need to communicate with, actions may be taken to protect you and your property from Acts of God, is a sensible way to proceed. A further alternative, that in exacting compensation, the alleged victim would have to demonstrate that she had suffered harm compared to what would have happened if the infringement had not occurred, would seem to me to be to be consistent with Mack’s critique of Nozick discussed below.29

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28 A luck egalitarian would classify these as brute luck, and seek to distribute their costs equally.

29 c.f. §3.1.2, pp. 152ff
In any event, the weakening of rights so that they may unilaterally be infringed provided compensation is paid proves very useful to Nozick. One of the rights that may thereby be infringed, Nozick argues, is a person’s right to protect their own rights. There are circumstances, he concludes, in which someone may suppress another person’s right, and expiate any wrong by offering compensation for this infringement. These occur when a person believes, honestly, according to his or her own lights, that someone else uses decision-making procedures that will impose a risk on others that their rights will be violated in unreliable pursuit of justice. This risk generates a generalised feeling of apprehension, and since, he argues, apprehension cannot be compensated for because it is not possible to assign responsibility for its source, it may be forbidden provided the suppressor pays compensation for violating the unreliable enforcer’s right to exact justice on their own.30 Everyone, not just the dominant agency, has this entitlement to suppress unreliable attempts to exact justice: “it does not claim to be the sole possessor of this right, everyone has it.”31 Hence, since it is natural that every agency (or independent) can be expected to believe its procedures are the most reliable (otherwise it would choose different ones), every agency or independent would fear its rivals’ procedures and seek to suppress them in favour of its own; the one that succeeds in doing so becomes the arbiter of rights-protection in a given area, or in more usual language, a State. Nozick further claims that the cheapest way for an agency to provide this compensation is to supply the


31 Ibid., 110.
suppressed independent enforcer of justice with its protective services.\textsuperscript{32}

The agency obtains obedience within a given territory: it decides whose rights can stand in conflicts, it authorises punishments for violation, and at the same it supplies them with protection. The independents can refuse the protection, in which case their rights to exact their own justice will be suppressed anyway, without the compensating protective service.\textsuperscript{33} We have moved from absolute individual rights, to compulsory obedience supplied together with security. The similarity between this arrangement and an idealised depiction of feudalism should give a liberal pause.

\subsection*{3.1.2 Mack and “anti-paralysis”}

Eric Mack has also criticized Nozick’s argument. He imagines a debate between Nozick and what he terms an “individualist anarchist”, but which we can recognise as one of Nozick’s independents. He argues that, if Nozick really takes rights as seriously as he claims at the beginning of \textit{Anarchy, State and Utopia}, the individualist anarchist can insist that

\begin{quote}
one must reject even the minimal state in favour of a system of competing private protective agencies. For even the minimal state...must obtain and maintain something like a monopoly over the protection of
\end{quote}

\begin{footnotes}
\textsuperscript{32}Ibid., p.112.
\textsuperscript{33}P. 113 Ibid.
\end{footnotes}
rights within its claimed territory in order to be a state.\textsuperscript{34}

The anarchist, Mack claims, rejects this attempt to monopolise rights protection,\textsuperscript{35} In doing so Mack considers two separate arguments (although he interleaves discussion of them in the text) for why monopoly might be allowed, which I shall call the “public good argument,” and the “liability rule.”

The public good argument amounts to a claim that protection of rights is something that would be under-provided in a free market, and that a monopoly would benefit everyone. Mack correctly explains that even if this were true, it would not convince the anarchist, since if individuals have rights

\begin{quote}
  in virtue of those rights they are not required to purchase protective services even if the alternative is that each individual will be subjected to more extensive infringements of his rights than would be involved in his being required to pay for those protective services.\textsuperscript{36}
\end{quote}

It is, after all, the individual anarchist who should be in the position to decide whether the cost of these protective services is worth paying. If he wants to pay more (e.g. to buy his own weapons or hire his own guards) than he would owe the


\textsuperscript{35}Ibid., 97.

\textsuperscript{36}Ibid., 105.
protective agency in taxes, that should still be up to him. And worse, from the libertarian point of view, is that if the public-good justification were true, it would also justify the provision of other public goods that happened to be less than optimally provided by the market. A classical liberal consequentialist, keen to preserve rights in some overall sense might well favour a state whose job it was to provide public goods, whatever those happened to be, and leave other resource allocation to the free market. John Tomasi, might for instance, find such a state attractive, but someone who believes that the virtue of rights lies in them being inviolable side-constraints would not. The individualist anarchist is just such a person.

Mack’s liability rule argument against Nozick is stronger: so strong in fact that Mack falls foul of it himself. Mack’s claim is that Nozick, in order to justify his monopoly, needs to claim that the suppression of competing protective agencies “are not really violations of the rights of independent self-protectors or indepen-

37 Libertarians usually adhere to a narrow definition of public goods that limits them to goods that are “non-excludable,” that is, goods which, once provided, must be indiscriminately provided to all who benefit from them, even if they do not pay for them. This category of goods does not include things like health care and education from which it is possible to exclude non-payers but could include things like street lighting, some public health measures and national defence.

38 Ibid., 106.

dent suppliers of protective services.\textsuperscript{40} And Nozick does just that by moving from a conception of rights as being at their core claims that are protected by property rules (that forbid boundary crossings) to a conception of rights as being at their core claims that are protected by liability rules (that allow crossings as long as liability for due compensation is paid).\textsuperscript{41}

Having found Nozick’s attenuation of rights wanting, Mack ends up supplying one of his own. Though certainly less of a departure from rights-as-side-constraints than Nozick’s, Mack’s attempt to persuade the individualist anarchist to accept a monopoly of force and jurisdiction ultimately proves unsuccessful. Mack first suggests that systems of rights should abide by what he calls an “anti-paralysis postulate:”

Suppose we are considering whether an agent’s rights over her own person and (legitimately acquired) possessions remain fully intact if she is in the process of violating the rights of others. If we hold that they do remain fully intact, then we must deny that others have rights of self-defense and we must hold that in many circumstances individuals under attack must submit to the violation of their rights.

To avoid a specification of rights that yields this conclusion we must

\textsuperscript{40}Mack, “Nozickian Arguments for the More-Than-Minimal State,” 97, emphasis in the original.

\textsuperscript{41}Ibid., 108.
hold that the aggressor’s rights do not remain fully intact. But note that it does not follow that the aggressor’s rights totally disappear. The aggressor may, for example, still have rights against defensive force which is not necessary to defeat his aggression.42

Whether such a postulate is needed depends on whether it is possible for rights to conflict. If, as we do in this chapter, avail of the choice theory of rights, such conflicts cannot occur, and to the extent that they appear to, it is because we, usually for the sake of convenience, don’t specify rights in exhaustive detail. Thus, the question of whether an aggressor’s rights remain intact or not if she is in the process of violating another’s rights doesn’t arise. Suppose the aggressor is trying to steal your shoes. You may exercise your natural right to resist her attempt to take them, using the force necessary to do so (e.g. by moving her hands out of the way so that she cannot get to the brogues in question). This is just your right to enforce the other rights that you have. On discovering she is a world-champion martial artist, you enlist an armed guard, employed by your favourite protective agency, to help. If you were not in the state of nature, but in fact under the jurisdiction of political institutions, you could also enlist the state’s assistance, if not to prevent the theft, at least to get the shoes back. But it is not necessary to say that the aggressor’s rights were being restricted to avoid a conflict, just that if they were specified in full detail they would not include a right to your shoes, thus precluding the conflict. Since you have the right to your shoes you also have the right to protect them from theft. You would only violate her rights

42Ibid., 112.
if you used excessive force to protect them. It suffices to note that there should be some criterion for determining whether force would be excessive. Moreover, even if rights were not required to be composable, the anti-paralysis postulate would still not convince the individualist anarchist. Mack argues that it could be invoked if

“the public goods feature of rights protection means that rights-bearers would be substantially less able to co-ordinate to protect rights (and rights are understood to preclude, in themselves, being forced to contribute to protection), so that a plausible specification of their rights would there not include an absolute prohibition against being required to contribute to protective schemes.43

because doing so would systematically diminish the prospects for the non-violation of those rights-bearers’ rights. Mack thus concludes as follows:

If a forced exchange is really needed to the funding of needed protective services (which will more extensively protect each individual from rights violations than the forced exchange itself will infringe), then the right of each of those individuals against being subject to the projected taking shifts downward from a right protected by a property rule to a right protected by a liability rule. Hence, a provider of protective services may require recipients of its services to pay for those services – as long as such a system of forced exchanges is really necessary for

43Ibid., 113.
the financing of (more than sub-optimal) protection of individuals’
rights and the extent of protection provided to each individual fulfils
the provider’s liability to provide compensating protection (If any of
these conditions are not met, the coercive taker violates the rights of
individuals).\textsuperscript{44}

This account requires further explanation. Mack argues here that most rights
should be seen as what he calls “property rules:” absolute side-constraints on
action, but that it is possible to conceive of circumstances in which putting these
absolute barriers in place would be counter-productive. These circumstances could
occur if people in an area, arranging their rights-protection separately, would end
up acquiring less rights-protection for the amount they were prepared to pay
than if this service were provided by a monopoly. A given quantity of protection
would be more expensive under competitive market conditions (or less effective
for a given price) than if supplied monopolistically. Mack argues that in these
circumstances although a state that taxed you and protected your rights would
suppress your right to secure your own protection on the marketplace (as well as
people’s rights to enter the protection business) you would end up getting more
rights protection in exchange for your taxes than if you had tried to purchase it
at market prices. Mack has shown, that in these conditions, it would be rational
for an economically maximising person to prefer being ruled by state over buying
protection from one of a number of competing agencies. But this is still not
enough to convince an individualist anarchist who is not under any obligation to

\textsuperscript{44}\textit{Ibid.}, 113.
be economically rational. The assumption is that he should be capable of rational choice, not that he always acts rationally, and to pursue economically efficient ends to boot. He may prefer to protect his rights himself or hire an agency, even though that would be more expensive and less efficient. He has every right to incur those extra costs. If an agency prevents him doing so, it doesn’t thereby persuade him to change his mind, it just coerces him. Mack thus also fails to defend individual rights as inviolable “property rules.”

3.2 The Impossibility of Unilateral Compensation

Mack’s critique cannot be made to stick: even his very minimal state cannot be imposed without violating rights. But could a rights violator compensate for this violation, and thereby eliminate the injustice of its imposition? If it could, Nozick’s justification for a state would still be viable, for according to his invisible hand explanation, a state is merely a very successful protective agency that succeeds in suppressing its rivals’ attempts at enforcing justice. Hence, if a state is to be justified, an individual must be able to unilaterally suppress another person’s right to enforce justice and then be able to unilaterally determine that the wrong of the suppression has been expiated by offering them a unilaterally determined quantity compensation for this violation.

Let us now consider what happens to rights in an instance of unilateral imposition that could plausibly arise in a state of nature. Suppose you come to observe a group of men approaching the wall surrounding the homestead you and your family put together over the last few years. They are armed, but most people,
in these conditions usually are. Maybe they’re just walking, with weapons for, self-protection or hunting. Or they might be robbers. As it is cold, their faces are covered up; but is it to protect them from the elements, or to hide their identity? The issue for us is not the effect of uncertainty, but the nature of what occurs should you decide that it is prudent have your guards shoot the approaching armed men. By issuing that order, you decided to act preemptively, suppressing the men’s right to enforce their view of what justice demands in favour of your own. In this way it is possible to describe your decision to order your guards to shoot as preempting consideration of whether they had a right to walk near your compound bearing arms; or for short, preempting their rights.

3.2.1 Preemption and Jurisdiction

Focusing more closely on the preemption of rights, note that under the choice theory, to have a right to \( X \) is also to have the ability to exercise your right to \( X \). First imagine you and I are in dispute. You think you have a right to \( X \), while I think I have a right to stop you exercising your right to \( X \). A state of affairs in which it would be permissible for me to use force to stop you exercising your right to \( X \) would be a state of affairs in which you would not have a right to \( X \). If I preempt your right, I am acting as if the state of affairs where you did not have the right obtained.

Now suppose that rather than just acting as if the second state of affairs prevailed, I operated a biased dispute resolution procedure that always preferred my side of the argument to yours. In the unlikely event that you accepted that you should defer judgments about whether your rights had been violated to it, the practical
effects would be the same as if I had pre-empted your rights, viz. you would not be entitled to exercise $X$, and I would be entitled to stop you from $X$-ing.

Third, suppose that, responding to your objecting to the biased procedure, I persuaded you (imagine that I am exceptionally persuasive) that I should use a discretionary one instead. Under the discretionary procedure, you agree to allow me to decide, at my absolute discretion, whether it is you or me who is in the right, and therefore whose apparent right is to be enforced, and whose apparent right is to be waived. This has important implications under a choice, or will, theory conception. Under this conception, giving me the power to make this decision, makes me the right holder, for I can waive it, not you. By operating this discretionary procedure, I have, with respect to $X$, extended my jurisdiction over you. This achieves the same practical effect (though not normative since effect you have given me your consent) as if had I preemted your right to $X$, and pretended that you had agreed to the discretionary procedure. If this were to hold true for all your rights, I would stand in the same relation to you as a state does to people under its jurisdiction. I would be able to decide which of your rights would prevail, and therefore when you would be entitled to use force.

Nevertheless, must a state’s control be so extensive? Is it possible for a state to only pre-empt some rights, notably those usually associated with criminal law (rights against assault, theft, and so on), but not matters confined to private contractual disputes? That is, if the state offers civil courts at which these disputes may be resolved, does it then come to pre-empt those rights or not? The choice theory takes the position that the important question is who has the right to waive? If, as with criminal law matters, the state can decide to prosecute whether
the victim agrees or not, then it has pre-empted the right; if as with civil law
matters, I can choose whether or not to bring a case, then it seems that the right
will not belong to the state, at least until that stage of the proceedings after which
it is impossible to withdraw. There has to be some such stage, even if it is only
after the judge has handed down the verdict. The state has, however, already
pre-empted any natural freedom to ignore the judgements of its civil courts. And
as a state has the power to decide which rights to preempt, a State, where one
exists, holds in fact if not in right, the powers that would belong to us were we
living outside the reach of political institutions.

3.3 Against a Utilitarianism of Rights

Preemption of rights can establish the kind of authority a state needs to be the
arbiter of jurisdiction in an area but it does so by overriding (if not expropriating;
see below\textsuperscript{45}) the rights of unwilling subjects. If it is possible to compensate them
for this violation, and the upholding of a system of rights is considered an uncom-
 compromising value, it would be possible for a Lockean state to rule legitimately. But
if it cannot, governments’ legitimacy is called into question, not by other values,
but by the very rights of individuals they are instituted to secure.

The attempt to justify unilateral compensation reinterprets the meaning of rights
so that rather than side-constraints against action, held separately by people,
they are determined to be amounts of another single value that can be compared,

\textsuperscript{45}c.f. §4, pp. 181ff
added up, and which are capable of cancelling each other out as though they were
ordinary scalar quantities. The problem persists if the requirement to operate a
single scale of compensation is relaxed in favour of allowing the state to impose
different scales on different people. The justification fails because if the scales
are imposed, then so is the compensation. Consider the alternative: if parties
agree on a scale of compensation, then the victim sets the amount and currency
in which it is paid, and therefore remains the holder of the right. But if either
the currency or amount of “compensation” is set unilaterally by the violator, it is
the violator who assumes control of the power to waive the right from the victim.
Agreed compensation is the voluntary trade in rights. Imposed scales of “compen-
sation” are no better than individual instances of imposed compensation. Such
a “utilitarianism of rights”\(^{46}\) perpetuates the problem of imposed compensation
rather than solving it.

I shall argue, instead, that there is a fundamental and irreconcilable moral con-
lict between a state’s monopoly of jurisdiction and an individual’s natural rights.
It manifests itself through the failure of compulsory compensation to fully make
whole those whose rights are violated. I shall show that if unilateral compensa-
tion is possible, that means some other principle is in fact held to override rights.
Absent such an overriding principle, the conflict between individual rights and
political monopoly appears insoluble. Because states possess no powers not dele-
gated from the individuals they serve (or, as “monarchs are but men,”\(^{47}\) certain

\(^{46}\)Nozick, *Anarchy, State and Utopia*, p.28.

\(^{47}\)Locke, *Two Treatises of Government*, 276 (§13).
individuals themselves constitute the political authority) the conflict cannot be located in a distinct political morality, but springs from the moral conflicts that individuals would face in a state of nature.

While it is easy to explain why people can be bound to a state to which they voluntarily transfer their powers to enforce justice, as we saw above,48 there remains the possibility that some people may prefer to enforce justice on their own. And though this is, at the very least suboptimal, perhaps even irrational, such an “individualist anarchist”, or “independent” may not be compelled to accept protection from a state or a provider of protective services who aims to become one, without violating their rights.

Nor are unwilling subjects as marginal as they first appear. It is certainly tempting to regard them as romantic Thoreau-type figures who just want to be left alone, and the benefits of the state being so overwhelming that only a few people would choose this kind of isolated, if free, life far from the benefits of civilisation. Any state of sufficient size could ignore these Thoreaus, and still maintain something close enough to a pure monopoly of force as has ever been claimed by states in the real world. The pool of potentially unwilling subjects is, however, rather larger.

Only people born into a state of nature, or at least into a world where only part of the territory to which they can feasibly travel is under state jurisdiction can choose to sign up to a state’s protection. Most are born in a state’s territory, and while they may in principle leave it, they have to go somewhere. Once the world becomes divided up between states, the choice men and women face is at best, if

48 c.f. §3.1.1, pp. 148ff
we assume borders are open, one of which state to be governed by, not whether to govern themselves or to submit to state authority.\textsuperscript{49} These new people, when they come of age, (see above)\textsuperscript{50} come into possession of the same right to enforce justice themselves that people born in a state of nature originally had. If states assert their respective monopolies of jurisdiction over them, they cannot allow people this right.

Yet, though when compared to the kind expansive liberal states that the social liberal tradition above\textsuperscript{51} attempts to justify, libertarian states can appear minimalistic, libertarians are not anarchists. They believe that suitably limited states are legitimate and can compel our obedience within their restricted sphere of competence. In the narrow set of circumstances for which they provide, coercion is permissible.

As we saw above,\textsuperscript{52} and though Steiner’s argument does not require him to understand justice as an uncompromising value,\textsuperscript{53} the argument he provides\textsuperscript{54} to

\textsuperscript{49}I am not committed to the view that states need not be territorial. Some other means of determining allegiance and jurisdiction (e.g. by heredity, location of birth, or oaths of fealty sworn) may also be possible.

\textsuperscript{50}c.f. §1.3, pp. 54ff

\textsuperscript{51}c.f. §2.3, pp. 87ff

\textsuperscript{52}c.f. §2.4.1, pp. 114ff


\textsuperscript{54}See Steienr, “Self-Ownership and Conscription.”
invoke “conscription” in the defence of certain rights could also be used to define a single ordinal scale of value according to which compensation can be assessed.

