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Reflections on the minimal state

John Hasnas

George Mason University School of Law, USA

abstract

This article challenges the traditional argument for the state that holds that because the market is unable to supply the rule-making, adjudicative, and enforcement services that are essential to life in society, the state must, and hence is morally justified. The author argues that the market's inability to supply these basic services proves only that the state must ensure that they are supplied, not that it must supply them itself. This implies that the traditional concept of the minimal state as one that supplies only these basic services is flawed. The 'remedial state' (one that regulates the private provision of these services) is actually the minimal state.

keywords

anarchy, libertarianism, minimal state, political obligation, protective agency, public goods

Introduction

Since John Rawls revitalized political philosophy with the publication of *A Theory of Justice*¹ in 1971, there has been much scholarly debate over the ethical justification for political obligation. Scholars involved in this debate typically share the assumption that there is a legitimate moral basis for state power, but disagree about what it is. Beginning with Robert Nozick,² however, a subset of these scholars explicitly questioned this assumption and seriously considered whether the state can be ethically justified at all.³ As a result, over the past quarter-century, several scholars have examined the fundamental moral justification for state power.

Like all normative arguments, the basic argument for the moral justification of the state has both a normative and an empirical premise. The normative premise is usually expressed as a conditional asserting that if the state is necessary for the delivery of certain essential services, then state provision of these services is morally justified. The empirical premise then asserts that the state is, in fact, necessary for the delivery of these services. The evaluation of this argument almost always focuses on the empirical premise. Critics try to show how the services in question can be adequately supplied by a free market; defenders counter by attempting to demonstrate how the market will fail.⁴ In this article, I have no intention of entering the fray over the empirical premise. Rather, I will argue that the normative premise is false in an interesting way that may render the debate over the empirical premise moot and should cause us to revise our conception of the minimal state.

The basic concepts

Most scholars who consider the matter follow Max Weber⁵ in identifying the state with an organization that asserts a monopoly on the use of force over some geographic area and raises its revenue through coercive taxation.⁶ Tyler Cowen gives a somewhat looser set of indicia, treating the state as an organization characterized by 'finance through taxation, claim of sovereignty, ultimate decision-making authority, and prohibitions on competitive entry'.⁷ Either of these locutions may suffice for present purposes. What appears to be essential for an organization to be considered a state is that it monopolizes the basic policing, rule-making, and adjudicative functions in an identifiable area and funds these functions through taxation.

A state that performs *only* these basic functions is usually, following Nozick,⁸ referred to as the 'minimal state'. The minimal state is thought to present a crucial test case because it is assumed that for any state to be justified, it, at least, must be. Therefore, the basic argument for the state consists in an attempt to provide a moral justification for an organization that is empowered both to compel its customers to pay for its police, rule-making, and adjudication services and to use its coercive power to suppress all competitors.

The exemplar: the argument from Locke's Second Treatise

The exemplar of the argument for the state can be taken from Chapter 9 of John Locke's *Second Treatise of Government*. There, Locke contends that in the state of nature, that is, in the absence of a state, human beings can have no 'established, settled, known law', no 'known and indifferent judge', and no 'power to back and support [a] sentence when right, and to give it due execution'. The lack of a uniformly accepted body of law and any recognized judicial and enforcement authority means that individuals' lives and property are always at risk of invasion by others. Because only a state can supply the rule-making, adjudicative, and enforcement services that individuals require for 'the mutual preser-

vation of their lives, liberties and estates', 11 the state is essential for human social existence, and is therefore morally justified. 12

Translated into more modern terminology, the basic argument for the state may be rendered as follows.

- 1) If the market cannot supply the rules of law, impartial adjudicators, and effective enforcement agencies necessary for human beings to live a secure and peaceful life in society, then a state that supplies these services is morally justified.
- The market cannot supply the rules of law, impartial adjudicators, and effective enforcement agencies necessary for human beings to live secure and peaceful lives in society.
- 3) A state that supplies rule-making, adjudicative, and enforcement services is morally justified.

