

Chapter 9

Market Anarchism as Constitutionalism

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A *legal system* is any institution or set of institutions in a given society that provides *dispute resolution* in a systematic and reasonably predictable way. It does so through the exercise of three functions: the judicial, the legislative, and the executive. The judicial function, the adjudication of disputes, is the core of any legal system; the other two are ancillary to this. The legislative function is to determine the rules that will govern the process of adjudication (this function may be merged with the judicial function, as when case law arises through precedents, or it may be exercised separately), while the executive function is to secure submission (through a variety of means, which may or may not include violence) to the adjudicative process and compliance with its verdicts. A *government* or *state* (for present purposes I shall use these terms interchangeably) is any organisation that claims, and in large part achieves, a forcibly maintained monopoly, within a given geographical territory, of these legal functions, and in particular of the use of force in the executive function.

Now the market anarchist objection to government is simply a logical extension of the standard libertarian objection to coercive monopolies in general.¹ First, from a moral point of view, among people regarded as equals² it cannot be legitimate for some to claim a certain line of work as their own privileged preserve from which others are to be forcibly excluded; we no longer believe in the divine right of kings, and on no other basis could such inequality of rights be justified. Second, from an economic point of view, because monopolies are insulated from market competition and hold their customers by force, they lack both the *information* and the *incentive* to provide consumers with fair, efficient, and inexpensive service. The anarchist accepts these arguments, and merely asks why they should apply with any less force to the provision of legal services.

1 It's sometimes suggested that government is not really a coercive institution, because its subjects have implicitly consented to its authority, either by voting or else by simply remaining within its borders. (The latter argument goes back to Plato's *Crito*.) For a compelling refutation of the claim that voting constitutes consent, I refer the reader to Spencer 1851 and Spooner 1870. As for remaining within the state's borders, the very question at issue is whether the state's claim of authority within those borders is *legitimate*. If I suddenly claim that your house lies within my sphere of authority, your remaining in your house does not constitute consent to my rule.

2 For the essentially egalitarian insight underlying libertarianism see Long 2001 and Long 2005.

Locke versus Locke

The minarchist has answers to this question, of course.³ The great ancestor of all minarchist critiques is John Locke, who famously lists three defects or “inconveniences” of the state of nature, or anarchy.⁴ In fact, however, each of Locke’s points presents a far more serious problem for *government* than for anarchy. Let’s consider them in turn.⁵

First, there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the Law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding them in the application of it to their particular cases.⁶

Locke’s claim is that under anarchy there will be no generally known and agreed-upon body of law. But he offers no reason for thinking this; the inseparability of *law* and *monopoly government* seems to be an unargued, unquestioned, and probably unnoticed assumption on his part.

Minarchists raise the similar worry that competing providers of legal services in an anarchic order will have conflicting interpretations of justice. No doubt they will. But how is this different from the system that minarchists favor? The whole

3 Perhaps the most popular argument for the state nowadays is the so-called “public goods” or “market failure” problem. I shall have little to say about this issue, beyond pointing to the growing literature on how markets can, and historically have, successfully solved such problems. (See, e.g. Anderson and Hill 2004; Axelrod 1984; Bell 1992; Benson 1990; Ellickson 2005; Loan 1992; Schmidt 1991; Stringham 2006; and Wooldridge 1970.) But one brief point is worth making. Let it be granted that markets can generate perverse incentives. This by itself can hardly be an argument for government intervention, since governments, too, generate perverse incentives; the *public choice* (or “rent-seeking”) problem is the governmental analogue of the market’s public goods problem. Markets, however, contain a built-in mechanism for *correcting* their perverse incentives: any entrepreneur who can figure out how to solve a public goods problem stands to make a profit (and historically has). It’s unclear that governments contain any analogous mechanism for correcting their own deficiencies; on the contrary, the poorer a governmental institution’s performance, the more revenue it tends to receive.

The specific topic of an anarchist region’s military defense against neighboring states lies beyond my present topic; but see Hoppe 2003 and Long 1995b.

4 Strictly speaking, for Locke the state of nature is not identical with anarchy; it signifies not the absence of a government but the absence of a contractually established civil society – neither of which, in his system, entails the other, just as possession and rightful ownership do not entail one another. (For example, when a government establishes itself by unjust conquest rather than by consent, we still have a state of nature, but not anarchy; when a legitimate, contractually established government is unjustly overthrown, we have anarchy, but not a state of nature.) But in these passages Locke is clearly thinking of an *anarchic* state of nature.

5 It’s worth noting that Locke’s three “inconveniences” correspond to the three functions of any legal system: the legislative, the judicial, and the executive.

6 *Two Treatises of Government* II.ix.124.

point of having a constitutionally limited government, with checks and balances, is that the agents who administer the system will have conflicting interpretations of justice. There'd be no point in having distinct branches of government limiting each other, or having the people limit the government through the franchise, if unanimity on questions of justice could be expected. In *both* market anarchism and limited government, then, the working of the system will involve different parties trying to enact their several conceptions of justice. The best system is not one that eliminates such conflict – no system can eliminate it – but one that does the best job of providing its constituent agents with an incentive to resolve their disputes a) peacefully, and b) in a manner favorable to individual liberty. The question is: which does a better job of this – markets or governments?