Such compensation can only ever be partial. The problem with pre-emption, as expressed in Nozick's automotive example, is that I am compensated for the taking of the car, but I am not compensated for the person who takes the car’s deciding to impose these conditions upon me. Hohfeldian analysis makes this clear. If my right to my car is a choice-theory right, then because I have the right to the car, I also have the power to waive the right to the car. So, if someone asked me to agree to the arrangement Nozick describes and I did so, I would be exercising that right, but if they impose the compensation upon me then they would be violating it. Moreover, that power is itself a right. If I hold it, then I am also entitled to waive the power. The car-taker could offer me extra compensation for violating the first power, but he would then be violating the higher-order power to decide whether to waive my power to waive the right to the car; a process that can go on indefinitely. It is therefore impossible for me to be fully compensated. The imposition of the compensation arrangement remains an assault upon my rights. It might be objected that this is of little consequence. Powers to waive powers to waive powers to waive ad infinitum appear rather remote from people's experience. Their remoteness should not concern the believer in the uncompromising supremacy of natural rights. One is entitled to stand up for one's rights, even in apparently trivial cases; and even if one were not, those higher order powers are not as insignificant as they first seem.

Consider a relatively impoverished university lecturer who happens to have his cheap ballpoint pen stolen by a passing billionaire. This billionaire takes pleasure
from stealing it, but feeling guilty, offers to replace it with a fountain pen. A little nonplussed, the lecturer accepts it as compensation. Now let us suppose that the same thing happens the next day, and every day after that. Though the experience isn’t terribly unpleasant at the start, after a week or two it starts to get irritating. The lecturer may always be compensated with an article of superior value than the stolen ballpoint, but there comes a point where he begins to feel that he’s being used as the object of the billionaire’s kleptomania. Even if we stipulate that the billionaire atones by supplying increasingly expensive pens and that after a couple of weeks of daily larceny the lecturer is presented with a fine piece crafted in the workshops operated by Mont Blanc, it would not be unexpected were he to begin to feel that his dignity was not being respected. The kleptomaniac billionaire may think this the harmless enjoyment of her vice. The lecturer has not, however been given any choice about whether he wants to help her indulge it. Though he is compensated for the violation of his right to the pen, his rights are still violated because he is forced to participate in this scheme of compensation. A state or proto-state agency that imposes compensation is thus in the same position as the billionaire. Even if romantic anarchists and children born after states have been instituted across the earth may choose to accept compensation for the violation of their rights, they may not be forced to accept a regime that imposes what it deems to be the amount and currency for this violation upon them.

It follows that a state in which person agrees to the schedule of compensation that is to apply to them (which could be, but does not have to be, the same for everyone) could rule legitimately. However, a state that makes an indefinite claim to monopoly of jurisdiction over an area or set of individuals, rather than a
claim to a monopoly over particular people who have agreed to the monopolist’s jurisdic-
tion, opens itself up to the possibility that enforcing its claim to monopoly will require the violation of the rights of those who do not wish to be subject to it. Moreover, if a Nozickian state chose to impose a single scale of compensation on people it would enforce unilateral compensation at the expense of the separateness of persons; if it imposed individual scales on everyone it would rule in an indefen-
sibly arbitrary manner. Though a state may well enforce many people’s rights, it is also highly likely to violate rights belonging to other people. A utilitarianism of rights changes the form of the offer the state imposed on you; it doesn’t allow you to refuse it.

Each time the state coerces one of these unwilling subjects and imposes compensa-
tion upon them for this coercion it does wrong. These violations are repeated. Since the unwilling subject has not consented to the regime, each violation that occurs causes the toll of injustice to mount. If violators did not, it would be equivalent to my supposing that should I break into your house and assert that I have thereby claimed a right to do so repeatedly, I would not keep violating your rights when I broke in again later. There is no set of state powers consistent with a state not violating the rights of those over whom it claims jurisdiction but who do not agree to its rule. State violations of their rights may only be minimised but never eliminated, and compensation for these violations can only ever be partial, never full. It appears\textsuperscript{55} that Lockeans cannot therefore count any state as fully legitimate even if rights are taken to be an uncompromising value.

\textsuperscript{55}Locke himself may well have only intended to supply states with qualified legitimacy. See above. (c.f. §2.4.2, pp. 123ff)
3.4 Conflict between state and rights?

The project of instituting a government in order to protect natural rights appears to have run into the sand. This conclusion may appeal to anarchists, but would be an admission of failure for classical liberals. Nozick’s argument becomes one to minimise the deviation from what the principles of justice in holdings would entail; attractive though such an option may be to a classical liberal, it does not in the end successfully resist aggregation.

If we want to keep the inviolability of rights, and argue that even if their violation is minimised, rights are still violated and wrong is still done, we must take a different tack. The alternative takes what first appears as a conflict between individual rights and the state’s monopoly character. It seems that there is an inconsistency between what’s necessary to respect individuals, and what’s necessary for a state to exist. What it may lose in consistency it gains however in honesty. Though rights are, unavoidably, violated, it at least recognises that the violation occurs and does not hide this fact by appealing to a disguised master value.

3.4 Conflict between state and rights?

We seem caught between individual rights, most importantly the individual right not to be governed and the assertion, made my any government, that it decides what rules are to be obeyed within the territory or binding upon the people over which it has control. To deny that individuals have rights against the state is to grant its officials the power that can be used for tyranny (see below for how this

\[56\text{c.f. §4, pp. 181ff}\]
could be controlled). Yet to deny the state the power to assert this jurisdiction is to deny that it is a state. This draws us towards the tradition of political morality in which it is claimed that the moral rules that govern political life are in some important ways quite different from those that obtain in our private business. I shall focus first on two prominent examples of this line of thought, the work of Machiavelli and of Michael Walzer.

Both men see the tension between public and private life more sharply than most philosophers. It seems that for Machiavelli, the conflict’s core was the evident opposition between the Christian ideals taught and preached and the virtues, which included such unchristian elements as exemplary violence perpetrated against the innocent,\textsuperscript{57} needed for public success. Moreover Machiavelli declined the option to resolve the conflict in the manner chosen by Savonarola: to condemn outright the worldly success and to put one’s trust in God’s word, or some revolutionary doctrine or other set of principles, nor to withdraw into a life of contemplation. Machiavelli saw value both in civic success and political action, and would deny that the conflict between public and private life, as Pocock\textsuperscript{58} and Berlin\textsuperscript{59} both, in their slightly different ways show, means he should be seen as immoral.

Though Walzer’s politics belongs to a less brutal age, he still argues that politi-

\textsuperscript{57}Niccolo Machiavelli, \textit{Discourses on Livy} (Chicago: University of Chicago Press, 1996), 214 (Bk 2:3).


\textsuperscript{59}See Berlin, “The Originality of Machiavelli.”
3.4 Conflict between state and rights?

cians even today don’t have the luxury of withdrawing from ruthlessness. As with Machiavelli’s Roman heroes, their licence to depart from the normal private morality is derived from their desire to achieve things for the political community of which we are also members. If the views Walzer expresses in Political Action: The Problem of Dirty Hands take a rather less sanguine view of sacrificing the individual for the good of the state, he nevertheless argues that there are times when we want politicians to commit moral wrongs in our interests and our behalf. His use of the example of a politician who is confronted with the choice of having a terrorist tortured is of course well known, but I’ll focus instead on a less dramatic one, but which because less dramatic describes a kind of political decision in which we would expect most politicians are frequently to be involved.

Walzer asks us to imagine a candidate, an honest and scrupulous candidate in whose policies we fervently believe. The only way he can secure election is to make a corrupt and dishonest deal with a party ward boss involving the quite illegitimate and probably illegal awarding of school building contracts in line with the ward bosses wishes. He asks us to imagine as well that our candidate has made his name and campaigned on, among other things, a promise to end this kind of

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62 The candidate seems to be modelled on George McGovern who did a not dissimilar deal to secure the Democratic nomination in the 1968 presidential election. Jed Perlstein, Nixonland (New York: Scribner, 2008)
corruption. Walzer’s contention is not only that the candidate should do the deal, but that we should want him to do the deal. We should want those we vote for, and who, by and large, seek to do good in public office, to be able to deal with the world as they find it, and to be open to the possibility of breaking the occasional rule if this is required. Unlike Machiavelli, for whom the politician should “know how to do evil, if that necessary,” Walzer tempers this by explaining that these kind of immoral decisions should be rare; and that the moral politician needs to acknowledge that he has done something wrong: “it is by his dirty hands” that we know the good politician. He is a kind of civil disobedient against the moral law, acting on behalf of our political community, willing to accept censure if not punishment quite unlike Machiavelli’s successfully ruthless leader who is entitled to bask in the glory that is his earthly reward.

Though I have in this chapter derived, from Lockean origins, something like Walzer’s and Machiavelli’s conflict between private morality and statecraft, their strategies are not in the end available to a Lockean. Walzer gives a priority to political community that we can’t accept: individual natural rights are too important, and their very strength is what has led us to contemplate the moral conflict between natural rights and the state’s monopoly. Machiavelli also derives value not from people’s fulfilment in public life, the ruler’s satisfaction at achieving glory, the exhilarating struggle for power or even mainly the good that a successful state does for its citizens, but from the polity itself. I need to explain how


\[64\text{See Walzer, “The Obligation to Disobey.”}\]
the moral conflict begins with conflict inside individual men’s and women’s heads. I deny that there’s something special about public life, and maintain that the only sources of morality are individuals and therefore decisions and arrangements and practices they create. If the public realm matters, it matters because it is important to the people who compose it and whom it affects. If public ethics and private ones are in conflict I must be able to explain — though not necessarily resolve — the conflict by considering the individuals’ interactions, like physicists can explain temperature by the kinetic energy of molecules.

3.5 Macro from Micro

We can see that in Locke’s conception of the state of nature each of us is clothed in the powers of a very small political entity. We enforce justice, according to our own lights, just as a state does over a large territory. Locke himself warns that conflicts arise when each man is judge in his own case. But why is it important to us to take that kind of dangerous risk? Suppose I feel have an obligation to watch over my neighbour’s land while she’s away. If asked, I might give a number of reasons for the feeling: perhaps she has paid me for guarding services, or she once did my brother a favour or we had known each other since we were little; or it is simply that we are friends. It’s possible to explain each of these as a set of promises grounding duties, or as self-interest of the enlightened kind, for in this kind of world a reputation for honesty difficult to acquire but easy to loose is of considerable value. But can this coolly rational analysis fully explore the matter at hand?
One possible alternative is that offered by Stuart Hampshire. In *Innocence and Experience* and in his Gifford Lectures, Hampshire assimilates individual practical reason to deliberation under conditions of procedural justice. We weigh different arguments in the same way that a chairman weighs the debates in a council chamber or parliament. Hampshire thinks this is a universal feature of reason, that applies in democratic deliberative fora as much as the councils advising monarchs and tyrants — at least when the tyrants in question wish to use the council to discover where their (or their regime’s) interests truly lie. Through this kind of practical reason we weigh up arguments; we accept some, and dismiss others. In so doing we may end up with some loss: some arguments will just lose, their considerations overwhelmed by others more weighty (or perhaps more numerous). Hampshire thinks this can relieve us from what he calls “Machiavelli’s problem” — that it is far too easy to invoke reasons of state to justify inhuman or gravely immoral acts, and that these seem too easily to override the claims to justice that people otherwise have. Procedural justice will ensure that all claims are considered, though some will end up losing out.

Hampshire’s argument, however, does not fully address Machiavelli’s problem. His is an explanation of how we might do justice in a pluralist moral universe. Faced

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67 Ibid., p.8.

68 Ibid., 162.
with different claims, we weigh them up, seriously, considering their strength and importance and arrive at a conclusion. Intrinsic to Hampshire’s model of deliberation is the provision of equal and sufficient respect to the various considerations that impinge upon the decision to be made. Hampshire provides an alternative view of what justice could be: not the protection of natural rights, but the respect for procedural justice. He doesn’t tell us what claims justice has versus other parts of our character. Procedural justice, for him, is the forum in which those claims are assessed, his own kind of uncompromising value.

Yet the moral conflict doesn’t arise because we fail to pay sufficient respect to the different considerations. It arises because though we want to do justice, this isn’t the only thing we, or indeed other people, want to do. People face conflicts between those different demands, and asking them to do everything to ensure they do justice puts those other ends at risk. In the state of nature, those ends could be your life or those of people you love.

Susan Wolf has, I think, the best understanding of this. She offers a positive counterpart to Nussbaum’s more tragic pluralism. If Nussbaum depicted us as torn between different ends as though caused by the conflicting interventions by the different members of a polytheist’s pantheon of deities, Wolf argues that we love our other ends, ideals, and projects and aim to pursue them. Wolf holds that a practical reason which sees morality as a matter of stepping outside one’s personal interests, and considering things instead from an impartial “moral point

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of view” is unduly “narrow:” in illustrating her moral psychology with with examples of a mother staying up late to sew her daughter’s Halloween costume and a philosopher struggling to write the best article she can, Wolf maintains that we don’t do these things only, or primarily, to satisfy our preferences; but nor do we do them because doing so maximises the good, or because we thus act out of duty. For Wolf, our loves and projects have their own intrinsic value.

the characters in these examples are not so interested in getting what they want. Their interests, rather are directed outward, toward achieving something whose good they take to be independent of their wanting.

Thus if we imagine ourselves at risk of getting embroiled in some conflict, in the state of nature, we may see why we don’t always want to take all measures necessary to avoid sit down with our potential assailant and work out a suitable compromise. (And indeed why they don’t do the same.) We don’t risk fighting merely because calm deliberation might not be in our interests. Encounters in the state of nature form part of repeated patterns, and rational self-interest recommends that we do quite different things when incidents can be repeated, opening up the opportunity for reciprocity, the development of conventions to divide up resources in conflict and so on. It is rather that often it is not just our self-interests that are drawn into the conflict, but some person or project to

70Wolf, “Morality and the View from Here,” 214.

71Ibid., 298.
which we are attached and on whose behalf we engage. We would not often been
given explicit protective duties over someone we love; and clearly projects that we
value are in no position to convey such authority. In situations like this, we often
feel we must allow ourselves to act beyond the limits of justice to protect them
— limits which we acknowledge up to a point, but not completely,\textsuperscript{72} and chose to
do so at justice’s expense.

Compare this to the way Machiavelli contrasts Christian morality with the good
of the state. Its good is independent of both Christian values and the glory that
is the successful statesman’s earthly reward. We can thus understand Wolf as
generalising Machiavelli’s political ethics to consider the full range of intrinsically
valuable non-moral sources for which we care. Wolf writes

\begin{quote}
    even the things that we do have duties to do for our children are more
    happily done not out of duty but out of love\textsuperscript{73}
\end{quote}

I don’t think that Machiavelli would have found that a bad description of why
those statesmen he admired acted – out of love for their city. This thesis does
not admit the space to fully discuss love, or, indeed thoroughly address how
Machiavelli’s attitude to the state is to compare to it. Nevertheless, he admires
certain states, urges political leaders to put their own ends aside in order to further

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\textsuperscript{72}If we completely acknowledged them the political problem would disappear; we are trying
to understand a world where people try to do justice, but that’s far from the only thing they do,
and indeed it’s far from the only thing they can be expected to do.

\textsuperscript{73}Ibid., 209.
those of the state (and condemns those, such as Caesar\textsuperscript{74} whom he considers put their own interests ahead). He would, I think, not be ill-disposed to think that the best kind of politician was motivated “not out duty but [out] of love.”

If we ask a state, or an agency that seeks to become a state, to assert a monopoly, we ask it to do the same kind of thing, as our neighbour asked us to do in the example above — we ask it to protect us, as we would protect the people or things that we love against all comers. We ask it to impose its power on people who find itself in the area under its control, whether they like it or not, just as we would do individually in some sort of confrontation where we would only try, up to a point, to do justice, but may well allow our zeal in protecting the object of our love to exceed what justice requires. We demand it make potential assailants an offer they can’t refuse. That they may well benefit from the scheme of order that systematic application of the offer generates does not change the coercive nature of the imposition of public authority. We would have this “godfather” wield tremendous power against those we believe would do us harm. Without being able to distinguish between legitimate and illegitimate political power, are we forced, like Hobbes to leave it a sovereign answerable only to itself? Or can limits to its power, be drawn, as in constitutional polities, making the state less dangerous; that is, more like a sort of “fairy godfather” that defended people’s rights, without being tempted by the potentially tyrannical powers of godfatherly rule? Without such limits there is the ever present danger that the state will turn tyrannical and those leading it will become corrupt in the way that of Al

\textsuperscript{74}c.f. §5.1, pp. 220ff
Pacino’s character became in the later stages of Mario Puzo’s story. In the next chapter we turn our attention to institutional restraints on state power, and investigate whether, if a state imposes its power upon unwilling subjects, violating their rights, it can be prevented from abusing it.

Chapter 4

Clients and Citizens

We saw above that Nozick’s invisible hand account of a state formation foundered. A state exercising a monopoly of political authority over a given territory could come into existence without violating the natural rights of the people over whom it rules in the very rare circumstances when all people whom the state wishes to bring under its jurisdiction consent to its rule. Yet the minimal state Nozick defends also asserts authority to impose itself on people within the territory it claims who would prefer to enforce justice on their own. Since Nozick presents protective agencies as offering protective services in exchange for money, he renders the imposition of state authority as a compulsory variant of this exchange: subjects receive protection, whether they like it or not, and are pay a fee (i.e. taxes) to pay for it. Unwilling subjects are provided with a discount that is supposed to compensate them for the compulsory nature of the transaction. However, as argued above such unilateral compensation cannot be justified. The conflict is between a state’s claim to exercise a monopoly of jurisdiction over a territory (or
indeed, a determinate set of individuals) and individuals’ natural right to exercise that jurisdiction themselves cannot be avoided. It must be recognised. This chapter’s concern is how the effects of that conflict ought to be managed.

The dilemma is familiar to anyone who rejects Plato’s class of guardians\(^1\): states are made up of people who are broadly the same as those they rule over, subject to the same incentives, pressures, emotions and self-interest that, in Locke’s terms rendered life in a state of nature dangerous.\(^2\) If private individuals might abuse their power (even out of fear), or prove partial to themselves when acting as judges in their own cases, why wouldn’t people holding public office do the same?

We don’t, indeed, need to pose the question as hypothetical. Corrupt and abusive officials, from petty traffic cops in search of a bribe to buy their family’s Christmas presents to autocrats committing what we might want to call “grand theft stato,” are hardly rare. We are also fortunate, however, that means, such as the separation of powers, have been found to protect ourselves at least to some extent from such “stationary bandits,”\(^3\) and that the structure of political institutions has effects at least as important as their origin. Their efficient design is a matter best left to constitutional lawyers, experts in state-building and possibly historians; we are here concerned with the normative aspects of there being such institutions, and in particular, whether natural rights require certain institutional forms, and whether there are limits to what they may, even in principle, set out to achieve.


\(^2\)Locke, *Two Treatises of Government*, 326 (§90).