An important caveat should be added. This argument is offered as an exemplar of the argument for the state's domestic power. As a state of nature argument, it proceeds by assuming that states do not exist and asking what essential goods or services human beings would be unable to obtain if that were the case. Because under the assumption that states do not exist there is no threat of foreign state aggression, arguments of this type do not address the issue of national defense. This is useful because it allows us to consider the moral justification for state power outside of the context of interstate warfare. As the discussion in the fourth section will make evident, this is the context in which the debate over the empirical premise has taken place in the literature. In the real world, of course, states do exist, and there is a need for protection against foreign state aggression as well as against domestic criminal activity. Whether the market can supply this type of protective service, however, will not be addressed in this article.¹³

Contemporary consideration of the empirical premise

When Locke wrote, and for centuries thereafter, the argument for the state went unquestioned. Because both premises were regarded as obviously true, political philosophy focused on *how extensive* a state was justified rather than *whether* the state was justified. More recently, however, political philosophers and economists have turned their attention to the status of the second, empirical, premise of the argument. Many of these have been willing to entertain seriously the question of whether the market can provide the basic rule-making, adjudicative, and enforcement services human beings need, and if not, why not.

The explanation most frequently given for market failure in this regard is that these basic services have, in whole or in part, the character of public goods, and thus will be underproduced by the market. Public goods are defined by the features of indivisibility and non-excludability such that 'Once produced, [they are] available to everyone at no additional cost (indivisibility), and it is not

feasible or efficient to exclude individuals from the benefit of the good[s] (non-excludability).'14 These features give individuals an incentive to enjoy the goods without contributing to their production, which prevents them from being produced in the desired amounts.

The public goods argument is most frequently advanced with regard to enforcement services. It is claimed that because private patrols or other measures designed to discourage criminal activities benefit those who do not pay for them as well those who do, there is a strong incentive for non-payers to free ride on the expenditures of others with the result that too little will be spent on protective services. ¹⁵ Christopher Morris provides a clear example of the argument in this context:

Security of person is to a large degree a collective good . . . [An] important part of the service provided by public police and systems of criminal justice generally is to *deter* potential violators from harming people. And this deterrence is an indivisible non-excludable good to neighbors and visitors . . . In addition to deterrence, there may be the benefits that follow from incarceration of the thief — namely, incapacitation — benefits that are also indivisible and nonexcludable.

Social order, at least security of persons and possessions, then, is to a considerable degree a collective good. Accordingly, to the degree that this is the case, social order may not be efficiently provided in the absence of a state. ¹⁶

William Landes and Richard Posner make a similar argument with regard to rule-making services. ¹⁷ They contend that because the existence of definite and widely known rules of behavior provides a non-excludable benefit to all, private providers of adjudicative services lack an incentive to establish the clear precedents that give rise to rules. This is because clear precedents 'would confer an external, an uncompensated benefit, not only on future parties, but also on competing judges. If anything, judges might deliberately avoid explaining their results because the demand for their services would be reduced by rules that, by clarifying the meaning of the law, reduce the incidence of disputes.' ¹⁸

Not all theorists agree that the rule-making, adjudicative, and enforcement services human beings need to live secure and peaceful lives with others are public goods that cannot be adequately produced in the absence of a state. Economists Murray Rothbard, David Friedman, and Bruce Benson and legal scholar Randy Barnett have each advanced extended arguments designed to show that these services can, in fact, be privately provided. ¹⁹ Although it would not be to the point to rehearse their arguments in detail, these scholars introduce both historical evidence and economic reasoning to show how private companies or organizations can supply the basic protective services individuals need in return for voluntary payments. These 'protective agencies' can take many forms, but are often analogized to health or automobile insurance companies that sell contracts for various levels of protection in return for premiums paid in advance. These

scholars similarly suggest that adjudicative services can be supplied by companies such as the American Arbitration Association or JAMS/Endispute, although they also suggest that such services are likely to come bundled with protective services in much the same way automobile insurance companies handle the litigation arising from traffic accidents for their clients. In the latter case, disputes with other clients of one's protective agency would be adjudicated according to the procedures specified in one's policy. Disputes with clients of other protective agencies would be handled according to procedures that have been antecedently specified by the protective agencies to reduce the cost of inter-agency conflict. Lastly, with regard to rule-making, these scholars claim that widely understood rules of behavior would arise from free-market adjudicative services in precisely the same way that our present rules of law arose from customary law and common law processes.