But under market anarchism, aren't there are a variety of competing legal standards and legal enforcers, with none having final say? Yes, absolutely. But *how does this differ from a minarchist legal system?* Or indeed from *any* legal system? Polycentricity is not an all-or-nothing characteristic, but rather one direction on a continuum; just about every legal system in human history has comprised a variety of competing legal standards and legal enforcers – and the *more* polycentric ones have generally been the more successful. (Not all historical cases of highly polycentric legal systems are particularly appealing by libertarian standards; but the more monocentric systems are almost always *worse*.)

As for the desideratum of an “established, settled, known law,” markets seem likelier than government to converge on a relatively uniform set of laws for the same reason that they tend to converge on a single currency: consumer demand. Consider: why are there no triangular credit cards? Government regulation is not the reason; rather, if someone started offering cards that wouldn't fit in the standard machines, nobody would accept them (unless forced to do so by law). Similar reasons explain why the market no longer carries both VHS and Betamax video cartridges, but only VHS;⁷ the market creates uniformity when customers need it, and diversity when they need that instead. Diversity in movie titles available is a benefit to consumers; diversity in shape and size of video cassettes is not. Hence the market tends to provide the former and suppress the latter.

The history of the body of commercial law known as the Law Merchant (*lex mercatoria*) illustrates this dynamic. The Law Merchant arose because existing, government-provided mercantile law was *not* sufficiently uniform; each country had its own regulations governing contracts, for example, and the courts of one country often would not uphold contracts made under the laws of another country. Such an obvious impediment to international trade was immensely frustrating to the mercantile community; but the courts, as government monopolies unaccountable to consumer interests, had little incentive to correct the situation. So the merchants of

7 Here I am relying on the assumption that the dominance of VHS is the result of market forces. Strictly speaking, of course, in a regulated market it is often very difficult to determine which particular phenomena are primarily the results of market forces and which are primarily the result of state intervention.

various countries joined together and set up their own uniform body of mercantile law and their own private courts (with no power of enforcement but the boycott).⁸

The minarchist may counter that once market providers converge on a uniform set of legal standards, the system is now a monopoly state rather than an anarchy. But first, such legal uniformity need not be imposed *by force*; it may come about simply because agencies whose policies are incompatible with the majority system will lose customers, going the way of Betamax. Second, even if legal uniformity *is* imposed by force, what's required is a set of *standards*, not a set of specific organisations. If there are no barriers to entry – if a new security agency can start up any time – how is the system not competitive?⁹

Contrary to Locke's assumption, the lack of a known and agreed-upon body of law is a much more serious problem for government than for anarchy. Governments typically generate ever-increasing mountains of bureaucratic regulations that no one has time to read; such a situation is the effective *equivalent* of having no known law. Under a private legal system where changes in law occur as a response to customer demand, such problems are much less likely; it is precisely government's *insulation* from customer demand that creates the problem in the first place.

Let's turn to Locke's second objection.

Secondly, in the State of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the Law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's.¹⁰

Locke's worry here is that, in the absence of a monopoly government, each individual will have to act as a judge in his or her own case, a situation that inevitable raises the specter of partiality and bias. Now I think Locke is quite right in judging that, emergencies aside, submitting one's disputes to a neutral arbiter is preferable to judging them oneself; the offices of prosecutor and judge are better separated than combined. But how does an argument for neutral arbiters suddenly become an argument for monopoly government? The historical record shows that stateless legal orders tend to generate quite effective incentives for people to submit their disputes to arbitration.¹¹

Locke appears to be drawing an erroneous inference from the premise "Each person should delegate retaliation to an impartial third party" to "There should be an impartial third party to whom each person delegates retaliation." This is simply a fallacy of composition, analogous to the inference from "Everyone likes at least one television show" to "There's at least one television show that everyone likes."

8 On the Law Merchant see Wooldridge 1970 and Benson 1990.

9 For the crucial ways in which a cooperative network of security agencies differs from a state, see Caplan and Stringham 2003.

10 Locke, *op. cit.*, II.ix.125.

11 See Anderson and Hill 2004; Axelrod 1984; Bell 1992; Benson 1990; Ellickson 2005; Loan 1992; and Wooldridge 1970.

It is actually government, not anarchy, that suffers from the problem of judicial bias. Under anarchy, *any* dispute can be submitted to third-party arbitration; but under a governmental system, in disputes between a citizen and the state, the state – which as a monopoly of course recognises no judicial authority but its own – *necessarily* acts as a judge in its own case. Division of governmental powers alleviates the situation somewhat, but even so, those with a grievance against one branch of an organisation are unlikely to receive unbiased justice from another branch of the same organisation. (Would you feel secure in having your complaint against the marketing division of IBM adjudicated by the legal division of IBM?)