\(^3\)See Olson, “Dictatorship, Democracy, and Development.”
States' assumption of coercive power, even when pledged to protect individual rights puts them in a position to enforce final judgement on whether their own officials have violated their agreement with “clients” who have exchanged their right to enforce justice for the state’s protection. Awareness of this aspect of state authority has most recently been revived by writers in the neo-Republican tradition including Philip Pettit and Quentin Skinner. Though I reject the republican understanding of liberty, its analysis of domination is relevant to states’ assertion of political power. I argue that a state’s assertion of its monopoly of authority amounts to the expropriation of procedural powers and immunities, which I call “rights of justice,” from its subjects and these put it in a position to dominate them. The will theory of rights’s expression in terms of Hohfeldian incidents allows me to explore how certain classical liberal institutions permit states to go some way to reassuring its subjects that they remain beneficiaries of what had been their rights, and may thus be classed as “citizens.” Even though the state has expropriated its subjects, these institutions, which have to be paid for through rights-violating taxation, may be defended in a fashion similar to its justice-enforcing nightwatchman functions.

4.1 The Importance of Procedure

That there is a conflict between the state’s claim to monopolise jurisdiction and a person’s right to enforce justice themselves can be seen most clearly from the perspective of the earlier stages of Nozick’s invisible hand state formation, in which the agency has yet to assert its claim to be a state and so our judgement
is not clouded by the panoply of concepts and monopoly of legitimation that states use to bolster their assertion of power. Recall that Nozick’s invisible hand account imagines state-like functions to be services that could be bought and sold on a market, rather than provided publicly and paid for through taxation. His model is like the early fire brigade. Before municipal fire services were established, households could subscribe to one of several competing private fire brigade services (usually provided, for obvious reasons, by insurance companies). Similarly, Nozick imagines that before state institutions were established, individual companies set themselves up in the business of protecting their subscribers’ rights, resolving disputes between their clients, and between their clients and the clients of other companies (or those who have not hired a company to protect them). When one company becomes dominant within an area, something Nozick thinks inevitable because he takes rights protection to be a natural monopoly, it behaves like a state.

His argument relies on Lockean normative content. The individuals in question are endowed with natural rights of self-ownership, and entitled to acquire property in accordance with Nozick’s historical entitlement theory of justice in holdings. (I defend a different, ecological, specification of natural rights above, but the argument presented in this chapter is neutral between these accounts). These rights come with powers of enforcement attached. For Locke these are set down to preserve the the Law of Nature “that no one ought to harm another in his Life,

\[4\text{c.f. §1, pp. 29ff}\]
Health and Possessions,\textsuperscript{5} and may be enforced by anyone.\textsuperscript{6} Bear in mind that the enforcement powers carry with them a restriction that they may only be used on an offender “only to retribute to him so far as calm reason and conscience dictates, what is proportionate to his Transgression.”\textsuperscript{7} The contract a person concludes with a protective agency, in Nozick’s view, takes the form of an exchange where the client agrees to pay the agency, and in exchange the agency agrees to enforce the client’s natural rights plus rights that the client has generated from contracts she has signed. In exchange for receiving an obligation to protect her, the client has handed over some money \textit{and} her powers of enforcement. Because the client was originally subject to the condition that enforcement be proportionate and subject to “calm reason,” this condition is therefore transferred to the agency.

A protective agency could by these means acquire authority to seek resolution of disputes its clients had with the clients of other agencies or individuals who had declined to hire an agency at all. In the last chapter we asked whether a state could impose its authority over unwilling clients. Here we investigate the extent of its authority over even those who willingly submit to it jurisdiction. What happens, though when an agency engages in a dispute with a client, or when two of an agency’s clients are in dispute with each other? Both are aspects of the same question. An agency’s ruling in a dispute between two clients of the same agency would either be accepted by both parties, so cease to be a dispute; or, if one

\textsuperscript{5}Locke, \textit{Two Treatises of Government}, 271 (§7).

\textsuperscript{6}Ibid., 272 (§8).

\textsuperscript{7}Ibid., 272 (§8).
or both rejected it, parties would find themselves in a dispute over the agency’s ruling with the agency itself. Let us consider just such a dispute.

### 4.1.1 David and Goliath

Suppose that David and Goliath have both entered into contracts with the same protective agency, and that they each opt for what we shall call the “Warrior Policy.” Under its terms, disputes between fellow subscribers to the policy are to be settled through trial by combat. After an appropriate site is found, Goliath straps on his armour and gets ready for the contest, but when he sees David approach with a sling becomes alarmed and calls for a time-out. When signing the contract with the agency, he hadn’t anticipated that such “asymmetric” weaponry could be used, and had understood that trial by combat was limited to conventional fighting with swords, shields and clubs. An official employed by the agency unfurls a scroll and having consulted it, finds no such restriction in the rules. The official takes this to mean that warriors may resort to any weapon they choose provided they are able to wield it unaided. Goliath now finds himself in dispute with his agency, whom he accuses of mis-selling. How do he and the agency settle the dispute?

An agency that considered itself sovereign would believe itself to have a position on how disputes with its clients should be settled. Even if it claims to operate according to a charter, not its officials’ arbitrary discretion, then it either must establish a body that interprets the charter; or refer the case to yet another organ. If the latter, that institution, and not the agency, in fact exercises the monopoly
of jurisdiction. Rules of adjudication don’t resolve the problem; they just remove it from the agency to the adjudicator.

To be clear: there’s no *a priori* requirement that Goliath accept with the agency’s ruling. Whether the agency is entitled to rule in disputes with its clients is something that depends on the terms the clients negotiated. Ordinary commercial contracts frequently include clauses specifying how disputes about their interpretation are to be resolved, and Goliath and the agency could avail of a similar mechanism in this case. It is possible that Goliath may have transferred his natural right to adjudicate even this dispute (subject of course to the terms of the Law of Nature) to the state-agency; but he could equally have kept it for himself. If he and the agency agreed to accept the judgment of a third party, this, as noted above, merely causes the problem to recur, this time as a dispute involving Goliath, the agency and the third party adjudicator.

Locke appeals to divine intervention to escape the quandary. He would have thought that Goliath could transfer most, but not quite all his rights to the agency, because some rights, including the right to decide to end your own life, belonged to God. This allowed him to assign the ultimate assessment of the legitimacy of an insurrection, and therefore of a government, through his interpretation of the people’s right of revolution as the right to submit a dispute about a state’s claim to adjudicate and enforce justice to the Almighty.\(^8\) A secular conception of rights cannot however assign sovereignty to God. Furthermore, under the choice theory of rights, the right-holder is sovereign and may alienate all her natural rights,

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\(^8\)Ibid., 412 (§222).
so it is theoretically possible for a state to claim an unconditional monopoly of jurisdiction. Goliath *could* have signed over all his rights of adjudication and enforcement, which we shall from now on call “rights of justice,” to the agency.

If Goliath does hand over those rights, this would entail giving the agency the right to use its procedures to determine the outcome of a dispute it has with him. Under these circumstances, we would conclude that there is no moral difficulty in the agency’s official deciding that the rules of the trial by combat as he sees fit. Our concern with Goliath’s liberty would end there: having chosen to exchange his rights for protection, he has no standing to complain if he regrets it later. A state in which everyone did the same on these terms would thus be entitled straightforwardly to govern.

This however evades the problem of political obligation rather than solving it. It’s far from clear that everyone would agree to those terms. Some might prefer to hold certain rights of revolution in reserve (and include in their contracts safeguards like *habeas corpus* or one that their “right to bear arms shall not be infringed”) or require a different agency to pronounce on disputes they had with their supplier of protection. Unlike Locke, Weber and Nozick don’t allow such powers to be reserved. Their states’ assertion of a monopoly of “legitimate,” i.e. recognised, force (Weber) or justice-determining procedures (Nozick) precludes it. A Weberian state could not countenance a right of revolution: it would claim (as states routinely do) that it was in the right and its opponents traitors who belong hung from the gallows or in front of the firing squad. Nozick’s dominant agency would

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9The Second Amendment to the US Constitution.
override the rebels’ justice determining procedures (being dominant, it would do so successfully; if it failed, the rebels would take its place and impose their procedures instead). There’s no question of the dominant agency denying itself the ability to suppress rebellion if it deemed that necessary to protect its clients’ rights.

Someone who believes she holds some of her natural rights in reserve therefore seems to find herself in the same relationship to a state as the independent enforcer of justice whom Nozick argues a state must override and whose position was discussed above.\textsuperscript{10} This is not however the whole story. Might a state not recognise those rights itself? In this vein, the tenth amendment to the U.S. Constitution proclaims:

\begin{quote}
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
\end{quote}

Nonetheless, it is the judicial branch of the federal government that decides how far these rights stretch. A person might believe that they have their natural rights guaranteed by the government but it is an organ of government that decides when their rights are breached and how they may be enforced. The power to enforce or waive rights is held by the state, delegated to certain officials, according to rules set out in the constitution and relevant statutes, but interpreted by other state officials sitting on the Supreme Court. The governmental institutions of

\textsuperscript{10}c.f. §3, pp. 137ff
the United States have notably robust checks and balances built into them, but even they do not always work effectively (e.g. as with the internment of Japanese Americans during World War II\textsuperscript{11}). And though the constitution did obtain the consent of those who voted for federalist representatives to the ratifying conventions in 1790, the U.S. government did not necessarily obtain the consent of those who voted against it (let alone slaves and women). Notwithstanding Jefferson’s belief\textsuperscript{12} that each generation might well have to authorise a new constitutional settlement, Americans are not in a position to do so.

### 4.1.2 Clients and Subjects

None of this of course is to condemn the United States or the American constitutional tradition, which has in fact been a remarkably successful experiment in liberal, indeed Lockean, democratic government. It is, though, to observe that this is despite its expropriation of its citizens’ natural rights. It has been so successful because it possesses political institutions that, most of the time, protect citizens from abuse by government officials, so although the state has in fact expropriated its people’s natural rights, its officials act as if it has not, and that those rights remain the property of their rightful owners. I shall turn to this important function that republican institutions play below\textsuperscript{13}, but first we have some remaining

\textsuperscript{11}George Brown Tindall and David A Shi, \textit{America: A Narrative History} (New York: W W Norton & Company, 1984), 1144.

\textsuperscript{12}O’Brien, \textit{The Long Affair}, 42.

\textsuperscript{13}c.f. §4.2, pp. 193ff
business dealing with political authority in a Nozickian minimal state.

Such a state rules over two kinds of people. In the first category are clients, those who explicitly consent to the authority and who therefore pose no moral problem. Members of the second, however, have withheld their consent and might be termed “subjects.” Their natural rights of justice have been taken without their owner’s consent and have had the state imposed upon them. Subjects far more numerous than it may at first appear.

Consider the offspring of the first generation of clients. When they come of age, they become entitled\(^\text{14}\) to the full range of natural rights. Yet they find themselves under the authority of a state, without actually possessing the natural rights of justice. The moment their rights come into existence, the state they are under expropriates them. Even if the state allows the new subjects to leave, they have to go somewhere else, in all likelihood somewhere under the authority of another state.\(^\text{15}\) Hence, a state that starts out ruling a voluntary community of clients will gradually be transformed into one that claims absolute authority over subjects, as the clients’ children grow up without it obtaining their consent.

\(^\text{14}\)c.f. §1.3.2, pp. 56ff

\(^\text{15}\)Otsuka develops an argument Otsuka, Libertarianism Without Inequality, 90. that a state’s legitimacy is contingent on allowing individuals to secede (he assimilates statehood to appropriation of resources) and establish their own personal political entity (or “monity”) elsewhere and be entitled to receive enough resources to have equal opportunity for welfare with everyone else. This would also mean that each state would have to accept something less than a full monopoly of jurisdiction because the body in charge of calculating opportunity for welfare would make the authoritative decisions.
Our central problem remains. If people lived according to the law of nature, they would have been able to resolve disputes without a state to impose order among them. But if they are not the sort capable of trusting each other, why should they trust the state’s officials instead? Setting up an ideal state whose officials do behave properly specifies the most that a state, charged with protecting rights may do. It accordingly serves to resist claims made by royal absolutists in Locke’s day, or Rawlsians in Nozick’s, in favour of more extensive state authority. It does not satisfy someone worried about state officials who exceed their authority or abuse their power. This is not a mere administrative matter: it is of practical importance given the frequency with which states exceed their authority. The theoretical maximum authority that a “government of angels,” to adapt James Madison’s phrase,\textsuperscript{16} may wield exceeds that which it is wise to entrust to one made up of “but men.”\textsuperscript{17}

We might imagine that at this point an anarchist would be entitled to make a self-satisfied interjection: “I told you so; you’ve now admitted that all states violated rights and therefore are illegitimate.” Yet in the absence of political authority, most people’s freedom does not bloom. People try to take advantage of what power they have to get what they want at the expense of others.\textsuperscript{18} They establish


\textsuperscript{17} Locke, \textit{Two Treatises of Government}, 276 (§13).

\textsuperscript{18} In the terminology of the choice theory of rights, which holds that the aggregate amount of freedom is constant, this would be written: “freedom is distributed to those most willing to use or threaten force to bring other people under their control.”
their own, small, spheres of authority where they can, and fight each other to expand them. Perhaps if they were, if not morally good, at least all willing to be bound by Locke’s law of nature they could survive without a government, but it’s not clear that these beings would even need politics — natural law would be sufficient to bring order to their affairs. Rather, as I have argued repeatedly throughout this thesis, politics arises because we’re not angels or robots. It is worth asking how we would behave if we were; but confining ourselves to that question makes political philosophy appear far more tractable than it really is.

The people who hold political office are much like the rest of us and subject to the temptations and vices as we. To a Fitzgeraldian who insisted “The rulers are different from you and me,” we would be well-advised to reply, with Hemmingway. “Yes, they have more power.” They can indulge their weaknesses and vices more than we can and can cause more suffering as they do. This makes it all the more important to think about how power is to be arranged so that they may be prevented from doing so.

4.2 The ‘Republican’ Revival

Giving up the assumption that the rulers will always behave as they ought means we have to think about what normative limits should be placed on their freedom. On the invisible hand account, the power that a state official holds on behalf of the dominant agency that has become a state has two sources. Some of it is likely

\[ \text{Ernest Hemingway is said to have replied “Yes, they have more money,” to F. Scott Fitzgerald’s observation that “The rich are different from you and me.”} \]
to have been obtained by free exchange with willing clients, for the agency owes its dominant market position to being able to attract a large number of customers. The rest, however, it will have taken from unwilling subjects, having unilaterally imposed upon them the compensation that the previous chapter argues is inadequate. It follows that the agency has already violated some of its subjects’ rights of justice, and these put its officials in a position to get away with committing further violations. Though it is not possible to make an agency respect all their rights (otherwise it would not be able to compel unwilling subjects to obey) it may be feasible, by constraining its officials, to leave them with what a Lockean would consider a lesser, but still valuable, measure of liberty.

Quentin Skinner, and Philip Pettit revive a plausible “republican” candidate for that lesser liberty through an analysis of freedom well known in ancient Rome and the early modern European republics, notably in Italy and Aragon. They draw on the contrast made in Roman law between free men, who are *sui iuris*, or their own master, and slaves or minors, who have someone else as theirs. Its key requirement is “security against interference, in particular interference on an arbitrary basis.” Pettit, who uses “arbitrary” to mean “at the discretion of” rather than “at the whim of”, because the Romans deemed this sphere of freedom a man’s *arbitrium*, calls this kind of liberty “freedom as non-domination.”

He sought to distinguish this freedom from the sort one has if one is not actually interfered with by another who has the power to do so by borrowing from Roman

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law the principle that a man was either free, or under another’s jurisdiction. This latter category not only included slaves, women and boys, but also many grown men. These last were formally minors so long as their fathers lived, and subject to his legal jurisdiction, which extended to all matters. Like the subject of a benevolent despot, a Roman gentleman’s son might, in practice, have been allowed to come and go as he pleased by his indulgent father, but he remained subject to paternal authority. The same applies to the involuntary subject of a Nozickian protective agency: she may, in practice, be left alone by its law-of-nature-abiding officials, but it still claims the right to determine how any disputes it chooses to get into with her should be adjudicated. In Pettit’s terms, the son and the subject each suffer from “domination.” The _paterfamilias_ and state both possess arbitrary power, while son and subject both lack security from arbitrary interference.

Goliath is essentially in the same position as the Roman son. He feels that he has had his fate changed by the agency to which he and David signed up. It, Goliath believes, claimed the power to change the rules governing trial by combat, and worse, it claimed the power to decide whether or not it had exercised the power to change those rules correctly. Goliath finds himself dominated by the discretionary power of the agency-state, which has seized powers to determine the meaning of “trial by combat” that Goliath didn’t transfer to it.

We need however to be careful to distinguish the Lockean and Roman understandings of freedom. For Pettit, the existence of a relationship of domination

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²²Peter Stein, _Roman Law in European History_ (Cambridge: Cambridge University Press, 1999), 5–6.
determines whether someone is free. It doesn’t matter to him whether someone willingly undertook to enter into that relationship or not. He “deplores” the freedom of contract Lockeans hold sacrosanct because “consent to a form of interference is not sufficient as a guard against arbitrariness”\textsuperscript{23} and maintains that

\begin{quote}
It would be good if we did not have to think of the consent of those affected by certain acts of interference — say, by acts of law and government — as necessary for the non-arbitrariness and legitimacy of the interference. For that would mean that we did not have to look to such doctrines in the attempt to legitimate ordinary political realities.\textsuperscript{24}
\end{quote}

“Good” or not, this avenue is not however, available to the adherent of the choice theory of rights, in which identifying who controls the exercise of rights is essential. That understanding of rights defines the right-holder as the person having the power to waive a right, rather than as the beneficiary of the duty correlative to it. A choice theorist could, nonetheless, apply the principle “a person is not dominated when she possessed security against arbitrary, rights-violating interference” without thereby classifying the person as a right-holder. How might this be done?

Consider how Pettit has defined arbitrariness in a way susceptible to Hohfeldian\textsuperscript{25}

\begin{flushleft}
\textsuperscript{23}Pettit, \textit{Republicanism}, 62. \\
\textsuperscript{24}Ibid., 63. \\
\textsuperscript{25}Wesley N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning.”
\end{flushleft}
An act is perpetrated on an arbitrary basis, we can say, if it is subject to just to the *arbitrium*, the decision or judgement, of the agent; the agent was in a position to choose it or not choose it, at their pleasure. When we say that the act of interference is perpetrated on an arbitrary basis, then, we imply that like any arbitrary act it is chosen or not chosen at the agent’s pleasure.\(^\text{26}\)

This is equivalent to saying that the dominator holds the Hohfeldian power to interfere with the subject even if she does not exercise it. Thus, to be able to make a decision that is arbitrary in Pettit’s terms is the same as saying that one has a choice-theory right to do so. Hence, if we have a (choice theory) right to \(X\), that is equivalent to saying that I am my own master with respect to \(X\). As under the choice theory it is possible for a right’s holder and beneficiary to be different people, if I am dominated by someone with respect to \(X\), then this is equivalent to saying that I don’t hold the right to \(X\), the person dominating me does.