Although most scholars do not believe that the arguments of Rothbard, Friedman, Benson, and Barnett demonstrate that fundamental rule-making, adjudicative, and enforcement services can be provided privately, few have responded to them directly. One who has is Tyler Cowen.²⁰ He argues that because the services that the posited protective agencies would provide have the characteristics of public goods, the protective agencies will inevitably band together into an abusive monopoly.

Professor Cowen concedes that private agencies can supply the protective services necessary for a secure life in society if they can avoid violent conflict when disputes arise between their clients and the clients of rival agencies. He also concedes that this can be achieved by the type of antecedent inter-agency agreements envisioned by the advocates of the market, and indeed, that such agreements can give rise to a contractual network that can internalize 'adjudication externalities'21 and provide society with the effective equivalent of a single legal code. According to Professor Cowen, however, this is precisely the problem because 'The existence of a common arbitration network creates a vehicle for protection agency collusion.'22 Professor Cowen suggests that the same ability to cooperate that allows protection agencies to avoid Hobbesian strife enables them to collude together to exercise monopoly power, which, given the economic incentive to reap monopoly profits, they will surely do. Thus, Professor Cowen concludes that 'Competing legal systems are either unstable or collapse into a monopoly agency or network.'23 Further, because the services that the cartel monopolizes include the exercise of coercive power, the cartel is both extraordinarily stable and extraordinarily dangerous. It is stable because 'Neither free entry nor defection from the cartel provides the usual protection against collusion that we find in other markets.'24 It is dangerous because its monopoly on the exercise of coercive power allows it to initiate coercion against its customers, which in turn allows the cartel to raise its revenue through the equivalent of taxation and to extend its monopoly over other segments of the economy.

Professor Cowen argues that it is the public goods characteristics of the

services the protective agencies provide that cause the agencies to collapse into an abusive monopoly.

The protection of property rights contains both public and private good elements. The private good element allows markets to produce protection services, but the public good element implies that a monopoly firm or network will arise because of externalities in the adjudication process. The provision of protection with mixed public and private features implies that some set of institutions or economic agents will enjoy monopoly power and reap economic rents.

The same contractual and cooperative relationships that overcome externalities problems in provision of the public element of protection also allow for successful interfirm collusion.²⁵

Thus, Professor Cowen's argument implies that the libertarian anarchists have not really overcome the public goods problem.

If Professor Cowen's account is correct, it constitutes strong support for the empirical premise of the argument for the state. Advocates of the state can point out that when rule-making, adjudicative, and enforcement services are provided by a constitutionally limited state staffed by democratically elected officials, there are many safeguards against the abusive exercise of coercive power. On the other hand, the collusive monopoly of protective agencies Professor Cowen describes is bound by neither constitutional limitations on its power nor the democratic election of its officials. Therefore, if Professor Cowen is correct that a market for these basic services can avoid Hobbesian anarchy only by evolving into a collusive monopoly, it would appear that the market cannot safely deliver these services.

Advocates of the market have responded to Professor Cowen's argument by attempting to show that private protective agencies need not collapse into a collusive cartel and that market incentives provide a better check on the abuse of power than can any constitutional or democratic limitations on a state monopoly, and the debate continues. However, my present purpose is not to resolve this debate, but to illustrate that most of the consideration given to the argument for the state has been devoted to the empirical premise. In the sections that follow, I will suggest that this is unfortunate because there is much to learn from a closer examination of the normative premise, and, more specifically, that such an examination has the potential to render the debate over the empirical premise moot or, alternatively, to point to a pragmatic method for resolving it.

An objection to the normative premise

Perhaps because most contemporary critics of the argument for the state attack the empirical premise, the normative premise has received scant attention. As a result, it appears not to have been remarked that in the form in which it is usually advanced, it is clearly untrue.

The normative premise asserts:

If the market cannot supply the rules of law, impartial adjudicators, and effective enforcement agencies necessary for human beings to live a secure and peaceful life in society, then a state that supplies these services is morally justified.

However, the consequent of this conditional clearly does not follow from its antecedent. Proving that the market cannot supply the rule-making, adjudicative, and enforcement services human beings need does not prove that a state must supply these services, merely that a state must remedy the market's failure to provide them. Therefore, the antecedent of the normative premise proves, at most, that a state that remedies this market failure is morally justified, not that a state that supplies the services itself is.