Market anarchists reject the concept of monopoly government, insisting that every legal institution must be subject to correction from without. It follows, of course, that any agency doing the correcting must also be subject to correction, and so on. This doesn't lead to an infinite regress, however, because while any legal institution is subject to correction from other legal institutions, those in turn are subject to correction from the first one; legal institutions check and balance *each other*.

It might be objected that the *entire group* of competing institutions is not subject to correction from without, and so constitutes a monopoly. But this would be a mistaken view. On the dynamic Austrian view of monopoly (as opposed to the static neoclassical focus on “market share”), a field counts as non-monopolistic so long as new firms are *allowed* to enter the field at any time; they need not actually exist *now*.

What of Locke's third objection?

Thirdly, in the State of Nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.¹²

Locke is concerned that without a government, individuals will lack the power to enforce respect for rights. But why should this be so? Locke neglects the possibility of forms of *organised defence* that fall short of coercive monopoly. This is rather ironic, given that Locke was writing in the days before England had introduced the institution of *police*. When such governmental institutions are ineffective or absent, it is common for private, non-governmental organisations for the enforcement of rights to emerge; instances include the thief-takers' associations of pre-Peel England and the vigilance committees of the old American frontier. (The Hollywood stereotype of the latter as lawless lynch mobs has been thoroughly debunked by the work of libertarian historians.)¹³ The alternative to having government provide all the shoes is not to have each person make his or her own shoes.

Here once again it is government, not anarchy, that is truly vulnerable to Locke's objection. When the forcible defense of rights is monopolised by a single organisation, it becomes much more difficult for individuals to defend their rights against *it*.

12 Locke, *op. cit.*, II.ix.126.

13 See Anderson and Hill 2004; Benson 1990; and Wooldridge 1970.

The Specter of Plutocracy

Another commonly expressed worry is that under market anarchism justice would go to the highest bidder, thus generating a plutocratic rather than a libertarian order. Now I certainly agree that the power of the wealthy might pose a danger to liberty in a market anarchist society.¹⁴ But the notion that the danger of plutocracy is *less* under government is hard to believe. On the contrary, government *magnifies* the power of the rich. Government officials control the spending of money that is not theirs; hence wealthy special interests only need to spend a few *thousands* to persuade some politician or bureaucrat to divert *millions* toward their goals. By contrast, when people control only their own property, their costs are internalised; hence a thousand-dollar bribe yields only a thousand dollars' worth of results.¹⁵

The minarchist's worries about the fate of the poor and marginalised under anarchy sound oddly like the typical state socialist's complaints that because *he*, the state socialist, cannot imagine how markets could help such people, the market must be rejected. Such failure to recognise the ingenuity of the market is not surprising in the state socialist, but it is more so in the minarchist.

For example: only the government can protect the poor from crime, the minarchist insists, because the poor cannot afford justice on a for-profit basis. But have minarchists never heard of the American Civil Liberties Union, or the Institute for Justice, or all the many other non-profit providers of legal services? Aren't non-profit organisations part of the market? And wouldn't they have even more resources to work with under a market system? (Nor are specifically profit-oriented solutions to be dismissed either. Under the medieval Icelandic system, poor people who were the victims of aggression could sell, to a richer and more powerful neighbor, their right to compensation.¹⁶ In any case, if libertarian economic theory is correct, a libertarian society would see the virtual elimination of poverty.)

Minarchists like Ludwig von Mises have long compared the free market to a voting system that specifically empowers the ordinary consumer:

In the capitalistic society, men become rich ... by serving consumers in large numbers. ... The capitalistic market economy is a democracy in which every penny constitutes a vote. The wealth of the successful businessman is the result of a consumer plebiscite. Wealth, once acquired, can be preserved only by those who keep on earning it anew by satisfying the wishes of consumers. The capitalistic social order, therefore, is an economic democracy

14 See my discussion of this problem, and possible solutions to it, in Long 1998.

15 For some of the ways in which governments, even allegedly "left-wing" or "progressive" ones, systematically benefit the rich at the expense of the poor, see Beito 2000; Carson 2004; Childs 1971; Grinder and Hagel 1977; Kolko 1963; Kolko 1977; Long 1994; Long 1998; Martin 1975; Radosh and Rothbard 1972; Ruwart 1993; Shaffer 1997; Siddeley 1992; Stromberg 2001; and Weaver 1988.