Now consider a radical writer living under an eighteenth century enlightened despot. The despot, style him Grand Duke, claims absolute power, but, as it happens, is convinced he ought to allow his subjects great latitude, including the freedom to publish seditious pamphlets. It appears that the radical writer holds

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\(^{26}\text{Pettit, Republicanism, 55.}\)
a liberty to publish, but he in fact does not. The power to waive (or enforce) the duties associated with that liberty (to refrain from interfering with whatever arrangement the writer comes to with publishers and booksellers to disseminate his tracts) rests not with him but with the Grand Duke. Should His Grace change his mind, he could extinguish that liberty at will. Though the radical writer benefits from the liberty, he does not hold it. Compare this to the unfortunate Goliath, who has voluntarily transferred some of his natural rights (to adjudicate disputes with other warriors) to the agency who administers the trial by combat. The agency, however, goes further: in asserting its monopoly of jurisdiction it helps itself to further rights that Goliath hasn’t yielded up voluntarily. It has expropriated them.

Note how this position is different from that adopted by libertarians including Nozick and Mack. In their view, a minimal state operates a policy of expropriation with compensation. I argued in a [previous chapter][#pluralism-godfather-against-a-utilitarianism-of-rights] that this fails to treat rights as side-constraints, but is instead an argument for the minimisation of their violation according to the determination of the state thus becoming at best a “utilitarianism of rights,” and at worst capricious individualised imposition of authority. Therefore, a state that makes an indefinite claim to monopoly of jurisdiction over an area opens itself up to the possibility that enforcing its claim to monopoly against independent doers of justice will require the violation of their rights, and preclude it being able to compensate them fully for the violation.

What then, does that expropriation mean for a subject? Evidently, the subject is left at the mercy of the state’s decision making structures and procedures. She
4.2 The ‘Republican’ Revival

has no recourse, within the state’s rules, against them. Yet, if the state actually exercises a monopoly, she has no recourse outside them either. Far from being trivial procedural rights, the rights that the state expropriates are vital. Nozick merely stipulated that the agencies would obey the law of nature. It is not enough for libertarians to be concerned about the powers that a state may permissibly claim, they must also be concerned that a state’s personnel may exceed the range of powers to which they are entitled, and thereby violate the rights it is their business to defend.

Locke’s justification for the benefits of living under a state was that since, as in a state of nature, people are bound to engage in disputes, some order needs to be brought to these disputes to prevent fighting; to limit violence to permissible self-defence and punishment; and to enforce compensation. A commonwealth (i.e., state) was the means to bring this order about. Unlike Hobbes, and Rousseau-style “social liberals” (see above,)\(^\text{27}\) Locke sets strict limits on what a state could be allowed to do. It ought to confine itself to enforcing people’s rights, rights that are either natural or created by contracts, exist prior to state authority and do not require public blessing.\(^\text{28}\) Locke’s argument however rejected the monarch’s godfatherly claim that anarchy was the only alternative to absolutism. Instead, the right measure of state authority would provide enough order to overcome chaos and violence. It would allow the arts of peace to flourish, knowledge to be accumulated and culture to develop, without possessing so much power that it

\(^{27}\text{c.f. §2.3, pp. 87ff}\)

\(^{28}\text{Locke, Two Treatises of Government, 250 (§123).}\)
would impose tyranny of its own. Though Nozick insisted that the worst effects of anarchy were at least comparable to the worst effects of state power,\textsuperscript{29} all but the most rapacious of states contribute to some extent at least to civilisation; but as they do, they amass power, and there is no reason to expect rulers would use that power to pursue their own private interests or caprice any less than private individuals in a state of nature do. Even rulers lacking in ill will, though pressure of time, inadequate information, or manipulated by devious counsellors, can be expected, as they foster civilisation, because of the power at their disposal, to commit serious violations of rights.

### 4.3 The purpose of Institutions

While Locke devotes considerable effort to how a state ought to be constituted,\textsuperscript{30} Nozick confined himself to describing a purely legalistic state. A minimal legalistic state cannot however do enough to protect itself from its own officials' frailties and worst instincts. It fails in its own terms. Unlike the common criticism that a minimal state offers too little economic security or allows unacceptable inequality, this one comes from within: it cannot quite live up to the reason it supplies for its own justification. The ideal can, nevertheless, be approximated. We now know that it’s possible to control the behaviour of states, without resort to countervailing armed force, through an intelligent balancing of powers (leavened by

\textsuperscript{29}Nozick, \textit{Anarchy, State and Utopia}, 4–5.

inculcation of certain civic ideals). A full institutional scheme would be outside the scope of this thesis, and anyway be rather too specific. The important question is what family of institutions could keep a state under control? Since the state itself is a legal fiction and all its behaviour can be reduced to that of the people in its service, this is a matter of working out how its officials, which by virtue of their power are in a position to violate rights, from getting away with it. These institutions are not there to provide compensation for the rights of justice that their establishment has expropriated: that, as we saw in Chapter 3 is impossible. They are to be set up to make the effects of this expropriation less bad by making it more difficult for that expropriation to lead to further violations of subjects’ substantive rights. Let us then think of a citizen as a subject who though she does not possess rights of justice, these having been expropriated by the state, is the beneficiary of substantive rights protected by public and social institutions.

Modern libertarians, however, conceive their ideal state as a judicial phenomenon. Its job is to resolve disputes between different people about what they are entitled to, possessed of the knowledge of natural rights, the disputants’ contracts for rights-protection (including, if one of them is a holdout of some sort, the ‘contracts’ imposed upon them) and the facts of the case. All of these functions could in theory be performed by any fair minded person, or even a suitably programmed machine. It seems as though so long as the judge (or machine) makes the morally correct decision, the disputants incur a moral obligation to comply with its ruling.

\[31\text{c.f. §3, pp. 137ff}\]
In fact, it’s more accurate to say that the judge or machine discovers the moral truth of the situation in question — a fact that is in principle accessible to reason and could equally be discovered by anybody including the disputants themselves if they were, heroically, able to put the particular circumstances of their case aside. Any realistic state of course in practice falls far short of this ideal: the argument of this thesis is that, in principle, all states will fall short.

No state can measure up because all states come into being or continue existing through the injustice of imposing themselves on unwilling subjects. That is, states take possession of rights that ought to belong to the people they rule. It is still possible however to offer a qualified defence of the state against the anarchist. The Hohfeldian analysis in the previous section showed how a situation in which subjects can remain beneficiaries of their rights even though they don’t possess the rights any more could be conceived.

Were states unitary agents, there would be little more to be said. To be sure we could take steps to programme the machine of state correctly; or if the state were to reflect the will of a single human being, seek to influence him or her to respect their subjects’ rights by composing a Lockean “mirror for princes” and an educational curriculum involving close study of the *Second Treatise of Government*, *Anarchy State and Utopia* and perhaps *Two Concepts of Liberty* and *The Metaphysics of Morals*. Having suitably indoctrinated our Little Prince, we could then cross our fingers in the hope that he would grow up to be a perfect Lockean despot. This project of course stands about as much chance of success as real renaissance-era mirrors for princes did. The efforts to make King James VI of Scotland a good Knoxite Calvinist did not go well: among the works composed
by this scholar-king is *The Trew Law of Free Monarchies*, a stout defence of the divine right of kings. Fortunately, real states, even despotic ones, do not act as efficient extensions of the sovereign’s will. They are collective bodies of people that even when they actually transmit a ruler’s will do so because enough others can be persuaded to agree. The framework within which a state’s officials work and the moral aspects of the exercise of their public capacities are supremely important. The former concerns political institutions while the latter, which we shall turn to in the next chapter, political ethics.

Goliath’s problem is one of trust. He doesn’t trust the state to run the trial by combat in a way that he believes correct. And lack of trust in the state is an instinct central to the libertarian’s political mind. By stipulating that all protective agencies obey Locke’s law of nature, Nozick avoids having to answer the anarchist’s version of the question addressed to Plato: who is to protect us from protective agencies? After all, what right would you have to defend yourself from an agency that would only ever do you justice?

Political institutions provide a partial answer. They bridle officials’ power, making it harder for them to abuse it. Two influential views of institutions conceive them

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32 VI and I, “The Trew Law of Free Monarchies.”


as rules — whether rules that regulate social conduct by impinging on individuals’
decision making processes, as elaborated in the treatment of institutions from a
rational choice perspective;\textsuperscript{35} or as John Rawls maintained,\textsuperscript{36} as attaching to
offices in society. Neither account suffices here. The principle underlying rational
choice analysis is a good one: that agents in a society do not approximate the
“administrative staff” of bureaucratic officeholders subject to “impersonal orders”
derived from a systematic legal code that Weber\textsuperscript{37} described as an ideal type. They
bring their interests, career-related as much as private, into work. But it does not
go far enough. As well as interests, people carry emotions — hopes and fears; loves
and hates; generosity and resentment; ambition or disillusion. The competition
for power sharpens them all. Meanwhile, Rawls’s conception of institutional rules
as practices, and whose distinction between the summary and practice concepts of
rules mirrors Kant’s private and public spheres of behaviour,\textsuperscript{38} confines rule-like
institutions to prescribing particular officers’ conduct: rules which, the officers by
definition have an obligation to uphold. Rawlsian institutions can describe what
office-holders, such as Weber’s administrative staff, should do; but do not explain
how the officials are to be made to obey them. Arranging society to limit the

\textsuperscript{35}For a seminal work in this tradition, see Douglass S North, \textit{Institutions, Institutional Change


\textsuperscript{38}Immanuel Kant, “An Answer to the Question: What Is Enlightenment?” in \textit{Practical
Philosophy}, ed. Mary J Gregor, trans. Mary J Gergor (Cambridge: Cambridge University Press,
1784).
4.3 The purpose of Institutions

chance that officials will abuse their coercive power is in Rawls’s terms part of the office of “reformer.”

Rawls’s institutions as rules tell us what it is to follow a rule. They don’t tell us what the rules should be or what we ought, or ought not do to enforce them. In contrast, the rational choice conception of institutions identifies their purpose correctly: to affect people’s behaviour, but its model of human behaviour would not have been unfamiliar to the “desiccated calculating machine” that Mill said his father’s Benthamite education had turned him into. Not, perhaps an inaccurate account of work in a well-functioning civil service (though even there, are the not factions and cliques?), it is an account of politics most plausible to someone who hasn’t participated in it.

Goliath’s distress was not caused by the lack of rules as such, but the discretion allowed to the single combat referee, and the variety of motivations that might cause her to abuse it. Why did the referee allow David to come armed with a slingshot? Was it whim? Was she bribed? Did she like the glint in David’s eye? Goliath needs an assurance that the referee’s agency wouldn’t enforce her decision if it had been made on those spurious grounds; he needs something that will affect

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41 Perhaps the mistake made is similar to that made in misapplying the prediction that markets are efficient. Properly understood this is the idea that in general, and on average, market prices reflect a rational assessment of what people think things are worth. It doesn’t mean that today’s price is too high or too low.
her behaviour.

This is a matter of the distribution of power. Power, as Arendt distinguished it from mere force, is a social and relational phenomenon that depends on other people recognising that you have it, and changing their behaviour to take it into account: “It springs up between men when they are together and vanishes the moment they disperse”\(^\text{42}\) as every dictator turned upon by his praetorian guard comes to learn. Why someone ought to command power is of course a separate matter but I conceive of institutions, formal as much as informal, as patterns in its distribution. Rules, when they are respected, can give rise to those patterns, but so can beliefs in loyalty, fear of authority or of what would happen in its absence, or principles about how one ought to behave in a certain social station, and so on. Certain patterns will be conducive to officials protecting for its citizens the benefits of the rights they have expropriated, and others will not.\(^\text{43}\)

Formal institutions (as well as informal ones, like British constitutional conventions, or the strong opprobrium attached to public corruption in Scandinavian countries) thus change the decision-making process that officials take part in. To imagine how this might work, suppose that the typical Danish official (Denmark is the least corrupt country listed in Transparency International’s Corruption Per-

\(^{42}\)Arendt, *The Human Condition*, 200.

\(^{43}\)The serious study of political power is a subject that contemporary analytical political theory has unaccountably neglected. Two partial exceptions stand out. Republicans provide an account of why it ought to be important, and rational choice theorists have identified the problem well, though adopt a simplistic psychology in seeking to understand it. Much more research is needed in this area.
The purpose of Institutions

ception Index) would believe she faced a different set of considerations when it came to awarding a public contract than the typical Russian (127th on the list)\textsuperscript{44} who might well believe that his public duties were circumscribed by duties to his political patron or siblings in search of employment). Leave aside for now whether our Danish official is honest, or whether she avoids corruption because fears either criminal punishment or social opprobrium should corrupt behaviour be discovered. We shall turn to moral considerations, and the peculiar moral considerations required in political life, in the next chapter. But note that we have excluded the possibility that the state may claim legitimacy, and therefore endow the incentives it provides with moral authority. The state’s existence instead is defended on the grounds that it is good at doing certain things — protecting rights — that would be permissible even if the state did not exist. Nevertheless, even this concedes too much authority to the state. Because the state’s power is based on its theft of the rights of its subjects’ rights of justice, it actually starts with less moral authority than private individuals.

Compared to individuals, well-run states may however set their undeniable superiority at keeping the peace against their inferior legitimacy in doing so to yield a qualified justification for their power. A state official could admit to a citizen: “you may not have consented to my rule” while still maintaining that “my government institutions are better at protecting your rights than you would be on your own so it is rational for you to accept my writ.” This justification nevertheless can only be offered thrice qualified. First, it only carries force against anarchy and

\textsuperscript{44}Transparency international’s most recent corruption perception index can be accessed at http://cpi.transparency.org/cpi2013/results/.
alternative political arrangements that would be less good at protecting rights. It could provide a benevolent monarch with a reasonable case if compared with chaos or tyranny (as late feudal kings would assert the benefits of royal justice over the warlordism of local magnates) but not against a partisan of a well-organised and liberal republic.

Moreover it depends on the overall rights protection being greater in the opinion of the subject and after the state’s coercion has been taken into account. The state cannot, in other words run a protection racket — and say, in effect: “nice bundle of rights you have there, pay your taxes, it would be a shame if anything happened to it.” It has to justify its existence by protecting the subject from people other than itself. It might be objected that this seems a bit far-fetched. No state openly sets itself up as a protection racket. But states do often argue that they provide public goods (security, clean air and so on) and they are justified in taxing people so they don’t free ride. This is the state doing something similar: since those other people are happy to pay for X, the state argues that you should too. Nozick, of course has demonstrated the inadequacy of the public good argument, by asking us whether one would be obliged to pay for books that someone had decided to supply you, without first asking if you wanted to buy them.

Finally, and most importantly, the justification offered only shows that it would be irrational for the subject to simultaneously (a) want his rights protected (b) judge that the state, even after the extra coercion it performed had been taken into account.

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46 Nozick, Anarchy, State and Utopia, 94–95.
account did a better of job than the alternatives, including anarchy, and (c) then refuse to accept the authority of the state. It does not provide moral justification for the state to coerce him into behaving rationally. Had he consented to the state’s authority, he would have transferred his rights to the state and his will would have been respected; whereas if the state overrides his rights and imposes its authority upon him, it overrides his will even if that overriding thereby gives effect to what the subject sincerely believes to be his own best interests.

There are moreover two conditions have to be satisfied before a state can claim that it might be justified in overriding a subject’s rights: it must be more successful than the alternatives including the subject’s own efforts in anarchic conditions at protecting the subject’s rights; it must also be more successful after the loss to rights-protection involved in having a state is taken into account. Thus the fact of providing rights protection does not in itself justify the ensuing measures required to put the protection in place. It may well be true for instance that pervasive video surveillance reduces the rights-violations involved in robbery. But if the surveillance is itself a rights violation then this has to be brought into the consideration when assessing whether it is justified. Similarly, if taxation is required to limit rights-violations, the rights-violations involved in taxing have to be set against the violations the taxation is enacted to raise funds to prevent. Note that this argument could also be adopted by a libertarian who does not share the plu-

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47 This thesis began from the starting point, which it does not attempt to justify, that persons’ ability to reflect on their uses of natural services within an ecosystem gave rise to natural rights. This ability to reflect includes the capacity for rational thought, but does not entail that people may be forced to comply with the conclusions of reason.
ralist position of this thesis: a person who thought that all rights violations could be measured on a single, transitive scale could, in principle conduct a calculation and rank outcomes so as to reduce the net loss of value.\textsuperscript{48} Above\textsuperscript{49} I defended a different model of deliberation that does not allow such precise calculations to guide action on the grounds that sources of value are many and not systematically comparable. Nonetheless, when reflecting on the form that institutions take we need to keep in mind that though establishing the right sort of institutions brings about major reductions in rights violation compared either anarchy or authoritarian government without institutional checks, it still comes at an ineradicable cost and inflicts a moral burden on people who impose the state’s authority. That is, the purpose of institutions is not to arrange things in the optimum manner but to impress upon officials the moral balancing act that governing indubitably involves. This balancing being a generalisation of the sentiment Margaret Thatcher appealed to when she said “there is no such thing as public money, only taxpayers’ money.”\textsuperscript{50} This sentiment being that the means at the state’s disposal don’t belong to those who are in charge of disbursing them, but that they have been

\textsuperscript{48}Suppose that frequent robberies in anarchic conditions would produce 100 violations (count each robbery as one unit of violation), and that heavy policing would stop 90, but would involve 5 uncompensatable units of violation through police brutality and 20 through the taxes needed to fund the. Meanwhile surveillance would stop 70 robberies but involve 8 units of rights violations through its intrusiveness and three in taxation. Anarchy would be rated at -100; policing -35; and surveillance -41, making policing the least bad option.

\textsuperscript{49}c.f. §3.5, pp. 173ff

\textsuperscript{50}Margaret Thatcher, “Speech to 1983 Conservative Party Conference” (Blackpool, 1983).
4.4 Outline of Institutions

What shape, then, should institutions that aim to live up to this compromise take? Their principal purpose is to prevent a state’s officials acting in a discretionary manner towards their subjects. It thereby ensures that although officials necessarily act on behalf of a state that has expropriated its subjects’ rights, the subjects remain the rights’ beneficiaries. This means the institutions need to impose restrictions on how officials act when determining whether a rights violation has occurred, deciding on the compensation or punishment that a subject may be required to pay or undergo, and in adjudicating appeals against decisions made by its own officials, such as an appeal Goliath might make against the interpretation of the rules governing trial by combat.

These institutions have no role representing the interests of subjects. The problem officials face is that expropriating subjects’ rights of justice puts them in a position where they can get away with arbitrarily interfering with the subjects’ substantive
rights. That is, doing one wrong puts them in a position to do others. While the first wrong cannot be undone, humanity’s experience of constitutional government shows that steps can be taken to prevent or at least reduce the likelihood of them abusing their power to allow them to commit further wrongs. Officials do not, however, have any obligation to secure anything as broad as their subjects’ interests, for no exchange where subjects handed over their right to rule to the state, conditional upon the state’s agreement to respect their interests has taken place. Rather, officials retain a duty correlative to their subjects’ natural rights not to violate them, but, by dint of being state officials, they have already violated this in part, and are now in a position to prevent subjects from engaging in effective enforcement action against further violations. Institutions then, should aim to limit the extent and frequency with which this occurs; in effect their job is to simulate the operation of the rights of justice that the subjects have had taken away from them.