If, as a matter of fact, the *only* way to remedy the market's failure to supply the necessary rule-making, adjudicative, and enforcement services is for the state to provide them itself, then the normative premise can be shown to be true. However, it is far from evident that this is the case. Assume, for example, that Landes and Posner are correct that because private adjudication services lack incentives to establish clear precedents they will fail to produce adequate rules of behavior. Although this might justify the existence of a state that subsidized the private production of precedents, it does not require and, therefore, does not justify the existence of a state that monopolizes the production of precedents itself. Consider also Professor Cowen's argument. Assume that he is entirely correct that the private provision of basic protective and adjudicative services will lead to a dangerous cartel. This would seem to justify the existence of a state with the power to prevent protective agency collusion, not one that required all citizens to purchase protective and adjudicative services exclusively from itself.

I submit that in the absence of strong evidence that the only way to remedy the market's failure to provide adequate protective, adjudicative, and rule-making services is to supply them via a tax-supported monopoly, the normative premise of the argument for the state cannot be regarded as true. For this reason, even if the empirical premise is true, the argument cannot establish its conclusion: that the minimal state, one that monopolizes the basic rule-making, adjudicative, and enforcement services, is morally justified.

Some thoughts about the minimal state

I have argued that the normative premise in the traditional argument for the state is false because it is too strong. Although its antecedent may justify state action to remedy the market's failure to provide essential rule-making, adjudicative, and enforcement services, it does not justify state provision of the services. This, of course, suggests that the following, weaker version of the premise might be true:

If the market cannot supply the rules of law, impartial adjudicators, and effective enforcement agencies necessary for human beings to live secure and peaceful lives in society, then a state that ensures that these services are provided is morally justified.

Let us assume, for the present, that the empirical premise of the argument for the state is true: that the market cannot supply the rules of law, impartial adjudicators, and effective enforcement agencies necessary for human beings to live secure and peaceful lives in society. There would then appear to be a legitimate argument for the existence of a state of some kind, although not for what has, perhaps inaccurately, been called the minimal state.

Consider for a moment the following rather fanciful situation. Following the revolution that resulted from the revelation that Al Gore actually carried Florida in the 2000 election by 10,000 votes, a constitutional convention is called to establish a truly minimal state; that is, one that will perform only those functions necessary for citizens to live together in security and peace. The delegates to the convention include the country's most brilliant economists, who are thoroughly familiar with both the public goods and abusive monopoly arguments against the market provision of basic state services.

The constitution that emerges from this convention has several familiar features. It creates a government of enumerated powers enclosed within a system of checks and balances designed to prevent the abuse of these powers. It authorizes the election of a congress every two years from representative districts and a president every four years by the populace as a whole, although it prohibits the president from succeeding himself or herself. It also retains the pre-revolutionary foreign policy structure of government, investing the congress with the power to declare war and the president, as commander-in-chief of the country's all-volunteer armed forces, with the power to prosecute it subject to all pre-revolutionary constitutional restrictions. What makes the new constitution distinctive, however, is the number and nature of the enumerated domestic powers.

The constitution invests the new government with only two domestic powers: the power to prevent dangerous protective agency collusion and the power to subsidize the production of rule-making, adjudicative, and enforcement services. The exercise of these powers is divided among the three branches of the new government. The congress possesses no direct domestic legislative authority of any kind. It is invested with only three functions: (1) to appoint the members of the Supreme Antitrust Court and the Supreme Public Goods Court, (2) to impeach any president who exercises domestic power without express authorization from one of these courts or otherwise violates his or her constitutional obligations, and (3) to impeach any member of the Supreme Antitrust Court and the Supreme Public Goods Court who abuses his or her position. Further, the members of the two courts must be selected from among highly qualified economists who have been certified as such by the American Economic Bar Association.