16 A simple extension of this approach could also solve the problem of murder victims who leave no heirs: courts can simply treat these victims' right to compensation as a *homesteadable claim*; see Long 1999.

in the strictest sense of the word. In the last analysis, all decisions are dependent on the will of the people as consumers.¹⁷

Anarchists simply draw the logical conclusion – as David Friedman does in the following passage:

You can compare 1968 Fords, Chryslers, and Volkswagens, but nobody will ever be able to compare the Nixon administration of 1968 with the Humphrey and Wallace administrations of the same year. It is as if we had only Fords from 1920 to 1928, Chryslers from 1928 to 1936, and then had to decide what firm would make a better car for the next four years. ... Imagine buying cars the way we buy governments. Ten thousand people would get together and agree to vote, each for the car he preferred. Whichever car won, each of the ten thousand would have to buy it. It would not pay any of us to make any serious effort to find out which car was best; whatever I decide, my car is being picked for me by the other members of the group.¹⁸

Hence, Friedman concludes, the provision of “governmental” services should be transferred from the political plebiscite to the economic.¹⁹

It’s sometimes objected that under such “market democracy” a rich person has more votes than a poor person, while under political democracy each person has one vote. This objection rests on an equivocation. If by having more votes one means having more ability to bring about the outcomes one votes for, then under even an ideal political democracy, 49 per cent of the population have, *in that sense*, no votes at all. (Under actually existing political democracies, of course, the rich have many more votes than they would have under market democracy, for the reasons explained above.)

Anarchism is a Constitutionalism

Minarchists often insist, as an objection to anarchism, that the use of force needs to be subjected by constitutional restraints. But here I suspect that the minarchist is being misled by a metaphysically illusive picture of what constitutional restraints are and how they work.

First of all, when we speak of constitutional restraints we are presumably not talking merely of restrictions written into a legal document. Such paper prohibitions are neither necessary (look at Britain) nor sufficient (look at Soviet Russia) for

17 Mises 1978, p. 178. Mises, like many libertarians, uses the term “capitalistic” to mean free-market or *laissez-faire*. Some libertarians, however, prefer to use the term for the economic system prevailing in industrialised countries, which they identify as an *unfree* market characterised by pro-corporate governmental regulation. For the ambiguity of “capitalism” see Johnson 2007; I make a case for abandoning the term entirely in Long 2006a.

18 Friedman 1989, pp. 131-32.

19 For present purposes I use the term “political” in its narrowly governmental sense – the sense in which Karl Hess (1969) called for “The Death of Politics.” For a defense of a broader notion of the political, see Lavoie 1993 and Long and Johnson 2005.

actually operative restraints. What matters is a nation's "constitution" in the original sense of the actual institutions, practices, and incentive structures that are in place.

But a constitution in that sense has no existence independent of the actual behavior and interactions of actual human beings. The metaphysical illusion I referred to is the habit of thinking of constitutional restraints (checks and balances, separation of powers, etc.) as though these structures existed *in their own right*, as external limitations on society as a whole. But in fact those structures exist only insofar as they are continually *maintained* in existence by human agents acting in certain systematic ways. A constitution is not some impersonal, miraculously self-enforcing robot. It's an ongoing pattern of behavior, and it persists only so long as human agents continue to conform to that pattern in their actions.²⁰ In Gustav Landauer's words: "The state is a relationship between human beings, a way by which people relate to one another; and one destroys it by entering into other relationships, by behaving differently to one another."²¹

The confused assumption that a legal framework must (or even can) be external to what it constrains tends to make political structure *invisible* except insofar as it is realised in familiar state-monopoly institutions. And this in turn helps to explain what anarchists often find puzzling: namely, the tendency among non-anarchists to treat a single unsuccessful or undesirable instance of a stateless society as a refutation of anarchism *per se* – whereas nobody regards a single unsuccessful or undesirable instance of a state as a decisive objection to the state as such. The reason for this puzzling double standard is that while people generally recognise that states can come in a variety of different political structures, so that the failure of one type proves nothing against another, it is implicitly assumed that *anarchies are all alike* in structural terms – that is, that they are all *structureless* – and so the failure of one counts against all. But in fact mere statelessness is compatible with a variety of different institutional and cultural arrangements, and one would expect differences in such arrangements to have a significant impact on a stateless society's viability.

Since human beings have free will, no social pattern of behavior can be *automatically* self-perpetuating; nothing whose survival depends on the choices of free agents can be *guaranteed* to survive. But such social patterns can be more or less *likely* to survive. A way of interacting that tends, by and large, to give most of the people participating in it an *incentive* to keep interacting in that way is more likely to survive than one that does not. And some anarchies will do a better job at this than others, just as some states do a better job at this than others.

It is sometimes objected that legal services cannot be supplied on the market because a functioning market *presupposes* a functioning legal order. Now it is true that a functioning market requires a functioning legal order; but it is equally true that a functioning legal order requires a functioning market. This is obviously true

20 I argue in Long (2006b) that the minarchist's implicit assumption that a society's legal system must be something *external* to society that *makes* it orderly is akin to the error, diagnosed by Wittgenstein, that there must be some mental item that all by itself guarantees its own meaning regardless of how one goes about applying it in practice.