This means that the rules institutions impose upon public officials are procedural in character — recall that I take institutions to be patterns in the distribution of power not rules themselves. They are concerned with the situations in which (expropriated) rights of justice can be exercised. They could for instance, include provisions against a subject having what she claims to be her property seized on behalf of the state by an official without the official first submitting a request that would be assessed according to a suitable procedure. Such a procedure would, for instance, have the aim of finding out whether, in fact, the property actually did belong to the client, whether she was liable to have it seized in compensation for a wrong she had committed, and so on. Similar safeguards could
be imagined to apply to other rights. They would include things like protection against imprisonment on officials’ whim: it is difficult to conceive of a scheme of rules that met this test that did not include something like *habeas corpus*.

How, would such institutions be constituted? Wouldn’t another set of rules be needed to govern their establishment, and the appointment of officials to the offices in the scheme for administering the first set? Moreover, the administration of the institutions itself would need to be governed by other rules. Together, these two sets of rules: the primary procedures, plus the rules governing the administration of the procedures, set up what looks rather like a separation of powers. This allows a protective agency’s (or state’s) personnel to be classified by function. Some would be in charge of enforcing (what they had come to believe were) rights; others in charge of determining, in a manner that seeks to reduce the chance of determining them erroneously or arbitrarily, what the rights should be. The former are executive, the latter judicial.

The institutions we are sketching here begin to look rather like a classical liberal judicial apparatus, tasked with protecting pre-existing rights held by the populace. In the classical liberal tradition, and also classical liberal political practice (e.g. in the pre New Deal United States, the French Third Republic and Victorian Britain) these judicial bodies were accompanied by admittedly imperfect representative institutions. Does the argument provided here lead to their justification too? At first it would appear not. The state’s mission, in the natural rights tradition is to protect pre-political rights (plus the rights that people grant each other contractually), and that is a judicial task. There would not be any need for positive law, and therefore no need for legislation. Natural rights are in principle
moral facts laid down and binding on people even in a state of nature. The state should merely be a vehicle for their enforcement, and the administration thereof: where Locke does discuss forms of political institutions, and condemns the assertion of “power to rule by extemporary arbitrary decrees”\footnote{Locke, Two Treatises of Government, 358–359 (§136).} or “governing without settled laws,”\footnote{Ibid., 359–360 page (§137).} he does so because he recognises that in practice, the forms that the commonwealth is to take affect how it behaves.

In this spirit, there would however need to be procedures to make sure that officials obeyed the rules that apply to them. The officials would have consented to such procedures as part of their contracts of employment with the agency or state; but how is the agency to decide which procedures to apply to its officials? How, for instance, should they be punished if they exceed their authority? Though officials’ employment contracts would of course be a matter of negotiation between the putative official and the state, each would need to bring to the talks proposals over which to bargain. This means that a separate body of what we might call the administrative law of the agency is also required. Its content has to be decided by some positive mechanism which might, subject to the limits of natural right, be a representative legislative institution. Moreover, as we have argued above, subjects would be taxed to pay for this protection from their own government. On which citizens, and to what extent, should these protection-racket taxes be levied? It seems that there also needs to be some mechanism for tax law.

This leads to the conclusion that those of the state’s functions that involve limiting
the extent to which subjects’ rights are violated, including, crucially, the operation of public administration and the monopoly enforcement of rights (i.e., the police, the criminal and civil justice systems, national defence forces and the foreign policy establishment) may be subject to some control in order to limit the effects of the expropriation of subjects’ rights.

The mechanism by which this is to be done is, however, something over which this theory provides no guidance. It is up to historians, political scientists and legal scholars to recommend one. Our theory does however circumscribe its aim, which should be to ensure that officials do not abuse their power. How this is to be done — whether by representative institutions, direct referenda, the rule of a benevolent oligarchy or an enlightened despot, the selection of officials by lot, or indeed some other method, is something on which the argument presented here is silent. Experience indicates that some of the mechanisms are more reliable than others, but even robust ones are prone to corruption. To take just one instance, consider the Irish case of the sleeping judge, where one of a three bench panel of judges fell asleep; the other two made a finding of fact that he was awake, and continued on with the case, convicting the defendant. That corruption, and its restraint, are the subject of the next chapter.

53See Patsy McGarry, While Justice Slept (Dublin: The Liffey Press, 2006) for a full account.
Chapter 5

A Machiavellianism of Rights

After concluding that\(^1\) no political theory which sought to establish principles of legitimacy external to the state’s justification could rely on a single “uncompromising value,” I considered whether a state, even though it violated other principles, could at least be established without violating the ecological natural rights I outlined above.\(^2\) I argued that it could not, and that despite his best efforts, Robert Nozick was forced to avail of a “utilitarianism of rights,” (see above)\(^3\) to justify even his minimal state, and that even this relied on the unjustifiable principle that compensation for rights violations could be imposed unilaterally by the violator of rights. In order to reject anarchy, I instead appealed to value pluralism and claimed that the conflict between individuals’ natural rights not to be

\(^{1}\text{c.f. §2, pp. 65ff}\\
^{2}\text{c.f. §1, pp. 29ff}\\
^{3}\text{c.f. §3.3, pp. 162ff}
governed, and a state’s assertion of a monopoly of authority cannot be resolved, only endured. I then argued that though republican institutions could reduce the frequency and effect of the rights violation that even the best of all possible states would have to engage in, they could not eliminate it entirely. Neither the development of political principles, nor the design of political institutions are enough. Good government requires ethical behaviour or perhaps even good character on the part of the governors.

This is not an original thought. Cicero framed his *On Duties* as advice on how his son should behave as a Roman republican gentleman; Erasmus wrote a guide, dedicated to Henry VIII(!), on how a virtuous prince ought to behave; even Kant, in *What is Enlightenment?* allowed himself to praise certain attributes that he believed an enlightened ruler should have in order to govern well and morally.

Yet, the kind of State that I have discussed in this thesis is altogether less noble than Cicero’s, Erasmus’s or Kant’s. It is, first of all, a departure from a stateless ecological ideal in which people respect each others’ natural rights and otherwise arrange matters between themselves as they see fit. Moreover, unlike Lockeans, including Jefferson, I conclude that it is not possible to devise, let alone institute

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6Kant, “An Answer to the Question,” 20–21 (8:40–41).

7As expressed in the phrase of the *Declaration of Independence*: “...to secure these rights
a suitably circumscribed form of authority that limits itself to securing those rights. I go beyond noting the need that Madison identified — that governments ought to be designed for men, not angels, to conclude that because they are administered by fallible human beings, the moral status of government is radically ambiguous. It is justified by human failings, and is at the same time compromised by them. Not only are all, or almost all states born in original sin: they impose their monopoly without offering their subjects meaningful conditions to choose otherwise; their sin cannot be redeemed with the right kinds of political arrangements. As long as they continue to exist, they exercise stolen rights.

Their crimes may not be as dramatic as that traditionally attributed to the early leaders of the Roman Republic. Its leaders are said to have slain “the sons of Brutus,” the republic’s founder, to prevent them plotting to establish hereditary rule. They are, however, continual. The state’s survival depends on a continued willingness to commit necessary crimes, a position most strongly defended by Machiavelli.

Governments are instituted among men.”


9In principle a state could obtain the universal consent of all its members, at the time of foundation. It could not however give the same opportunity to its members’ children who would find themselves come of age under its political authority, if the rest of the territory to which they could leave was also under the control of states.

10Machiavelli, Discourses on Livy, 45 (1.16).
5.1 Machiavelli and the State

Machiavelli saw that crime as the first of many needed to prevent Rome’s republican order from falling victim to corruption; that is, from becoming different form of government, and departing from its purpose. The theory presented here conceives of government’s purpose as the protection of liberty, expressed in the ecological anarchist ideal but recognising freedom as a value that enables people to choose to pursue other values. Freedom is particularly important to the pluralist because it is needed to allow her to choose her own set of values and make compromises between them rather than have the pattern of compromises imposed by someone else. She knows she will need to sacrifice some liberty, but it ought to be up to her to decide when and for what (or, indeed, for whom) to make the sacrifice. At the same time, when a person protects a portion of their own freedom by asserting dominion over another it amounts to converting themselves into their ruler. (see above)\textsuperscript{11} Anarchy is tantamount to unstable and violent competition among warlords who are effectively small states of their own, not to the absence of coercive political power. To adopt Machiavelli’s own terminology,\textsuperscript{12} we might say that “republics” in which power is distributed among citizens are the only alternative to principalities, where it is concentrated in one person’s hands. The chief virtue of a republic is that it preserves people’s freedom, but in order to come into being, and maintain itself in existence, it has to restrict the freedom it is created to protect. The people who control the republic, that is, its citizens, have great and

\textsuperscript{11}\textsuperscript{c.f. §3.2.1, pp. 160ff

\textsuperscript{12}Ibid., p.7 (Bk I.1).
dangerous power, in particular the power to divert the institution that preserves their freedom from its purpose and in effect destroy it. As explained above\textsuperscript{13} the traditional idea of political legitimacy, adopted by Rousseau and Rawls but also by Nozick, provides false comfort that a state constituted in a particular way, or which acts within certain limits, does so in a morally acceptable fashion. I deny that political authority can be morally acceptable. It is, rather, a necessary evil. Though means exist to reduce the danger that this comfort allows, through, for instance, arrangements such as the separation of powers, political power remains dangerous, easy to misuse, and when misused liable to yield disastrous moral and practical results.

I shall begin this chapter by exploring Machiavelli’s conception of corruption, and of the need to commit injustice to prevent it from taking root, then argue that political virtue in this conception is a matter of carrying out the injustices necessary to bring (or keep) the policy in existence, but not going any further. Excess also counts as corruption. I then revive the early modern idea of magistracy, meaning the office filled by one who exercises executive power, and observe that republican political institutions disperse this authority to citizens who do not so much exercise political rights as hold citizenship as a political office. Moreover I claim that the fact of exerting power and influence on a state’s institutions means that one exercises some magisterial power. Citizens in a republican government exercise that power, with which come obligations to resist what Machiavelli appears to see as quite like the tidal force of corruption, a sort of inevitable human tendency

\textsuperscript{13}c.f. §2, pp. 65ff
that drags people towards vices. To see how defences against this tide might be constructed I introduce the notion of independent citizenry, popular among American Whigs and revolutionaries of the eighteenth century. They campaigned (unsuccessfully in the end) to limit political power to “independent” freeholders. I shall defend the concept of independence but argue that making independence as universal as possible is a better safeguard against corruption than limiting the franchise. I shall then claim that this provides reasons for limited redistributive taxation (though taxing the rich to redistribute some of their wealth even for these purposes nonetheless wrongs them); that this is circumscribed by strict limits to direct public sector employment (since that corrodes independence because there is little so dominating as a relationship of employment). Rather than limiting magisterial power to the rich, securing this independence requires the provision of sufficient economic independence to citizens, something that can be done by ensuring they have enough alternative opportunities to make a living and that this, though an injustice because it will require some taxation, is necessary to preserve the citizens’ independence, and consequently the republican form and rights-protecting function of the state.

5.1.1 Corruption

Machiavelli uses corruption as it is used in ordinary speech: a corrupt form of government is a rotten one, no longer pursuing its virtuous nature; the same for a corrupt people that hands over its liberty to a tyrant;\(^{14}\) or even a corrupt reputa-

\(^{14}\)Ibid., 11 (I.2).
tion, as Machiavelli describes Julius Caesar’s, which has meant that posterity has seen him, erroneously, as a great man.\textsuperscript{15} When applied to governments, Machiavelli’s account owes much to Polybius’s “cycle of political revolution”\textsuperscript{16} in which forms of constitution decay as a result of power’s tendency to corrupt. Good kingship decays into tyranny, which is overthrown by good aristocracy; aristocracy decays into corrupt oligarchy, and is overthrown by democracy; democracy in turn degenerates into savage mob rule; a leader then emerges to bring order to the chaos, and is acclaimed as king. The cycle continues. Machiavelli is, however more pessimistic than Polybius: corruption is for him an inevitable process that can be retarded though never fully stopped by men who possess the virtù to promulgate good laws. Without attempting rigorous exegesis of the term,\textsuperscript{17} which would be far beyond the scope of this thesis, I render virtù as political acumen and distinguish it from more traditional ideals of virtuous rule. If corruption goes to far, there is no alternative but for a new prince, possessed of uncommon virtù, to refound the state and wield “almost kingly power.”\textsuperscript{18}

Corruption, in Machiavelli, comes about through the decisions made by people

\textsuperscript{15}Ibid., 48 (I.17).


\textsuperscript{17}Extensive material discussing the meaning of virtù can be found referred to in Berlin, “The Originality of Machiavelli,” Pocock, The Machiavellian Moment, and the introduction to scholarly editions of the Discourses such as Machiavelli, Discourses on Livy.

\textsuperscript{18}Ibid., p.51 (Bk 1:18).
holding political power: in a principality by the prince; in a republic, by the citizens. It is the rulers’ job to combat it by introducing laws that keep pace with the form corruption takes. Machiavelli’s insight is that corruption is not opposed by the rule of conventionally virtuous people, but by measures taken to preserve the good character of the polity. Those measures may in themselves stem from the same vices — for instance: ambition, lust for power, and avarice — that motivate the tendency to corrupt. This can be transposed to our theory. The only purpose that could, in the qualified sense of justification discussed above, justify overriding citizens’ natural rights to the extent required to establish political authority is to protect the freedom of its citizens to pursue the combination of loves for people and projects that they prefer. A state becomes corrupt when it deviates from this aim. It can fail in two ways: if it uses its power to infringe or violate its citizens’ rights in its own interests or those of a section of the citizenry at the remainder’s expense; or if it fails to maintain the means of its own continued existence, and therefore its ability to protect liberty. The form of the state matters, but so does its performance: it has a job to do.

This view of the merits of statehood suits the argument developed so far in this thesis, which denies the possibility of a fully just state. States can hold injustice at bay, but must employ unjust means to do so. Thus, in the phrase “necessary


20Machiavelli, Discourses on Livy, 47–52 (1.17–118).

21c.f. §3.5, pp. 173ff
evil,” necessity conveys both imprescindibility and effectiveness. It is as important that the wrongdoing achieves the purpose for which it was committed, as for it to be unavoidable. Machiavelli reserves his strongest condemnation for tyrants who seize a republic and then despoil the state: after death, such men are left in “sempiternal infamy.” They fail as much according to the Christian standard: by doing evil; as by the pagan: in achieving nothing by it. I understand states’ violation of rights being defensible (though not legitimate) only as long as the violations fulfil both senses of necessity. To adapt Mancur Olson’s terminology, a slothful state is little more than a slow-moving bandit. Citizens that allow their states to decay and to neglect preparation to meet the misfortunes they encounter are as corrupt, albeit in a different manner, as those who seek power to exploit their fellow men and women.

5.2 From Citizens to Magistrates

In the previous chapter I distinguished citizens, who remained beneficiaries of the rights that had been expropriated by the state, from subjects, who had both the possession and the benefits of the rights taken from them. The state’s assertion of a monopoly of jurisdiction put it in a position of being able to render citizenship insecure. That is, its expropriation of the ruled’s rights of justice put its officials

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22Ibid., 33 (I:10).

23Olson, “Dictatorship, Democracy, and Development.”

24c.f. §4, pp. 181ff
in a position where they could get away with denying their subjects their rights’ benefits and even, because they control the adjudication procedures that decide whose claims to hold rights are to be upheld, dismiss any accusations that they had done anything wrong.

I suggested that certain political institutions could be created to circumscribe officials’ power. There could be a separation of powers; punishments for officials who were found to have exceeded their authority; oversight mechanisms that aimed to restrict official use of state power to the securing to citizens’ the benefits of the rights the state had expropriated from them. As well as formal institutions that provided rational incentives for good behaviour, I also envisaged mores: socially imposed codes of honour, disapproval of displays of wealth by public officials, pride in an ethos of public service, shame heaped upon those who abused their power, etc. that affected officials’ emotions and social position.

I left open the possibility that citizens might take part in holding the state that rules over them to account, but did not make it a requirement. Nothing in the previous chapter would in principle rule out the citizens and officials being drawn from entirely different populations, as though they were a volunteer corps of janissaries or enlightened international administrators. A state run by austere mercenaries or a private development charity, who established the rule of law over the territories they governed, administered justice fairly, and taxed as little as was required to get those things done would leave the ruled with little to complain about. Yet we would I think be justifiably sceptical about such a state’s ability to endure. The scepticism is the same one as that applied to Nozick’s protective agencies, and which is central to the argument of this thesis. What would keep
those mercenaries or charity workers honest?

If we describe as a “citizen” someone who has the benefits of her natural rights guaranteed by a complex of political institutions that protect her from fellow inhabitants who bear her ill will, we may distinguish citizenship from another kind of status: that which belongs to someone who, as well as being the beneficiary of rights, can exercise some control over the the institutions of the state. It will be illuminating to describe that office as that of “magistracy.”

In early modern political theory the concept of magistracy served to denote the governmental functions of political office and allow comparisons across an immense variety of constitutions then in effect across Early Modern Europe. Magistracy described an office rather than a person. Thus under the Spanish monarchy, the same monarch wielded formally unchallenged magistracy in Castile, while exercising much more circumscribed authority under Aragon’s distinctly republican constitution. Magistracy’s defining characteristic is its being accepted by the politically active part of the society as being entitled to exercise

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26This was known as a “composite monarchy” where the same monarch was sovereign of several different, often unrelated, territories. They were often produced by marriage alliances.


28Before the American Constitution of 1790, the term referred to the set of laws and traditions that governed the established political practice of a country. I use the term in the above sense, and do not intend to suggest that the Aragonese it all written down in a single document.
power. Collective magistracies, like the Florentine Signoria, or ones where power was divided, as in the Dutch United Provinces, were not uncommon. Thus, when in 1651 the States of Holland contrived to leave the Statdholderate empty in order to deny it to the house of Orange, its magisterial functions devolved to committees of the States General.\textsuperscript{29}

It is possible to identify the specific offices in to which magisterial power is attached in a particular constitution. In some it might be the supreme judicial procedure; in others magisterial power might be shared between a judicial procedure and deliberative assembly in which officials discussed the decisions to be made. The defining characteristic is the exercise of control over the state officials. For instance the judges charged with hearing Goliath’s challenge to the ruling made by the referee overseeing the trial by combat would exercise the magisterial power see above\textsuperscript{30}. It is possible to conceive of some of those powers that impinge on the official’s functions being transferred to the citizens. Hence, when they exercise them, through elections, referenda, or participating in the political process, the citizens become magistrates of a kind. They exercise the same kind of power as more exalted officials do, though individually in lesser degree, and usually with less frequency, and with less fine control over the machinery of state.