The Supreme Antitrust Court constantly surveys the protective and adjudicative services market looking for any evidence of the type of dangerous collusive behavior Professor Cowen warns about. Should it detect such behavior, the court can issue cease and desist orders, impose monetary penalties, or order the break up or dissolution of the offending companies. The Supreme Public Goods Court

constantly surveys the markets for rule-making, adjudicative, and enforcement services looking for evidence of the type of public goods problems that could result in the underproduction of these services. Should it detect such problems, the court can order the disbursement of funds to subsidize the production of the services in question or other forms of necessary remedial action. Thus, if Landes and Posner's critique of the market for adjudicative services is correct, the court could authorize payments for clear precedents to correct the shortfall produced by the market.

As chief executive officer, the president is responsible for enforcing the orders of the anti-trust and public goods courts in precisely the same manner as the pre-revolutionary president was responsible for enforcing the orders of the old Supreme Court. For this purpose, he or she has executive powers analogous to those possessed by the pre-revolutionary president, for example, command of FBI agents and federal marshals, the ability to call out the national guard,²⁷ and in case of insurrection, to declare martial law and call out the military.²⁸ Under the new constitution, however, the president is strictly prohibited from acting domestically unless explicitly authorized by one of the two new courts.

Consider the characteristics of the new government. It does not legislate. It does not adjudicate interpersonal disputes. It does not provide general police services, only those necessary to prevent protective agency collusion. It does, however, have sufficient power to prevent or remedy the types of market failure that are assumed to doom the private provision of these services. Further, this power is embedded within a system of constitutional checks and balances and democratic elections designed to insulate it from potential corruption by market forces.

It is unclear precisely how active the new government will be. It may have to intervene frequently to ensure that adequate rule-making, adjudicative, and enforcement services are produced and to prevent or break up malevolent efforts to corner the market for enforcement services. On the other hand, a single intervention to establish a continuous flow of necessary subsidies may be all that is required to ensure adequate services, and the deterrent effect of state scrutiny coupled with the threat of forceful intervention may discourage collusion sufficiently to make direct intervention virtually unnecessary. If the latter is the case, the new government, while remaining vigilant, may be rather inactive. What is certain, however, is that even at its most active, the new government will do considerably less than one that must directly supply citizens with rule-making, adjudicative, and enforcement services. In other words, the new government will do considerably less than the 'minimal' state.²⁹

This suggests that it is a misnomer to refer to a state that does nothing more than monopolize the basic rule-making, adjudicative, and enforcement functions in an identifiable area as the minimal state. I would submit that the new government described above is a better candidate for that appellation. However, for the sake of clarity and convenience, let us refer to this new form of government as the 'remedial state'.³⁰

The remedial state appears to be a state that ensures that citizens have the rule-making, adjudicative, and enforcement services they need to live secure and peaceful lives without providing them itself. Therefore, if the empirical premise of the argument for the state is true, the normative premise, which cannot establish that the minimal state is morally justified, may be strong enough to establish that the remedial state is.

One additional observation needs to be made. The argument in this section proceeded under the assumption that the empirical premise of the argument for the state is true and that the market cannot effectively supply basic rule-making, adjudicative, and enforcement services. If we set up a remedial state and this turns out to be incorrect, no real harm will be done.³¹ The remedial state will simply have nothing to do. If, as the critics of the empirical premise contend, the market really can safely and effectively supply the needed services, the remedial state may give us a glimpse of that rarest will-o'-the-wisp: a state that really would wither away.

A reflection on the nature of the state

The discussion of the last section seems to lead to a conundrum. The remedial state seems to violate the semantic convention noted in section two that defines a state as an organization that monopolizes the basic rule-making, adjudicative, and enforcement functions in an identifiable area. Because the remedial state does not do this, it does not seem to qualify as a state under the accepted definition. Yet, it is based on a constitution, finances its activities through taxation, claims sovereignty over its geographical area, and exercises ultimate decision-making authority within its limited sphere of competence. The remedial state certainly looks like a state; it just does not do the things a state usually does. Applying the accepted definition, the remedial state seems to be a non-state state.

I think this apparent paradox can be rather easily explained. It stems from the fact that we derive the definition of the state historically rather than analytically. We determine the essential characteristics of the state by examining states that have actually existed rather than by conducting a *tabula rasa* search for the logically necessary features of a state. As far as I know, all actual states exercise monopolistic authority over the legislative, adjudicative, and enforcement functions and gain their funding through taxation. This is entirely unsurprising since most states throughout history were created by agents seeking power over others. But the result of this historical uniformity is that we do not think to question Locke's description of the state as the exclusive supplier of these essential services. Because all the states in our experience do, in fact, supply these services, it is natural to assume that doing so must be an essential characteristic of a state.