21 Gustav Landauer, "Weak Statesmen, Weaker People," *Der Sozialist*, 1910; quoted in Graham 2005, p. 165.

if the legal order is market anarchism; but *it is no less true when the legal order is a government*. As Anthony de Jasay points out,²² states can arise only in societies wealthy and orderly enough to maintain them. Hence a state cannot exist unless there is a functioning economy of some sort. (Anarchists take this to show that the state is a *parasite* on productive activity; the most the minarchist can claim is that it is a *luxury good*.) In any case, a functioning market and a functioning legal order arise *together*; it's not as though one shows up on the scene first and then paves the way for the other. To think otherwise is to fall once more into the metaphysical illusion that economic activity takes place against the background of a legal framework whose existence is somehow *independent* of the activity it constrains.

The "constitution" of a free society, then, needs to be a pattern of interaction in which people act – and in so doing give themselves, and one another, an incentive to keep acting – in ways that tend to maintain freedom. Market anarchists and proponents of limited government *both* claim to be offering such a pattern. The choice between government and anarchy, then, is not a choice between having a constitution and not having one; it is a choice between two different constitutions. Far from eschewing checks and balances, market anarchists take *market competition*, with its associated incentives, to *instantiate* a checks-and-balances system, and to do so far more reliably than could a governmental system.

Despite the best intentions of those who framed the U.S. Constitution's checks-and-balances system, there has been sufficient convergence of interests among the three branches that, occasional squabbles over details notwithstanding, each branch has been complicit with the others in expanding the power of the central government. Separation of powers, like federalism and elective democracy, merely *simulates* market competition, within a fundamentally monopolistic context.

Anarchy thus represents the *extension*, not the negation, of constitutionalism. Instead of thinking of anarchy as a situation in which government has been squeezed down to nothingness, it might be more helpful – at least for minarchists – to think of anarchy as a situation in which government has been extended to include everybody. This is what Gustave de Molinari, the founder of market anarchism, meant when he wrote, in 1884: "The future thus belongs neither to the absorption of society by the State, as the communists and collectivists suppose, nor to the suppression of the State, as the [non-market] anarchists and nihilists dream, but to the diffusion of the State within society."²³

A "diffused" legal system is preferable on pragmatic grounds because anarchy *multiplies* checks and balances; handing all power over to a single monopoly agency is too risky. It is also preferable on moral grounds, because it recognises the equal right of all persons to practice any legitimate profession, and because the alternative – a monopoly government – would necessarily run afoul of the Lockean prohibition on being a judge in one's own case. A monopoly government, i.e. an agency that refuses to submit its use of force to external adjudication, is by definition *lawless*; thus anarchy is the *completion*, not the negation, of the rule of law. Anarchy "comes not to destroy but to fulfil the law."

²² De Jasay 2002.

²³ Molinari 1888, pp. 393-94; translation mine.

The Final Legal Frontier

In case of disagreement among protection agencies, the minarchist asks, must there not be some force in society that *makes* the agencies first submit their disputes to, and then abide by the results of, arbitration? Certainly. But the assumption that securing compliance with the results of arbitration is the function of some *one* agency, rather than of the entire system of interacting agencies, is precisely what market anarchism challenges.

Indeed, the minarchist position appears, once more, to run into an infinite regress. If people cannot cooperate peacefully unless they are subjected to some organisation serving as final arbiter, then the members of that organisation likewise cannot cooperate peacefully unless there is some further “final” arbiter over them, and so on *ad infinitum*. And as we have seen, even invoking a Hobbesian dictatorship would not be enough to terminate the regress, since no individual possesses the might – *without cooperation from her subjects* – to compel acquiescence.

We can in any case turn the question back on the minarchist: how are disputes among different branches of the minarchic government resolved, and *who* makes the disputing parties abide by the result? The answer, of course, is that under the sort of constitutional regime that the minarchist generally favours, there is no *one* branch, let alone one individual officer, who makes such judgments stick. (This is precisely why seventeenth-century theorists of royal absolutism, like Thomas Hobbes and Robert Filmer, thought that one-man dictatorship was the only stable form of government.) Nor are government officials characterised by *unanimity*. Yet most of the time government officials are not waging war against one another. What leads them to resolve their disputes peacefully? *Constitutional restraints*.

But once again, it is not as mere *paper guarantees* that constitutional restraints are effective. What matters is *institutional structure*, with *checks and balances* and other incentival and informational mechanisms. Securing cooperation among the branches of government is the function of such checks and balances between one branch and another, not the function of some unchecked superordinate branch. Anarchy is simply a *generalisation* of this principle; that’s why I’ve been describing market anarchism as a species of, rather than as an alternative to, constitutionalism. When minarchists ask what anarchists can rely on to maintain order in an anarchist society, the answer is: the same thing minarchists rely on to maintain order within a minarchic government. What’s sauce for the goose is sauce for the gander. The only difference is that anarchists rely on the natural incentive system of the market rather than trying to construct an artificial incentive system in the social-engineering mode.