This is another reason why the problems of political philosophy cannot be resolved by arguments of principle or institutional design alone. In any conceivable scheme


\textsuperscript{30}c.f. §4.1.1, pp. 186ff
that assigns elements of a state’s monopoly of political power to particular people or offices there will be some specific men and women who will exercise that jurisdiction. Institutions may create a framework but they are not self-propelled: people still have to operate them. The rules that govern the institutions cannot be specified by the same institutions. If they did they would deny the officials the discretion to choose how to use their institutions, and thus deprive them of the magisterial powers, which devolve back to the institution’s original designers, who would need to be consulted on points of controversy. Designers may not, however, be available to be pressed into service (they might have died some time ago; or the institutions might have evolved without being consciously designed). In these cases people who claim authority to interpret the designers’ intentions or the social conventions to which they give rise end up wielding the power instead. A situation where people make moral judgements about how the institutions would be used cannot be avoided.

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31 See above (c.f. §4.3, pp. 200ff) for how I understand institutions, which I conceive as sets of relationships of power in a society, rather than as rules.

32 The designers may have provided for such people to be appointed, as in the US Constitution, or they may have subsequently claimed the authority as did Ayatollah Khomeini did of Islamic law under the doctrine of *velayat-e-faqih* (rule of the jurist) in revolutionary Iran. Giles Kepel, *Jihad: The Trail of Political Islam* (London: I B Tauris, 2002)


34 See also Bernard Williams’s discussion of the impossibility of apolitical humanitarian inter-
This emerges, ultimately, from the fact of the monopoly and the need to provide authoritative resolutions to disputes. It may be objected that Hillel Steiner avoids this need by invoking the automated, and “censorious”\footnote{Steiner, \textit{An Essay on Rights}, 109.}35 Evaluator machine who threatens to enforce rights by means of threats backed up by his “nuclear-tipped brass knuckles.”\footnote{Ibid., 192.}36 A world that benefited, if that is the right word to describe a machine capable of bringing about such destruction, from a generous production run of Evaluators programmed to oversee a green libertarian distribution of rights would not suffer from the “inconveniences of the State of Nature,” and could therefore implement the utopia outlined in Chapter 1.\footnote{c.f. §1, pp. 29ff}37. We may question, however, whether the decisions made under the Evaluators’ duress are moral decisions if we do not accept Steiner’s belief that coercion does not restrict freedom.\footnote{Ibid., p.28.}38 An Evaluator’s effect is to tip the scales of self-interest overwhelmingly in the direction of complying with the demands of rights, but the argument in the succeeding chapter\footnote{c.f. §2, pp. 65ff}39 implies a denial of Evaluators’ authoritativeness and legitimacy. Evaluator is limited to specifying the requirements of justice, but its nuclear-tipped

brass knuckles usurp people’s ability to choose the compromises between values that they want to make for themselves just as much as Kant’s uncompromising duty.

Men and women with magisterial powers are in charge, even if each only in partial charge, of the institutions that regulate the society at which they are directed. To the extent that they have these powers, even if it is only occasionally at elections or referenda, or informally through public opinion, civil society organisations or putting their material resources at the disposal of political campaigns, they are involved in political activity and face the same demands of political ethics as Machiavelli’s republican statesmen. Even Machiavelli’s princes found it hard to escape this requirement. They would have to had remained indifferent to their state’s enduring beyond their own active political life time, and eschew passing their work on to their children 40 to allow themselves to their state as their personal chattel.

5.2.1 Office

Who should the magistrates be? Should the officials who have asserted power over the territory they govern hand magisterial powers to those over whom it rules as a form of compensation for usurping their rights of justice: as if “because we tell you what to do, you may tell us what to do.” Though this has rhetorical appeal, and though some people may feel themselves compensated by this offer, the argu-

ment cannot be made to stick. A share in a collective is, as argued above\(^41\) only equivalent to individual possession when the object of collective control is fungible like money. The citizens’ power over state officials is more dispersed and less frequently exercised than the states’ power over them.\(^42\) It is theories of political obligation that seek to convert that occasional exercise of power into justification for legitimate rule. The people, even assembled collectively at occasions conceived for the purpose, usually exercise power fitfully and in imprecise fashion. The officials, in contrast, do so all the time. Even in polities that institute direct popular participation, like Switzerland or California, officials wield more power than the citizenry. Second, as argued above\(^43\) compensation is a subjective matter the adequacy of which is determined by free agreement of victim and aggressor, and may not be unilaterally imposed by the latter. Finally, people do not always want to get involved in political activity. They have their own lives to lead, and there have always been some who see democratic institutions as imposing a burden on them, as in ancient Greece where the Athenian authorities employed Scythian slaves to

\(^{41}\) c.f. §2, pp. 65ff

\(^{42}\) The examples in the earlier chapter referred to ‘internal’ power, directed against individuals subject to the same state. The reverse may well be true for power directed externally. A share in the direction of a state’s total military power, will normally be more useful than maintaining one’s own horse and buying one’s own armour, even in confederation with other similarly equipped individuals. This is perhaps because military success in conventional conflict depends on concentrating forces. See Clausewitz’s concept of “the unification of forces in time” in Carl von Clausewitz, On War, ed. Michael Howard and Peter Paret (London: Everyman, 1993), 241–246.

\(^{43}\) c.f. §3, pp. 137ff
round up men who refused to attend the assembly. Despite the rhetorical power that emerges from the democratic tradition which understands political participation as a right, we can only grant this with substantial qualification. A state may institute devices that its judicial procedures recognise as rights of political participation, but those are quite different beasts to the natural rights to person, property and enforcement that the natural rights tradition understands people to be endowed with. While natural rights describe the natural freedom people ought to have, political rights define the scope of popular magistracy. That is, popular magistracy is a means of controlling state power and attempting to ensure that citizens continue to receive the benefits of their natural rights, which the state expropriated by asserting its monopoly of jurisdiction. To be clear: the test I apply is whether the means actually succeed in this. The form popular magistracy ought to take is the one that effects the distribution of political power which, in the circumstances of the particular state or society in question, is most likely to safeguard people’s receipt of the benefits of their (expropriated) rights of justice. It is the real, rather than the formal, distribution of political power that matters. Thus it might not be indefensible, for instance, to judge the Singaporean system of government, in which ordinary voters have hardly any power but in which property rights are protected, financial corruption is nonexistent, in which people are generally free to get on with their lives in an atmosphere of political

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stability, superior to that obtaining in Argentina in which freely elected governments not infrequently expropriate property, impose arbitrary taxes and officials take sizeable bribes. People are not under any obligation to take up the minor political office of ordinary citizen — they may prefer to rely on the wisdom of the authorities that rule over them, but if they do take up the office, they become magistrates and incur a share in responsibility for directing the state towards fulfilling its conflicting purposes, protecting the benefits of liberty, and maintaining its efficient existence.

Political participation can thus be understood not as a fundamental right but as an office, involving technical rights vis-à-vis other political institutions but also moral duties to further the purpose for which they were appointed to that office.

45 There are some flies in the Singaporean ointment. Singapore’s regime is very socially conservative and interferes in numerous private matters, and in which political speech is tightly restricted. Moreover, most Singaporeans live in public housing, (Singapore Housing and Development Board, “Public Housing in Singapore,” April 2014, http://www.hdb.gov.sg/fi10/fi10320p. nsf/w/AboutUsPublicHousing?OpenDocument). which gives the government significant control over their lives. Argentina’s government also restricts freedom of speech, though more haphazardly. In particular it has targeted the collators of inflation statistics (it seeks to suppress the true inflation rate) and the opposition-leaning media group Clarín. “Don’t Lie to Me, Argentina,” The Economist, February 25, 2012.

46 This makes it possible for people to “free ride” on the magisterial exertions of others. However, the scope for this free riding is not huge. If those who don’t exercise their powers of oversight of state officials are very numerous, they liable to be ignored, so don’t get very much for free. If political institutions somehow respected their rights without the apathetic needing to bestir themselves in political activity, that should be put down to the good fortune of being ruled an uncharacteristically virtuous set of magistrates.
Duties that attach to this lowest rank of magistrate would include obligations to oversee those higher up (government officials) and prevent them using the rights they have expropriated to commit further rights violations. Voters who fail to live up to these duties are worthy at least of moral condemnation.

5.2.2 Independence

Since the purpose of giving people this power is to allow them to prevent other state officeholders from abusing their position, it becomes important that state officeholders be prevented from using the power at their disposal to intimidate or suborn the ordinary citizenry. The people, in other words, need to be independent of the state.

Independence in political office loomed large in seventeenth and eighteenth century struggles between representative institutions and monarchs. Monarchs were frequently accused of appointing placemen to bodies that were supposed to hold them to account, while offering lucrative royal office and desirable titles of nobility to buy off opposition supporters. The seriousness of this problem was reflected in measures developed to stymie it: for instance the provision of the British Act of Settlement of 1701 (rather suggestively entitled: “An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject”) that prohibited a member of parliament from accepting paid Crown office or a Crown pension.

Worries about politicians being given improper financial incentives persist. There is alarm, and not infrequently political scandal, over donations to political cam-
campaigns or parties, elections carried out by party list systems in which the professional politicians standing owe their livelihoods to their position on the list, and therefore to their party’s bosses, or the use of confidentiality clauses in public servants’ contracts. The latter in addition officially makes people’s exercise of political rights (which under the argument advanced here would also be duties) prohibitively expensive by threatening them with unemployment. Even if “public interest” exceptions are provided, people may not wish to undertake the risk of a taking a legal case which, if decided against them, could ruin their life. Unenforceable contracts may still have an intimidating effect if the cost of proving their unenforceability is too great.

What unites these different cases with the English Whigs’ concerns in 1701, is the fear that parliamentarians or even voters will find themselves in a position of political dependence on someone else. It includes but is broader than the corrupting power of the accumulation of money in the hands of private individuals who are at liberty to use it for political purposes. A “political fund” deployed to influence elections is just one way of limiting magistrates’ independence. The poor can also be targets (and be more easily affected if the principle of diminishing

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47 Examples of this are legion. They include the controversy surrounding the *Citizens United* supreme court case in the United States, in which restrictions upon donations to political action groups unaffiliated with candidates were struck down as infringements of political speech protected by the First Amendment to the US constitutions, or the numerous party funding scandals in continental Europe.

marginal utility applies to income) of financial pressure.

5.2.3 Independence in Eighteenth Century America

Gordon S. Wood, the historian of the American revolutionary period, argues that the revolutionaries found the prospect of ensnaring the poor in financial dependence almost as alarming as of the Crown exercising authority through official and unofficial patronage. One, whom Wood quotes, wrote that

poor, shiftless spendthrift men and inconsiderate youngsters that have no property are cheap bought (that is) their votes easily procured Choose a Representative to go to court

Indeed, even radical English Whigs, like James Burgh and Joseph Priestly, feared the “people in low circumstances” who were especially susceptible “to bribery, or under the power of their superiors.” In the theory of “mixed government” that was the orthodoxy in Anglo-American political culture at the time, the popular role in public affairs, susceptible as it was among other vices to the financial influence of the rich, was to be balanced by an “aristocratic” element. Lacking


50Ibid., 168.

51The aristocratic element had its own vices. In corrupt form it could descend into factionalism (See Polybius, The Histories, Bk IV Ch 9 for his treatment of this matter, which heavily influenced renaissance thought.). The aim of mixed government was to arrange each of its elements to check each others’ vices.
hereditary titles of nobility, the American revolutions imagined instead a senatorial class like that of ancient Rome by whom the public interest was to be expressed. Thus, emphasises Wood,

Nearly all of the states provided for special property qualifications for senatorial candidates exceeding those for candidates for the lower houses...in North Carolina and New York higher property qualifications were required for the senatorial electorate, a means of distinction which James Madison believed superior to attaching property qualifications to the candidates.\(^{52}\)

Property qualifications remained a viable proposition well into the nineteenth century, and “in the face of widespread enthusiasm for universal manhood suffrage Kent [In the New York Convention of 1820-21] and the other Federalists sought to maintain a special freehold qualification for the electors of the state senate.”\(^{53}\)

The equal status of free white men was too firmly embedded in American revolutionary society to appeal even to the limited hereditary distinctions applied in Rome. Instead, they justified senatorial guardianship of the public interest by invoking “independence.” Affairs of state were properly the province of gentlemen, who, not having to work for a living, could approach public life from a position of disinterestedness and act in pursuit of the common good. This they achieved

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by possessing enough wealth to avoid having to engage in business: “Independence, as Josiah Quincy pointed out in 1768, really meant independence from ‘the fickleness and inconstancy of the marketplace’.”

Some of this is evidently thinly disguised economic class interest. The landed gentleman quoted above who feared that the “poor, shiftless, spendthrift men” continued: “their votes easily procured” would “vote away the Money of those that have Estates.” Yet, a defence of the use of state power to redistribute the property of others independent of a consideration of the legitimacy of that property’s acquisition is not, as Nozick noted disapprovingly, an unknown element of political theory. Nor are populist campaigns of redistribution rare in actual political history.

But where many American revolutionaries used the poor’s lack of financial independence conveyed by property to deny them magisterial power (they would have to be content with what this thesis calls rights of justice, and even those imperfectly exercised because of legal expenses they could not afford), I shall argue

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54 Ibid., 68.


57 If the rich had acquired their property legitimately, its redistribution would qualify, under the Lockean of justice within which this thesis makes its argument, as a violation of their rights to the fruits of the voluntary exchanges in which they had engaged in. The green libertarian ideal sets out the system of property rights that the state ought to attempt to protect, and it is the state’s function to protect the greater property of the rich as much as it is to protect the fewer holdings of the poor.
that securing citizens’ economic independence, so that they can then take part in political institutions from a position of political autonomy is a function that the state ought to perform. In doing so the state allows the poor more power to protect themselves from abuses, and thus secure the benefits of their rights that the state has appropriated, something that without this state intervention risks being confined to the independent rich.

5.3 Making a living

In chapters “Fairy Godfather”\(^5\) and “Clients and Citizens”\(^6\) we conceived of the morally relevant sense of independence to be non-domination. Following Pettit, we said that someone was independent if she was not subject to the “arbitrary,” that is, discretionary, power of another. Among the situations in which this independence can be exhibited is a roughly competitive\(^7\) market, like the market for restaurants in a reasonably large city, where numerous customers and suppliers interact to exchange goods and services and none is in a position to dictate terms to their counterparty. Each diner can choose among places to eat, while each

\(^5\) c.f. §3, pp. 137ff

\(^6\) c.f. §4, pp. 181ff

\(^7\) For avoidance of doubt, I don’t here intend to represent a “perfectly competitive” market. I imagine there to be a wide variety of foods available; that restaurant quality varies as do customers’ tastes and willingness to pay; and that buyers may be motivated by any number of factors as well as price (quality, fashion, whim, good advertising, personal recommendation), in choosing what best suits them given the resources they have available.
restaurateur can offer their wares to a variety of customers. If a customer finds the price too high, food poor, or service inferior, she can go elsewhere. If a supplier finds a customer rude, or believes she is unlikely to pay for the services rendered, he can throw her out and find another.

This kind of market has two features worth noting: there are plenty of alternatives available to parties on each side of the transaction, and the importance of any one transaction to both diner and restaurateur is relatively low. In these circumstances, neither buyer nor seller is able to exercise market power. Although each side may make decisions on a whim: a customer could take against the atmosphere and decide not to go in; a restaurateur objects to the look of a customer’s shoes so refuses to let him take a table, the effects of these decisions are too small to cause more than irritation.

If, however, there is only one supplier, and the good it supplies is important, it can

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61 The conditions don’t apply if discrimination is common. If all but a very few restaurants in an area refused to serve, for instance, black people, then black diners would have little choice but to eat in the small number of restaurants where they were served. Not only would their decisions about where to dine be subject to the power of the majority of racist restaurateurs; their options in the remaining few restaurants would be limited, and they would probably face inferior service and even higher prices. The higher costs are a function of the number of unavailable establishments. If a society that practiced segregation without discrimination, i.e., where two races actually were “separate but equal,” is too hard to imagine perhaps one subject to deep sectarian divisions like that of twentieth century Glasgow would have been one in which costs were imposed equally on both Catholics and Protestants. Even if the two groups were roughly equal to each other (in Glasgow they weren’t quite) their members would be worse off than if no discrimination were practiced at all.
exercise significant market power. Barriers to entry on either side of the market allow the participants protected by the barrier to exert power free of the pressure imposed by competition. The economic literature on the subject focuses on the economic effects of this, including higher prices over the long term, disincentives to innovation, and the erection of barriers to entry to deter competition. It is the ability to exercise this economic power to achieve non-economic ends that concerns us here, however. If the matter over which the power is exercised is sufficiently important to the person over whom it is exerted, the party wielding the power is in the position, according to its own discretion, to threaten severe negative consequences, or offer overridingly important rewards, to change the target’s behaviour. Though the victim of the other person’s market power may well, under some definitions of freedom retain their liberty, they also qualify as dominated. Though free, they are weak.

This argument might appear to create a platform from which to develop a conception of exploitation, perhaps leading to an argument that a contract between a dominant and dominated party should not be binding. I do not however intend or need to make such a claim because I understand state power as something

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62 The same applies under monopsony, where there is only one customer.


64 See the argument against freedom of contract in Pettit, *Republicanism*, 63–65.
imposed in morally questionable fashion, not something legitimately exercised as a result of an agreement between subject and the public authorities. It is enough, for my purposes here, to maintain that citizens dominated by the state would be unable to exercise their magisterial function of preventing abuses of state power. More precisely it is enough to argue that in so far as they are dominated, it would require heroic efforts or make major sacrifices to fulfil their role of magistrate.

The effects of domination can be felt outside the sphere of high politics. Because we are ecological creatures, whose continued existence depends on making use of the flows generated by natural services see above,\textsuperscript{65} we require constant access to them. Someone who can control our access can thereby amass power over us. If she subjects us to her \textit{arbitrium}, that allows her to dominate us. Furthermore, most of us are not solitary creatures. As we make plans and agreements with others, and develop ideas that we want to pursue, we form other interests, some of which, in the happiness of people we love, and the success of our projects can (see the discussion of Susan Wolf's work above)\textsuperscript{66} be extremely important to us.

An entity that can exercise power over us can force us to compromise those plans in ways we would not, absent that entity's intervention, have compromised. In a non-political context, our natural rights provide us with a means of discovering\textsuperscript{67}

\textsuperscript{65}c.f. §1.1, pp. 31ff

\textsuperscript{66}c.f. §3.5, pp. 173ff

\textsuperscript{67}They can insist that we compromise our plans to make way for their rights; but they may not violate our rights to compromise theirs. This is a first approximation, because though rights are important, and in the ecological utopia where everyone seeks to respect each others' rights
which compromises others have good reasons to insist we make. Politics, however, is the process by which authoritative and enforced outcomes of these kinds of conflicts are generated. The exercise of political power enforces certain moral compromises upon people.