This perfectly understandable assumption is incorrect, however. One cannot conclude from the historical fact that all existent states claim exclusive control over the use of coercive power that such exclusive control is logically necessary

for an organization to be a state. From a purely analytical standpoint, the essential features of the state are limited to those that are necessary for it to realize its purposes. However these purposes may be defined, if they can be achieved without monopolizing the legislative, judicial, and enforcement functions, there can be a state that does not exercise such a monopoly. Since, in the present context, we are discussing the minimal state, its purpose is, by hypothesis, the provision of the minimal amount of services necessary for citizens to live together in peace and security. If the remedial state can ensure that these services are provided, there is no reason why it should not be regarded as a true state, even though it does not provide the services itself. Thus, if nothing else is gained from this reconsideration of the argument for the state, it may at least teach us that we need to revise our basic definition of the state.

Conclusion and a final suggestion

Most political philosophers take it for granted that the state is morally justified. Among those who entertain the possibility that it may not be, the focus of debate is on whether the state is truly necessary or whether the market can safely supply the basic rule-making, adjudicative, and enforcement services that human beings need. I have ventured no opinion on this subject in this article, but I have argued that proving that the market cannot supply these essential services does not prove that a state must, and hence does not provide a moral justification for what is conventionally called the minimal state. I have also argued that proving that the market cannot supply these services might provide a moral justification for the remedial state, one that ensures that citizens receive essential rule-making, adjudicative, and enforcement services, but does not supply them itself. Lastly, I have argued that from an analytical standpoint, there is no reason why the remedial state should not be regarded as a true state. This last point carries the implication that it is a misnomer to refer to a state that is limited to the monopolistic provision of rule-making, adjudicative, and enforcement services as the minimal state. Because the remedial state does considerably less than one which legislates, maintains a judicial system, and runs a police force, it would appear to be a better candidate for designation as the minimal state.

Let me close with the suggestion that the idea of the remedial state, rather than being merely a whimsical theoretical construct, may ultimately prove to have some value. For, consider what would be required to settle the dispute over the empirical premise of the argument for the state, that is, to determine whether the state is truly necessary. Since supporters and opponents of the premise could probably argue about what will or will not happen indefinitely, the only way to resolve the point may be to put it to the test in the real world. But how can such a test ever be conducted? Those who believe that a market for rule-making, adjudicative, and enforcement services will necessarily lead to tyranny will certainly not be willing to dispense with the state's monopoly and its constitutional and

democratic limitations merely to settle a point. Yet as long as the state monopolizes these functions, the proposition can never be tested.

The remedial state appears to offer a way around this impasse. Because its power is the power to prevent tyranny and because this power is itself constrained by constitutional and democratic limitations, it possesses the safeguards the opponents of the market regard as necessary. But because it permits a competitive market for rule-making, adjudicative, and enforcement services to exist, it allows the claims of the advocates of the market to be tested. If the opponents of the market turn out to be correct, the remedial state will be quite active, and may ultimately convince us that the state should monopolize the provision of the basic services. But if the advocates of the market turn out to be correct, the remedial state will do nothing, and can eventually be dissolved. If the latter is the case, the value of the remedial state will be to facilitate the transition from state to anarchy.

notes

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- 1. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
- 2. Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974).
- 3. A nice sampling of these scholars (along with some that defend the state) is provided by the collection of articles in John T. Sanders and Jan Naveson, *For and Against the State* (Lanham, MD: Rowman & Littlefield, 1996).
- 4. Not all critics of the state are market anarchists, who assert that all necessary basic services would be produced by the competitive forces of a free market. Others argue that these services can be supplied by cooperative, rather than competitive, non-coercive social mechanisms. For purposes of convenience, however, and because it is the market anarchists who usually press the arguments discussed in this article, I have expressed the argument for the state in terms of a corrective for market failure. This will not be inaccurate if the term 'market' is understood in a broad sense as encompassing both competitive and cooperative non-coercive methods of supplying the necessary services.
- 5. Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), p. 56.
- See, for example, Murray N. Rothbard, For a New Liberty (New York: Macmillan, 1973), pp. 49–50; John Hospers, 'What Libertarianism Is', in Liberty for the 21st Century, edited by Tibor R. Machan and Douglas B. Rasmussen (Lanham, MD: Rowman & Littlefield, 1995): p. 14; David Boaz, Libertarianism (New York: Free Press, 1997), p. 187; Robert Paul Wolff, In Defense of Anarchism (New York:

- Harper & Row, 1970), p. 1; Ludwig von Mises, *Liberalism in the Classical Tradition* (New York and San Francisco: Cobden Press, 1985), p. 35.
- 7. Tyler Cowen, 'Law as a Public Good: The Economics of Anarchy', *Economics and Philosophy* 8 (1992): p. 250.
- 8. Nozick, Anarchy, State, and Utopia, p. 26.
- 9. John Locke, *Second Treatise of Government*, edited by C.B. Macpherson (Indianapolis, IN: Hackett Pub. Co., 1980), pp. 65–8.
- 10. Ibid., p. 66.
- 11. Ibid.
- 12. I am obviously glossing over the issue of consent that is at the heart of Locke's argument for the state, but is not centrally relevant to the present concern.
- 13. If this troubles the reader, I would be willing to assume *arguendo* that state provision of national defense is justified and can be supplied subject to the same constitutional and democratic restraints that exist in the USA today (or any stronger set of constraints that the reader feels is necessary to protect against a military takeover of government). This would recast the question under consideration as whether, *under the assumption that the state exists to provide essential protection against foreign aggression*, there is any justification for its domestic power. Locke's argument can then be seen as an exemplar of the argument designed to establish this more limited conclusion.
- 14. Christopher W. Morris, *An Essay on the Modern State* (New York: Cambridge University Press, 1998), pp. 59–60. This definition may be a bit strong. To qualify as a public good, a good need not be available to everyone, but merely to many who do not pay for it and who cannot be efficiently excluded from its enjoyment. I am grateful to Jack Sanders for pointing this out to me.
- See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), p. 5; Gordon Tullock, *Private Wants, Public Means: An Economic Analysis of the Desirable Scope of Government* (Lanham, MD: University Press of America, 1970), pp. 127–8.
- 16. Morris, An Essay on the Modern State, pp. 60–1.
- 17. See William M. Landes and Richard A. Posner, 'Adjudication as a Private Good', *Journal of Legal Studies* 6 (1979): pp. 235–84.
- 18. Ibid., p. 238.
- See Rothbard, For a New Liberty; David Friedman, The Machinery of Freedom, second edition (La Salle, IL: Open Court, 1989); Bruce Benson, The Enterprise of Law (San Francisco, CA: Pacific Research Institute for Public Policy, 1990); Randy Barnett, The Structure of Liberty (New York: Oxford University Press, 1998).
- 20. See Cowen, 'Law as a Public Good'.
- 21. Ibid., p. 256.
- 22. Ibid., p. 259.
- 23. Ibid.
- 24. Ibid.
- 25. Ibid., p. 265.
- 26. See, for example, David D. Friedman, 'Law as a Private Good: A Response to Tyler Cowen on the Economics of Anarchy', *Economics and Philosophy* 10 (1994):

- pp. 319–27; Tyler Cowen, 'Rejoinder to David Friedman on the Economics of Anarchy', *Economics and Philosophy* 10 (1994); pp. 329–32.
- 27. As President Eisenhower did to enforce *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
- 28. As George Washington did in the case of the Whiskey Rebellion.
- 29. There would be no difference between the remedial and minimal state with regard to the provision of protection against foreign state aggression. Both would have to supply this service to the same degree.
- 30. I confess that this is a somewhat inelegant designation. However, Nozick has already appropriated the uncomfortably oxymoronic 'ultraminimal state' (see Nozick, *Anarchy, State, and Utopia*, p. 26), and locutions such as the 'micro-' or 'nano-minimal state' would only make things worse.
- 31. This is not literally true because we will have created a concentration of power that could be subverted and put to oppressive use. However, at this point, I am accepting for the sake of argument the hypothesis of the advocates of the state that constitutional and democratic restrictions are effective safeguards against the corruption of state power.