Minarchists sometimes charge market anarchy with lacking “legal finality” or a “final arbiter.”²⁴ Let’s consider what such “finality” means. This concept could be

²⁴ See, e.g. Bidinotto 1994 and my subsequent online debate with Bidinotto (Long 2003a; Bidinotto 2003a; Long 2003b; Bidinotto 2003b; Bidinotto 2004a; Bidinotto 2004b; Long 2004a). Portions of the present chapter are drawn from my side of that debate.

interpreted either Platonically or realistically.²⁵ Platonically, legal finality would mean an absolute guarantee that disputes are settled beyond any possibility whatsoever of being revived. Realistically, legal finality would mean that in practice disputes do fairly reliably get brought to an end.

Platonic legal finality is of course impossible. Neither anarchy nor minarchy can provide it; nor can any other conceivable legal system. What person or institution is the final legal arbiter, for example, under the current U.S. system? Is it Congress? No, the Supreme Court can declare its laws unconstitutional. The Supreme Court? No, Congress can initiate the process of amending the Constitution to get around the Supreme Court. The only system that allows for a final arbiter would be a Hobbesian dictatorship, with all power vested in a single person (for even a small ruling council might have internal disputes, and who then would have the final say in resolving them?). But as La Boétie (2003) and Hume²⁶ pointed out centuries ago, no individual ruler (unless she hails from Krypton) possesses in her own right sufficient power to compel obedience from everybody else; hence any dictator's power depends on the concurrence of those she rules. Thus a final arbiter in the sense after which the minarchist hankers is an illusion, a Platonic ideal – it cannot be realised *on this earth*.²⁷

The original U.S. Constitution notoriously had *nothing* to say about how disputes between different branches of the Federal government, or between the Federal government and the States, were to be resolved. (Incredibly, it didn't even say whether the member states had a right to secede.)²⁸ It made clear that the Constitution was the "supreme law of the land," but it was utterly silent on the question of what should be done if a given branch of government overstepped its constitutional authority. When the U.S. Supreme Court declared President Andrew Jackson's "Trail of Tears" policy unconstitutional, Jackson proceeded with the policy anyway, quipping "[Chief Justice] Marshall has made his decision; now let him enforce it!" Customs governing cooperation among the branches of government evolved only gradually;²⁹ the current system, under which the Supreme Court is recognised as having the power to declare the actions of other branches unconstitutional, *has never been codified in law*; it emerged instead through precedent and informal acquiescence.

Even where the rules for resolving disputes within the state apparatus *are* legally codified, such "paper guarantees" are meaningless except insofar as they are honored in actual practice. In the early years of the Roman Empire, the popular fiction that Augustus had "restored the Republic" was officially maintained; *on paper*, all political authority was still vested in "the Senate and the People," while the Emperor had *no legal existence*, i.e. there was initially *no such office* as "Emperor." But of

25 I choose the adjective "Platonic" by analogy with Reisman 2005's "Platonic Competition."

26 David Hume, "Of the First Principles of Government," in Hume 1985, pp. 32-36.

27 See Cuzán 1979.

28 This omission enabled each side in the 1861-65 U.S. Civil War to claim constitutional support, with some color of plausibility.

29 See, e.g. Axelrod 1984. When cooperation finally did evolve, it did so in a malignant way, with each branch of government concurring in the expansion of the power of the others.

course the Emperor's *de facto* authority, resting on the support of the army, far exceeded the authority of Rome's *de jure* rulers. Similar remarks apply to the *de facto* constitutional role of the military in the Turkish Republic in recent decades; *in practice*, the Turkish army's chief function has been to check the rise of Islamism and Communism in the civilian government by staging a coup whenever Islamists or Communists gain too much power; after each coup the army, rather than holding on to the power it has seized, steps back and holds democratic elections. This has happened so regularly and predictably over the course of the Turkish Republic's history that it must be described as part of Turkey's *de facto* constitution, though of course nothing *on paper* authorises the army to seize power – or guarantees that it will relinquish it afterward.

The point is that what gets disputes resolved within a legal system is not the rules *per se*, but rather an *incentive structure* that makes the system's administrators likely to act in accordance with such rules. Hence minarchy, no less than anarchy, must rely on such an incentive structure. Under market anarchism, it is economic competition that provides that incentive structure. (And if the objection is that such incentive structures presuppose a functioning legal system, the answer, once again, is that these structures are precisely what *constitutes* a functioning legal system, and so cannot "presuppose" it in the sense that the minarchist requires.)

Minarchists sometimes ask: under market anarchism, *who decides* what counts as a rights-violation? But this question is ambiguous. If it means "whose authority *makes* an action count as a rights-violation?" the answer is that nobody under any system has or could have any such power.³⁰ If it means "whose sole decision brings about legal finality in cases of disputes over rights?" the answer, once again, is that no *person* has the power to bring this about unaided, whether under minarchy or under anarchy (and if anyone did possess such monopolistic power it would be unjust for her to exercise it). Or if it means only "how does legal finality get achieved?," then the answer is that in a market system, legal service providers will tend to gain more profits to the extent that they succeed in cooperating with other providers in such a way as to secure (realistic) legal finality. But whether a *particular* adjudicator's decision ends up bringing a dispute to an end in any *particular* case always depends not on the adjudicator's sole say-so but always on the overall pattern of interaction among legal service providers and their clients; and again, this is as true under minarchy as under anarchy.