Yet while here is an inevitable moral cost to political activity, (though likely not as high a cost as that the early Roman Republic had to pay in slaying Brutus’s children; see above) steps can, as we have said be taken to reduce it by limiting the extent to which state power enables those who hold it to further violate certain rights in the attempts to protect others. The state’s enforcement of contracts that people make through its executive and judicial agencies, or at a minimum, by authorising individuals to enforce the judgments of adjudication procedures that it deems binding, has the effect to securing ends. This ensures that when people agree to cooperate or exchange the exchange is actually carried out, or the enterprise undertaken.

...and other desires, and resolve differences by calm and mutually respectful argument, in good faith this would be enough to allow people, with give and take to live peaceful and conflict-free lives. In a world peopled by Rousseau’s “men as they are,” it would not. Some of our desires and plans would conflict with other people’s, and what turned out to be their rights, and some means of determining the outcome of such conflicts would be needed.

...c.f. §5, pp. 217ff

Among these functions should be ensuring equal access to the state’s procedures of adjudication, a point that I think Nozick would have to concede. I do not have space to develop the argument, which turns on the principle that although people’s entitlements to holdings are determined by the historical “pedigrees”, Steiner, “Choice and Circumstance,” 299. their higher-order entitlement to enforce their possession of their holdings is held equally by everyone. As well as
Meanwhile, people’s entitlement to their share of natural services, and obligation to establish provision for their offspring to have at least as many and as good of these as they did themselves, sets a base line of resources below which people may not fall (see above.\textsuperscript{70})\textsuperscript{71} Still, there is no guarantee that this will necessarily be sufficient in the economic conditions that obtain to secure independence. The basis of independence and the determination of entitlements of natural services are orthogonal to each other. If conditions are good enough, income from trading the output of natural services will be enough for people to make a living independently, but this need not be the case. If it is not, were the government were to to tell me “Vote for X, or you will be banned from employment, and obliged to survive by using your initial entitlement to natural services,” I would correctly feel subject to public coercion, Nonetheless, perhaps it is the act of banning that creates this compensating its subject by supply them protective services, Nozick’s minimal state, in order to ensure its dispute resolution procedures’ accuracy, would have to provide them with lawyers as expert in the agency’s procedures as those on the other side.

\textsuperscript{70}c.f. §1.3.2, pp. 56ff

\textsuperscript{71}I do not address the disposition of entitlements should a natural catastrophe cause the amount available suddenly to be reduced. This thesis departs from the ideal situation in addressing people’s disagreements, conflicts and hostile emotions. The spirit of the state I describe, which contemplates coercion to ensure people’s independence, would I think lead to emergency taxation to re-establish people on their feet, but not to sustain them over time. Nor do I address parenting duties. My intuition is that parents have duties to prepare their children, as best they can, for the world they grow up in. What is to be done when parents fail to live up to those duties is a topic on which the libertarian tradition is rather quiet, and a fruitful avenue for further research.
impression. Suppose that the only source of employment available to me was, through economic circumstances that can be attributed to nobody in particular, in the state’s employ, and the job came with conditions not to bring the public services “into disrepute” (see above)\(^\text{72}\); with breach of those conditions leading to dismissal with no alternative but to survive using my entitlement of natural services. Such an arrangement would not in itself be unjust. The state is under no obligation to offer me a job, but doing so would hardly be conducive to my being in a position to challenge the state’s power. It would be a situation in which the state could perpetrate other injustices (against me, or someone else dear to me) and in which I would not be in a position to oppose public authority. I would not be an independent check helping to ensure that I and my fellow citizens remained beneficiaries of the natural rights of justice that it had stolen; I would feel very strong pressure to keep my head down.

It may be objected that there is nothing special about the state happening to be, as opposed to claiming a right to be, a monopsonist consumer of labour. Could I not similarly be in hock to a private company? If a particular company is to all intents and purposes the only employer in town, would it not be able to exercise the same level of power deemed excessive in state hands? It could, and this would enable it to engage in abuses of power that ought to be condemned. Nevertheless, being worthy of condemnation is not the relevant criterion here. The company does not claim a monopoly of employment, it only happens to exercise one. If it sought to intimidate other people from conducting independent business, it

\(^{72}\text{c.f. §5.2.2, pp. 235ff}\\)
would likely be guilty of a rights violation and state courts could demand it pay compensation and refrain from such conduct. Admittedly, if it sought to use its power in the local community to influence business regulations (e.g. to exclude competitors) it could also exercise undue power. However, in the rather free market society that this thesis conceives itself to be working towards, there would be few regulations that had the effect of distorting the terms under which parties would compete in the marketplace.\(^{73}\)

Though important in modern societies,\(^{74}\) being employed by someone else is far from the only way of making a living. People can also engage in trade, using the means at their disposal to make a living by providing goods and services that other men and women are willing to pay for. They do so alone, in families, or in cooperation with specific business partners. In a green libertarian ideal economy, this is the primary form of economic activity. People are envisaged as holding title to the output of certain natural services and expending effort and ingenuity to make them as useful as possible to each other. They choose what to make and whom to do business with just as they choose whom to socialise or procreate with. Though people retain the liberty to enter into an employment

\(^{73}\)See, for instance, Friedrich Hayek, *The Constitution of Liberty* (London: Routledge, 1960), 199–204, for an argument on how general regulations are to be distinguished from arbitrary or discriminatory ones that favour certain market participants over others. Hayek’s argument there focuses on the state imposing regulations for its own political purposes, and it is not a large step to include in those political purposes, the private interests of certain firms who have been able to manipulate the political process to their advantage.

contract, with reasonably fixed hours of work, predictable pay and clear prospects for advancement in a hierarchical organisation, this isn’t the picture of human flourishing that green libertarians have in mind. They would see it as a little quixotic, as they would someone who preferred a life under feudal authority or monastic discipline.

Employment is *ceteris paribus* a dominating relationship, and a person’s employer is in a position to exercise considerable control over someone’s life plans, particularly if the firm or industry in which she works is one where progress depends upon ascending a hierarchy (the need to ascend such a hierarchy could be understood in economic terms as a “barrier to entry”). Furthermore, the employer often also has the power to intervene in considerable detail into personal aspects of her life: where she is physically during most of the day, how she dresses, how she performs her work, and so on. The gains in security are purchased at quite a cost in freedom. Still, the mere fact of this does not constitute an injustice. People are entitled to make this trade, and it is to be expected that many will. They don’t want to have the responsibility or the stress of that accompanies the freedom of being their own boss.

The extent of the domination they are under however depends importantly on their market power. The star footballer who demands hundreds of thousands of pounds a week so as not to jump ship to a rival is clearly not dominated. Workers

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with high value exercise considerable hold over their employers\textsuperscript{76} and the existence of a practice of paying over the odds to secure loyalty\textsuperscript{77} suggests it applies more broadly across the labour market. The right to leave employment grounds this market power. The existence of feasible alternatives gives the employee the choice of whether to accept the employers’ conditions or to find better ones elsewhere. Of course, there are frictional costs associated with a job search (time, moving house, a partner’s career, etc.) but the employer has her own frictional costs to pay (finding a replacement, the disappearance of tacit knowledge, uncertainty about the quality of the new worker). Engels’s “unemployed reserve army of workers”\textsuperscript{78} is only available to certain employers in particular economic circumstances.

Under an optimistic reading, everyone’s natural rights to certain natural services would preclude anybody needing to enlist in such an army. It would, by providing them with a level below which they could not fall, secure them enough for people to survive, and quite probably to allow them expand their holdings through trade. To take an illustrative example: in an industrialising green libertarian society, a mill owner who planned to operate a factory would have to first buy the right to pollute the air and water from people who lived nearby, who would be


in a position to negotiate themselves a share of the factory’s profits before they allowed production, and so pollution to go ahead.\textsuperscript{79} The original providers of financial capital to the business would receive a lower share of the proceeds than they did in, say, 18th Century Manchester, as some of the venture’s profits would be distributed among the local residents, many of whom would be workers at the city’s mills. Green libertarian property rights resist certain inegalitarian tendencies to which un-ecological markets give rise (though, as stated earlier\textsuperscript{80}, they rely on inequality’s not being eliminated entirely to stimulate what in the phrase often attributed to Keynes, are the “animal sprits” important for innovation and progress).

\textsuperscript{79}That kind of industrial enterprise is usually viable only at a certain scale, and therefore, holding the choice of industrial technology constant, a certain amount of pollution, the rights to which would, originally belonging to a certain proportion of the residents, have to be bought. Breathable air within a certain radius probably qualifies as a non-fungible natural service above a certain minimum level (see see above (c.f. §1.1.1, pp. 33ff)) because anyone in an area receives the pollution inhaled, giving them considerable bargaining power when pollution exceeds this amount. Over the long run, this would stimulate the development of environmentally efficient technology just as over the long run it stimulated the development of labour-efficient technology. Note, though, that all participants in this bargaining process would have, should they plan to have children, to preserve natural services that are at least as good as the ones they had for themselves, to pass on to each of their children.(see above (c.f. §1.3.2, pp. 56ff))

\textsuperscript{80}c.f. §1, pp. 29ff
5.3.1 Public Employment and Political Power

Nevertheless, it is still possible that a particularly lucrative industry, say, saffron farming, could generate revenue so great that workers there are offered wages much higher than those in any alternative occupation, and which yield a standard of living far greater than that available by trading the output of natural services. Stipulate that entry into the saffron market would have to be limited (e.g. due to the difficulty of finding the correct combination of soil and climate needed to grow saffron successfully), otherwise the high return to saffron farming would stimulate other people to go into the business, eroding the farmers’ profits and their ability to pay high wages to their employees. In a state of nature, this is not a problem since the handsomely remunerated saffron farmers, like renaissance legislators in receipt of royal pensions, have made a choice to forgo elements of their freedom to make money.

Labour-market domination by the state is different. Though not unjust, it would remove checks on public power. People subject to it would not be able to fulfill a magisterial role as they would be subject to powerful economic incentives because

\[81\] The prohibition against declaring natural rights to territory under green libertarian principles (see above (c.f. §1, pp. 29ff)) would likely make resource extraction, as opposed to the combination of resources with the output of natural services into useful and beautiful products and services, less lucrative than it is in the real world. If a polity were to operate system of artificial property rights to natural resources these would need to be justified on instrumental grounds as copyrights and patents usually are. There is no space to go into this in this thesis, but a comparison with systems of intellectual property might be a fruitful direction for future research.
dominating public employment places detailed matters of working conditions into state officials’ hands. Potentially relevant domination can occur when private employment practices, unobjectionable there, extend to the public sector, and thus bear on people’s ability to exercise their magisterial power. Criticism of a particular aspect of the administration of a certain government programme is often an act with political consequences — yet employment relationships can prevent such arguments being made. Even in situations, unlike those that had obtained in the British health service, where official confidentiality clauses were not used, informal channels of power can enable the authorities to punish politically wayward employees. Virutous officials may refrain from using this power, but others may be tempted to abuse it.

We need to attend however, to the origin and scope of domination. First, the source of the power to determine labour market conditions, not the formal employment status, is decisive. A situation in which government ministers determined pay and career structure across an industry through a national bargaining process linked to state subsidy negotiations or a system in which regulations were used to control the detail of how notionally independent professionals were to do their job would equally enable officials to impose restrictions on people’s political activity or other aspects of their freedom. Similarly, employment conditions in a firm that depended on state contracts for the majority of its income would also be subject to political influence.

Second, the extent to which the labour market in question resembles a roughly competitive one is crucial. Were the government to employ, say, typists, it would not necessarily be in a position to exercise labour market domination, because
they could find other work elsewhere. To exercise domination, the government would need conditions of employment in the public sector sufficiently better than in the private to make people fear they might lose their job if they stepped out of political line. It could of course arrange this, either by improving conditions, e.g. by offering higher wages or a more generous pension settlement to public sector typists than private employers could afford; or by using political power to reduce the private sector employment of typists; e.g. by requiring them to obtain an expensive “typists’ licence.”

Frictional considerations work in the state’s favour. A private employer may face immediate costs to their business and be liable to lose money if staff leave. A state institution, being larger and less specialised is less likely to be seriously affected except by a big walkout. Note that large conglomerates with easy access to capital would find themselves being able to resist the frictional costs to all intents and purposes as much as a state would.

As the purpose of dispersing magisterial power it to institutionalise countervailing power and “keep the authorities honest,” protection against this kind of abuse

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82 This would be an example of the state using power to do something on its own initiative. The use of state power to suppress economic competition is common, but it is more often in defence of the beneficiaries of a state policy, than of the state itself. As I write London’s “Black-Cab” taxi drivers have taken new internet based taxi booking services to court, arguing that the apps’ providing this service is illegal. The kind of state I envisage here would be prohibited from enacting regulations as potentially blatantly uncompetitive as this one could turn out to be. Others, such as the the establishment of training standards for doctors or the imposition of strict building codes in earthquake zones, may be allowed as “necessary evils,” though their detailed specification is outside the scope of this thesis.
is essential for limiting the kinds of abuse with which public officials can get away. How then, should this political control be avoided, and people’s economic independence from politics, though not from the state’s judicial function (the latter being inseparable from statehood) be preserved?

One possibility would be to provide people with a basic income,\textsuperscript{83} constitutionally protected and automatically determined to insulate it from the political process. The purpose of this income would be to provide people with a source of revenue independent from that which they receive from using their entitlement to natural services for trade. This would however be expensive, and would require extensive, rights-violating, taxation to fund.\textsuperscript{84} If cheaper means can be found to protect citizens’ independence to the extent needed for them to exercise magisterial powers,


\footnotesize{\textsuperscript{84}Though the development of a reliable estimate of the cost of providing a basic income in a green libertarian economy lies outside the scope of this thesis, the following rough calculation indicates the expense it could involve in an industrialised country such as the UK. To provide every British resident with a basic income equivalent to that recommended by the Living Wage Campaign, would require approximately £954 billion, or 59\% of nominal 2013 GDP. In 2013 UK GDP was £1,593 billion. (ONS Quarterly National Accounts Q4 2013, Table A2) The living wage was set at £7.65 per hour. Multiplying that by 40 hours for a full-time work week and 52 weeks per year, for 60 million British inhabitants yields £954 billion. Though the figure could be reduced by assuming some of the required means were supplied by the revenue from traded natural services, it would need to be increased to take into account of the public services the British state currently provides through other taxation. It is enough to note for my purposes that the provision of means required through direct subsidy appears likely to require significant taxation and therefore significant violation of natural rights.}
that should be preferred. Fortunately, if the argument above is correct, independence can be secured without such extensive taxation. It is enough that someone has the possibility to seek alternative sources of income, not significantly less generous than those available to them in public employment. This is enough to allow them the financial independence to be able to exercise magisterial power and fulfil the duties of that minor political office.

Two conclusions follow from the foregoing discussion. The first is that the state, wherever possible, should refrain from employing people directly. The element of frictional uncertainty involved in changing jobs gives, all other things being equal, an element of power to the employer in a hierarchical organisation. Though it is plausible that state bureaucracies tend towards being rigid, hierarchical employers, even if they did not, the power has constitutional implications it would lack when wielded by an organisation that did not claim a monopoly of jurisdiction. The problem is less serious in categories of work (such as the typists discussed earlier, were alternative private sector employment is not available) but it is not eliminated entirely. Measures such as the use of confidentiality clauses in employment relations, and which do not preclude the disclosure of criminal conduct to

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85I do not have evidence for this being a systematic feature of state organisations per se, it may simply be that larger organisations (and state organisations tend to be large) are less flexible, for it is plausible to conclude that large private bureaucracies can be equally hierarchical places to work in. Conversely, military organisations that operate according to the doctrine of “mission command” See US Army, Field Manual 6-0: Mission Command (Washington, DC: US Army Headquarters, 2011). allow subordinate units a great deal of autonomy in the means they use to perform a mission. The normative aspect of the link between hierarchy, size and membership of an organisation in the public and private sectors remains a fruitful avenue for further research.
the authorities with jurisdiction is unobjectionable in private business. But it is transmuted into a violation of free expression — and thus interferes with magisterial duties — when the employer is the state. Occasionally, however, states cannot avoid employing people and paying their salaries through (rights-violating) taxes. Direct employment is likely to be necessary for at least some elements of its judicial role, or when the function is one, such as national defence, that relies for its success and reliability on loyalty stronger than that generated by mere contractual obligation. In these cases they need to put in place mechanisms to limit the extent that its employees suffer domination. Measures might include a convention where reserve troops retain the ability to speak publicly when not on duty; providing public recognition and status to armed forces, judges and police; robust internal dispute resolution and disciplinary procedures. Establishing such measures is not impossible. Israeli reservists, for instance, have a noted tradition of political involvement that operates freely, but within the democratic institutional space afforded by the citizens, and is not taken to constitute revolutionary dissent or to portend coups.\textsuperscript{86} In some such cases alternative employment for people with particular skill sets will not be available. It is rare these days to leave one army and join another, for instance, as competing private security agencies are the thing states are instituted to prevent;\textsuperscript{87} but in other areas it is likely to

\textsuperscript{86}The Israeli tradition of soldiers’ involvement in democratic politics contrasts both with the Anglo-American one where military personnel are studiously non-political and the now thankfully largely abandoned Hispanic practice of more direct military involvement — See Pérez, \textit{Historia de España}, 451–463. for the latter.

\textsuperscript{87}That law enforcement and military personnel find themselves responsible for exercising the
be sufficient for the state to take a small enough role so that its staff retain the
effective option to seek what we might want to call “enough and as good” other
work in the private sector.

The second conclusion is that to guarantee people’s independence from the state,
they need to be able to put themselves in a position where they can avoid having
to depend on its munificence. The exact nature of this position is determined
by labour market conditions, and may be expected to change with a society’s
economic development. Citizens may of course still allow themselves to depend
on public munificence. These weaker-willed citizens would fail in their magisterial
duties and be, at least in the opinion of their more censorious compatriots, worthy
of condemnation. What matters is that citizens with enough and as good ways
of making a living will be able to resist state threats and blandishments; those
that lack them might not. The former will be able to function as independent
magistrates, the latter risk being subject to the state’s *arbítrium*. The green lib-
ertarian property rights guarantee people a certain quantity of physical capital
they can use for productive purposes. Yet, the story of economic development is
very much that of the application of increasing amounts of skill and knowledge
— human capital — through technological advance. A person’s ability to make
their own living in a developed market economy depends significantly (though not
exclusively) on receiving a level of education that enables them to work product-
tively. The argument developed here is too general to uphold a specific level of

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state’s power, and also, of necessity under rather dominating conditions of employment, may be
an irony, or it may merely reflect in acute form the radical ambivalence with which I view state
power.
required education, but it does conclude that there will be circumstances in which it is justified to tax people to supplement others’ initial entitlement to natural services and so provide for conditions where they can be sufficiently productive to exercise independent magisterial power. As a society’s level of technological and social sophistication increases, the amount of education required is likely to increase as well, though so, fortunately are the resources that are expected to be available to subsidise it without imposing excessively rights-violating taxes. This technology ought ceteris paribus also to raise the value of the output produced by transforming the output of natural services into manufactured goods and services.