Consider: under the limited constitutional government favored by the minarchist, if a court rules against a disputant, she can appeal to a higher court. If the highest court rules against her, she and her friends can petition Congress to pass a law reversing the Court's decision. If the Court declares the new law unconstitutional, she can petition the President to fill upcoming vacancies on the Court with judges friendlier to her point of view – or she can work to have the Constitution amended. Failing that, she can try to foment a revolution. *All of these options are in principle open to her.* No agency or institution in a governmental system can truly issue a *final verdict* in such a way as to *guarantee* beyond all possible doubt that the case really is closed. Hence legal finality in the Platonic sense is something that a *governmental*

30 See Rand 1990, pp. 17-22, and Sharvy (forthcoming).

system is no better able to provide than an anarchist one, because legal finality in the Platonic sense is something that has no reference to reality.

In any case, no legal system *needs* Platonic legal finality; for any legal system intended for use *on this earth*, realistic legal finality is perfectly adequate. Thus the fact that a market anarchist system lacks a “final arbiter” does not by itself show that it lacks realistic legal finality, unless one assumes what the minarchist needs to prove, namely that a social system cannot perform a function unless some one specific agency is authorised to perform that function. (“Under capitalism, who will be in charge of making the shoes?”)

Given that “final say” is impossible, one might wonder why this doesn’t show that government itself is impossible – in which case we should stop clamoring for anarchy and instead recognise that we already have it. The answer is that a government is not an agency that genuinely *possesses* “final say” – for indeed no such agency exists. Rather, a government is an agency that *claims* to possess “final say,” and that gets enough people to support its claim that it ends up being empowered to violate many people’s rights and to inflict a great deal of damage in the course of attempting to enforce its nonexistent authority. (Likewise state socialism does not really succeed in destroying the market – and if it did succeed, universal starvation would quickly follow³¹ – but it does succeed in imposing massive *distortions* and *inefficiencies* on the functioning of market forces.)

Voiding the Warranty

Brian Barry (1975), in his infamous “review” of Robert Nozick’s *Anarchy, State, and Utopia*, accused the libertarian Nozick of “proposing to starve or humiliate ten percent or so of his fellow citizens (if he recognizes the word) by eliminating all transfer payments through the state, leaving the sick, the old, the disabled, the mothers with young children and no breadwinner, and so on, to the tender mercies of private charity, given at the whim and pleasure of the donors and on any terms that they choose to propose” (p. 332).

Note that Barry evidently felt no need to explain why it should be thought preferable to leave these needy individuals to the “tender mercies” of *state welfare*, likewise “given at the whim and pleasure of the donors and on any terms that they choose to propose.” Here we have two modes of social interaction – the peaceful and the violent (or as the nineteenth-century libertarians called them, the “industrial” and the “militant”) – *neither* of which functions *automatically*. To cite the teaching of La Boétie and Hume once again: violent institutions *no less than peaceful ones* depend for their continued operation on the ongoing voluntary activities of free agents – in particular, in this case, on the cooperation of the coerced with the coercers (given that ordinarily the coerced vastly outnumber the coercers, such cooperation cannot be achieved by brute force alone) *and* on the cooperation of the coercers with one another. The question is: which pattern of interaction – the peaceful or the violent, the

31 See Mises 1990.

egalitarian or the hegemonic – is most likely, given its incentival and informational constraints, to generate desirable outcomes?

Now once the question of welfare is put in terms of comparative institutions, libertarians can readily show – indeed, have pretty thoroughly shown – that peaceful, egalitarian, market-based methods of poor relief are more efficient and reliable than violent, hegemonic, governmental methods.³² But Barry’s magical picture of the state forestalls so much as the idea of comparative institutional analysis: in his eyes the state – magically, somehow – *guarantees* what a market system leaves *un-guaranteed*.

Libertarians generally avoid making Barry’s mistake. Indeed, one might go so far as to say that rejecting this magical picture of the state just is one of the defining features distinguishing libertarianism from its ideological rivals. But minarchist libertarians, I suggest, have not disentangled themselves from the magical picture so thoroughly as anarchist libertarians have. Instead, they often write (*when discussing anarchism*, though seldom when discussing any other topic) as though a government’s *decreeing* some desired result is equivalent to its *achieving* it – and then contrast this idealised picture of government with the muddling reality of anarchy, to the latter’s detriment.³³

This magical picture of government appears to underlie the minarchist’s demand to know what *guarantees* that private entrepreneurs under market anarchism will not behave in tyrannical and abusive ways? The answer, of course, is that *nothing* “guarantees” it, just as nothing “guarantees” that governmental politicians will not behave likewise. But once we leave aside the magical approach for a comparative-institutions approach, we can ask a more useful question: under which system is such behavior most *likely* to be restrained? The superiority of anarchy over government here lies in the fact that under government the tie between the *decision* to commit aggression and the *cost* of that aggression is far weaker than under market anarchism. Under a governmental system, the cost of state policies leading to war is borne by taxpayers and conscripts, not by the politicians who crafted those policies. Under market anarchism, by contrast, agencies who resolve disputes through violence rather than arbitration will have to charge higher premiums and will thus lose customers.³⁴ A government *can’t* lose “customers” (taxpayers) unless they take the drastic step of moving to a new country; by contrast, switching protection agencies would be as easy as switching long distance service. This is also the reason that governments are so warlike: they can buy war at *less* than the market price by shifting the costs to their subjects.