This argument leads to a justification for limited taxation to supplement the funds people may obtain though making use of their initial entitlement to natural services. Such revenues would be used to enable those whom economic conditions would not allow to be independent of state employment to equip themselves to secure the skills necessary for alternative employment to be open to them, as well as to protect themselves from the effects of accidents or misfortune that might befall them. The rights violations involved in raising the money are not motivated by a desire for material equality but necessary to ensure that poorer people are also in a position to be independent of their rulers. Though it might well also authorise some taxation to prevent people losing independence as a result of their option luck, though it should be noted that the amount of provision authorised is not enormous, as it is only needed to top up the peoples’ entitlement to natural services to the extent that it is necessary to secure education (or practical
assistance for the moderately disabled, that would put a person in a position to have alternatives other than public employment available to them. Since people are free to sell their natural service output to fund education, or indeed to use the streams of output as security for financial instruments to fund expensive education or capital improvements to their holdings, the amount of funding that would be raised through taxes is not expected to be large: the aim is to provide a backstop to ensure that people can remain independent of the state even if their own economic circumstances are unfavourable.

5.3.2 Political Ethics

We have outlined the shape political and social welfare institutions ought to take in order to ensure the citizenry’s independence. This supplies citizens with power to limit a state’s ability to use the rights of justice it has expropriated to carry out and justify (to the satisfaction of adjudicative bodies it has set up for itself) further violations of their rights. Public institutions are to be kept in check through the oversight that independent citizens are able to exercise through political bodies in which they hold political office and exercise power: parliaments, councils, and, from time to time, elections and referendums. What are ordinarily referred to as citizenship rights are more accurately understood as a form of political office that if taken up comes with obligations; (see above.)

88This thesis does not address serious disability. It confines itself to what Rawls called the “Normal range,” Rawls, A Theory of Justice, p. 83]

89c.f. §5.2.1, pp. 231ff
in the sense that they are disinterested in the outcomes of the political oversight process because their material condition is not supposed to be importantly affected by its specific decisions. Their original entitlement to natural services is protected by the state’s judicial arm; they are free to make a living by trade, enterprise and engaging in employment relations; in so far as it is necessary, they receive generalised educational and social insurance subsidies to shore up their labour market power and prevent them having an interest in currying favour with or being subject to financial pressure from state officials. These measures allow them to be able to exercise the duties of their political office including the minor office of participation as an ordinary voter. Though this subsidy is funded through taxation it is justified as a lesser evil because it is necessary to keep people independent of the government.\(^90\) It is to be preferred to the American Whigs’ policy of restricting participation in the institutions of political oversight to those who manage to be independent without receiving subsidy because in that situation the poor would lack any means of preventing the coercive political institutions being used against them. They would have to rely on “virtual representation”\(^91\) by the rich.

The shape of these institutions does not entail their justice or legitimacy. Rather their aim is to direct citizens’ power to press upon the practical reason of gov-

\(^90\)If follows from this at at low levels of economic development the evil done by taxation would probably exceed the effects of distributing political power it would produce.

\(^91\)”Virtual representation” was a theory advanced to defend, among other restrictions of the franchise, the power that the Westminster parliament claimed to impose taxes on the American colonies.
ernment officials and to reinforce any moral convictions they may have. In this connection, I neither expect public officials to be “moral saints”\textsuperscript{92} nor to behave so as to maximise their self interest; their moral psychology should in the main be like other people’s.\textsuperscript{93} But magistrates — a category that includes all who exercise power over the political institutions — cannot avail themselves of a maxim of legitimacy. This means their actions cannot be judged blameless because they meet conditions such as:

Act so as to fulfil the outcome ordained by the institutions.

Or,

Act within the space provided for you by the institutions.

In Chapter 3,\textsuperscript{94} we alluded to “dirty hands” approaches to political morality. Their defenders\textsuperscript{95} can be understood argue that holders of political office sometimes have to act in situations where maxims of legitimacy provide no guidance. If the argument of this chapter is correct, all political decisions made by holders of political office have this character to some extent because they involve coercion,

\textsuperscript{92}See Wolf, “Moral Saints.”

\textsuperscript{93}Treating public officials as having the complex of interests, moral impulses and loves described by Susan Wolf in “Morality and the View from Here,” should I believe, yield interesting conclusions about political life. The details are, however, beyond the scope of this thesis.

\textsuperscript{94}c.f. §3, pp. 137ff

\textsuperscript{95}(e.g.) Walzer, “Political Action, the Problem of Dirty Hands.”
which, as we saw above\textsuperscript{96} can be reduced, but never eliminated or justified without remainder. Though not all political decisions will be directly coercive, few will not involve defending the enforcement of outcomes of judgements using expropriated rights of justice, and the use of money taken from tax payers to carry it out. Even under the relatively lightweight state institutions imagined here, many political acts will involve extracting resources from the population and using them to raise military forces and equip police services, operate the courts and provide legal aid. Others might, as when infrastructure planners authorise compulsory purchasing of land to build roads, involve altering the extent to which private property rights can be exercised. Officials cannot derive legitimacy for their actions from the state or its constitution because those don’t possess any themselves. Holders of major political office may explain their actions as acting on behalf of citizens, whose demands they aim to fulfil, but this does not supply them with the moral authority required to change the features of their citizens’ moral deliberation that political legitimacy would require.\textsuperscript{(see above)}\textsuperscript{97} It places the responsibility firmly on the citizens, who as “mini-magistrates” have empowered their politicians to act. Because, however, this is nothing more than the citizens authorising agents to coerce on their behalf, the citizens need to address the same moral difficulty as their political leaders. Questions of necessity — is this rights violation necessary? proportionality — if it is, what kind of violations does the necessity justify? and mitigation — how can the violations be kept to a minimum? apply just as much

\textsuperscript{96}c.f. §4, pp. 181ff

\textsuperscript{97}c.f. §2.3.1, pp. 88ff
5.3 Making a living

to them as to their leaders.

Though Machiavelli perceived a conflict between individual Christian morality and the establishment of a glorious state, I argue that the conflict is somewhat different: it is found between the need for state institutions to protect rights, and those rights themselves. To ensure rights are protected, it is necessary to set up some kind of political authority, but that authority of course has to wield power capable of destroying the rights it is supposed to protect.

Magistracy is an inherently morally ambiguous role. The magistrate puts herself in a position where she is perpetually subject to temptation to abuse the power she holds. The good magistrate thus has a duty to limit the opportunities for temptation and must exercise statecraft to foster an independent citizenry. Some measures to assist her include arranging the distribution of power in the society through the entrenchment of constitutional rights and the separation of powers — the classical liberal institutions — and the development of a strong political culture that supported them through informal social conventions that reduces the chance of the political institutions being subverted. Nevertheless economic independence remains important to the operation of those formal institutions and social conventions. As there will always be people who have the state's rule imposed upon them; citizens need to be able to maintain their independence, because only by having that ability can they exercise power against their rulers.

This has two important implications for social justice that exist in permanent conflict with each other. In the first instance, it suggests that the good magistrates are under an obligation to secure opportunities for people who find they have none
or few to make a living independently of the state. To preserve this independence, they should contemplate taxation to authorise measures such as publicly funded education (of a level sufficient to allow people to compete in the labour market that exists at the time; but not publicly administered) and pre-educational childcare; emergency unemployment assistance, disaster relief, etc., and the facilitation of practices that allow people to maintain their independence. Though these violate rights, the rights violation involved is an evil necessary to limit state power.

But it also abhors institutions of dependency. Permanent welfare transfers to people because, say, they are less fortunate, put people in a situation of dependence on state programmes of redistribution rather than emancipating them from it would be excluded. So too would the provision of employment in state bureaucracies. In fact, public employment is to be avoided. Little makes someone as unacceptably dependent on the state as being employed by it. Even in advanced democracies like Britain, public employees’ political rights are in fact quite seriously restricted in the name of neutrality and confidentiality. Beyond the state’s rights-protection functions, which are dangerous and self-defeating to outsource — Machiavelli was right to warn against mercenary armies\textsuperscript{98} — there should be as little public employment as possible (thus public education would be funded by providing money to poor students, not paying teachers directly). The kind of state that I argue state officials have a duty to create or preserve, and which citizens, when acting as mini-magistrates at election time, should vote for, is more expansive than a classical liberal one focused on night-watchman functions,

\textsuperscript{98}Machiavelli, *Discourses on Livy*, 175–177 (Bk II:20).
but rather smaller in scope than the social democratic welfare states of Western Europe. The expansiveness is justified because the poor living under a classical liberal government lack the power to press their claims and are thus vulnerable to abuse by men and women who wield political power.

These programmes are nevertheless founded on injustice and should only be permitted when they in fact reduce the evils to which officials would, in their absence, be likely to resort. All office holders, from presidents and prime ministers down to individual voters, need to bear this in mind when making political decisions, including decisions about the state’s use of resources taken from tax payers. State power is dangerous and morally ambiguous, and though necessary cannot be wielded without causing significant harm. The correct attitude is one of radical ambivalence. As war may be “politics by other means,” political ethics should be considered a study in ambiguity, akin to the traditional understanding of the ethics of war.

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99Clausewitz, On War, 99.
Chapter 6

Conclusion

This thesis has argued that the standard accounts of libertarian theories of justice (and liberal theories more generally) evade or overlook the central moral problem of political legitimacy; namely, that state’s necessary use of coercion reduces freedom. It has rejected the possibility, defended by the overwhelming majority of political philosophers, starting with Plato, that it is possible to come up with moral principles that that generate obligations to obey states’ instructions because they are issued by states, and that people’s freedom is therefore not restricted when they are forced to comply with these obligations.

Such moral principles have a role: they allow us to think about what kind of society we would prefer there to be, but the coercive nature of state institutions distorts that society. Its coercion means that any society possessed of a state will fall short of the ideal. This position is not “philosophical anarchism,” which denies that states can, in practice, be legitimate. Rather, I have defended the more
radical claim that the concept of legitimacy is not applicable to states that have among their important purposes the protection of their subjects’ liberty. Doing without legitimacy, however, makes political philosophy more complex than it had originally appeared to be. The coercive nature of political power makes its use inherently morally ambiguous, and the attitude one should take toward it one of fundamental, radical, ambivalence.

I structured this thesis as the pursuit of an original green libertarian stateless ideal “mugged by reality.” Its starting assumptions were that all creatures can act, but people are special because they can reflect upon their actions, and that the effects of what people do, or don’t do to each other ought to impinge upon this reflection. In the chapter “Green Libertarianism”, I argued these effects could be described in terms of the uses (known as “natural services”) to which individuals put other elements of an ecosystem, and could be regulated by two principles. First, an uncontroversial one that people should not use each other as natural services without their consent, which the limited space afforded by the thesis did not allow me to focus on, but which resembles Kant’s injunction not to use someone merely as a means, and Lockean accounts of self-ownership. And second, a decidedly more controversial ecologically-based Lockean principle of justice in acquisition. Universal adoption of these principles could allow people to coexist without irresolvable conflict and therefore without needing a state to enforce them. Environmentally conscious capitalist anarchists would hold property and prosper thanks to human creativity in its use, all the while inhabiting a world of finite resources.

The picture of human nature on which that argument was based is, however,
profoundly unrealistic. Useful though it may have been to describe an ideal, it imagined beings not very different from the angels for whom in James Madison’s words “no government would be necessary.”¹ In fact, fear, greed and love, and not mere reason, move people to seek power over others. A state can bring some order to this contest but only by wielding force of its own. Political legitimacy is invoked to authorise its use. The right sort of ruler: anointed by God; conforming to reason or principles of justice; elected by the people; or even for Hobbes and Kant, any that can keep order, is owed a duty of obedience. This, I argued in the “Liberalism and Legitimacy” chapter, should not be acceptable to a liberal because all states coerce and all principles of legitimacy fail to give freedom its due. If they subordinate it to another principle such as justice, use it as an input to an aggregation process, give it a step on a ladder of lexical priority, or even exalt a distribution of it through a system of natural rights (including the green libertarian system I outlined) they are precluded from taking into account the wrong that coercion authorised by the principle of legitimacy entails. But if they deny that coercion so authorised is ever wrong, their principle is reduced to fiat. Coercion may be necessary, but its justification is, as Locke was aware but his contemporary followers were not, properly understood as a matter of the continuous assessment of states’ behaviour, not fidelity to a separate principle of legitimacy. As Isaiah Berlin recognised most clearly, when a state coerces someone it reduces their liberty; if the coercion is justified it has to be by reference to another value, or another person’s freedom.

¹Pp. 319-320 Madison, “Federalist No. 51.”
Second, states’ claims to exercise a monopoly of jurisdiction: to be the highest judges in an area or over certain people, entail their rule is, in general, imposed. Insofar as states offer their subjects services like protection of rights these are usually “offers they cannot refuse.” The consent of all the governed, far from being the rule is in fact an unusual exception. It is a serious mistake to treat protective services like Nozick does, as compensation for the rights violation of governing them against their will, because it is as much of a violation for the state to determine the quantity of compensation as it is to impose its jurisdiction in the first place. States’ claim to monopoly requires them to behave like Mario Puzo’s “Godfather:” they come into being through immoral acts of coercion, and maintain their existence in the same way. All states have “dirty hands,” and if they wield moral authority, it is authority of a distinctly ambiguous character. Their hands are dirty, however, not because of any special property of states, but because an individual in the state of nature who coerces another acts, and quite often “ought” to act, out of love for people and projects in ways that the angels of Chapter 1 would condemn. The best states are “fairy godfathers” that take their inherent moral ambiguity seriously and try to limit the sins they commit.

Reality’s third intrusion is that our rulers are no better or worse than us. If we need them to protect us from each other, we also, for the same reasons, need to be protected from them. Among the rights they usurp are “rights of justice:” rights to enforce our other rights, to judge disputes over their interpretation, and so on. Officials, who are not particularly less scrupulous than most people, don’t only exercise first-order power, but may also dominate the citizens and get away with any crimes they have already committed. The means of their restraint has in
recent political theory exercised republicans such as Phillip Pettit. Though they err in considering domination the opposite of liberty. I argue in “From Clients to Citizens” that non-domination is accurately understood as akin to citizenship, and it is to be secured by the arrangements of political power informal as well as formal that I describe as institutions. Their detail is of course outside the scope of the thesis, though I envisage something like the separation of powers. Their end is to ensure officials act as if they had not expropriated their peoples’ rights, but that the people still held them themselves. Their operation however presents a second element of level ambiguity: institutions need resources to function; resources that a state is to obtain by taxing people in order to fund their more effective protection from the very authorities levying the taxes. This view of taxation is alien to that supplied by accounts of political legitimacy. Under those accounts, taxes, even Nozick’s limited impost exacted to fund security, reflect underlying moral obligations, rather than a contest between the need to tax and the wrongdoing involved in taxation.

“A Machiavellianism of Rights,” my final chapter, concerns itself it with who the people who need to make these moral judgements should be. While the form of institutions most effective for making officials act as if the ruled still possessed their rights of justice is an empirical question outside the scope of this thesis, the character of the powers people wield is not. I argued that the moral conflict at the heart of my argument: between a state’s purpose — protecting freedom — and its nature — a monopoly on coercive force; is not dissimilar to Machiavelli’s conception of republican government. I accordingly see states as susceptible to corruption, that is, diversion from their purpose, by the people who operate their
institutions. Restraining this corruption is a matter of dispersing the “magisterial” power to rule, and it is essential that magistrates exercise this power independently of the state’s officials. The legal institutions of the previous chapter provide some safeguards, but economic independence from the state is also required. Unlike the American revolutionary Whigs who saw this as a reason to restrict the franchise, I argued that it sets up a third level of moral ambiguity. Measures need to be taken to allow people to be economically independent of the state; but these measures are likely to require more taxation still. I reject a basic income as too expensive, and limit myself to exploring how people’s opportunity to make a living independent of the state can be secured. The end result is a conception of the state that emerges from the moral conflict between its own function and the means of its continued operation. Struggling with that moral conflict, rather than applying a principle of legitimacy in the belief that one can thereby wish the conflict away, constitutes political ethics. It is a struggle in which all participants in politics, from prime ministers and parliamentarians down to ordinary voters, ought to engage.

The details of the struggle provide my particular preferred view of the extent of desirable state authority. In my case it should exist to protect the equal independence of the person and the green libertarian rights to use and transform natural services that I argued people are entitled to. The result is a kind of polity which, though more extensive in its environmental, social and economic activity than much contemporary right-libertarian visions, interferes a good deal less in “capitalist acts between consenting adults” than the social democracy common in the Anglo-American academy. Adopting a different view of the state’s purpose
could move this framework in a less or more egalitarian direction. It would always remain, however, a philosophy sceptical of political power.

This thesis’s focus on the concept of political legitimacy drew on research from a broad range of areas in political theory and this interplay on occasion stimulated promising directions for future research, to which I have made reference in the main body of this work. Two areas stand out however as being particularly important: political power and the relationship between “political morality” and ordered, “law-like” ethics.

Adopting a principle of legitimacy confines the moral assessment of political power to theories of the second-best. In ideal circumstances, political power that acts in accordance with the principle is to be enjoined; and political power exercised against it is to be forbidden. In less ideal circumstances, the principle provides a guide to virtue like “a city that is set on an hill”\(^2\) which, in the spirit of Jesus’s sermon on the mount, we may in better circumstances come closer to achieving. This thesis denies that possibility because coercion, even in good cause, changes the shape of the society to which it is applied: an ideal points to the end of a rainbow, but trying to reach it causes it to move further away. How this happens is, with two partial exceptions, largely unexplored in analytical political theory. Those two exceptions are: the rational choice school and republican political theory. The rational choice perspective is right to inquire into the behaviour of government officials, and is a definite improvement on imagining people as automatic executors of a collective political agent’s will, but incorporates an exceedingly limited

set of motivations into its model of human behaviour. Republicans are right to concentrate on the effects of people who hold power on society, but adopt a position that does not distinguish between relations of domination voluntarily entered into and those imposed by an entity which claims a monopoly of jurisdiction. The normative implications of how coercion — the central political relation — pushes societies away form stateless moral ideals remain significantly under-researched in the analytic tradition.

Secondly, the argument made at the end of the “Fairy Godfather” chapter\(^3\) that the ambiguity attributed to political morality can be explained as emerging from the ambiguity involved in individual decisions to coerce in a state of nature has the striking implication that political morality is not an exception to ordinary, unambiguous systematic moral systems, but that what had been considered systematic morality somehow emerges out of an underlying pluralist moral environment. It is worth pursuing this to investigate first, whether an effective state appears to “do the coercion so that its citizens don’t have to,” thereby allowing them to go about their lives free from the moral struggles this thesis maintains are an inescapable part of political activity; and secondly, how the two conceptions relate in areas where public power is less immediately authoritative: in particular, relations between political entities, and the contest for political power within them.

\(^3\)c.f. §3.5, pp. 173ff
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