Similar reasoning applies to some minarchists’ worry that each special interest group might hire its own protection agency. Well, so they might. But of course the phenomenon of interest-group politics will be a problem under minarchy as well.

32 See, e.g. Andreoni 1993; Beito 2000; Gosden 1973; Green 1993; Long 1994; Siddeley 1992; Tanner 1996; and Woodson 1989.

33 I discuss the implicit view of government decrees as *incantations*, bringing about their results as though requiring no intermediate process, in Long 2001.

34 Or donors, or co-op members, depending on whether the protection agency is organised as a cash-for-profit, cash-charity, or labour-charity enterprise; see Jacobson 1995.

The question is which system will do a *better* job of handling this problem. Now under minarchy, the government will presumably lack the constitutional authority to give these various interest groups the favors they want; but constitutions can be amended, or creatively reinterpreted, or indeed simply ignored. (Look at the case of the United States.) Even under minarchy, then, interest groups will vie – through voting blocs, propaganda, campaign contributions, and bribes legal or illegal – to transform the One Big Protection Agency into one that promotes their own agenda. The difference is that under anarchy, the costs of such codification are *internalised*; interest groups must *themselves* foot the bill for the regulations they favor.

Moreover, if agency A seeks to resolve its disputes with agency B by resorting to warfare, the costs to agency A's clients will skyrocket. This will not deter A's more fanatical clients, but more will surely be deterred than would be the case under a monopoly government, where such costs can be externalised by spreading them across all the government's "clients." Under the present governmental system, special interest groups don't have to pay the full costs of their policies; they get politicians to fund their schemes out of the general tax base. It's relatively costless for special interests to demand that government impose their particular values on society. But suppose that, under market anarchism, when you get your monthly bill from Acme Security Company, you see that you're paying 100 hayeks for "basic service" (protection against force and fraud) and 800 hayeks for "premium service" (snooping on your neighbors to make sure that they're not taking drugs or having abortions or playing violent video games). The number of bigots who would be willing to *pay* to have their own values forcibly imposed is bound to be smaller than the number of bigots who merely *advocate* such imposition; talk is cheap. (And the few fanatics who *are* willing to put their money where their mouth is would be easier to deal with under anarchy; you can't arrest people who *lobby* for government-imposed aggression, but you can arrest people who actually aggress.) The threat of clashing interest groups is thus an argument *for*, not against, market anarchism.

It's true, as opponents of market anarchism charge, that people living under anarchy might disagree about the definition of aggression. But if two security agencies disagree about how exactly to define property rights in some particular case, they can fight it out – thus sending their costs through the roof and their customers to the nearest competitor – or they can resolve their dispute through peaceful arbitration, thus keeping their costs low and their customers happy. Governments resort to force far more often, since they don't have to worry so much about losing customers – though it's worth noting that even governments interact peacefully most of the time, *despite* facing an artificially low cost of war. Private security agencies, which would have to buy at the market price, would choose war even less often.

Indeed, the problems that minarchists raise for market anarchy often seem as good, or bad, arguments for world government as for a geographically delimited nation-state. What happens, for example, when Switzerland and Austria have a disagreement – about customs duties, or rivers flowing from one country into the other, etc.? Must Switzerland either coercively enforce its preferences on Austria, or else resign itself to impotence? Obviously these are not the only options. Most disputes between countries are resolved through peaceful negotiation, rather than through either warfare or total surrender. The same would naturally apply to disputes

between rival protection agencies – except that, as noted above, such agencies would be *more* likely than states to choose negotiation, because their costs of going to war would be internalised – whereas states can pass the costs of war on to their captive customer base. Few customers will care to pay the high fees of warfare-prone agencies; and surrender-prone agencies will obviously not be a big winner with customers either; thus negotiation would be the dominant strategy.

So disputes under anarchy are likely to be resolved *peacefully*. But how likely are they to be resolved *correctly*? Admittedly nothing “guarantees” this. But a) a competitive court system is more likely to be information-generating than a top-down legislative system, for familiar Hayekian reasons; and b) since aggression is costlier than non-aggression, the dispute-resolution will tend to favor laws with a broadly libertarian content.

The case for anarchy over minarchy thus lies, above all, in the following two facts: first, a system of freely competing protection agencies *could* exist without aggression, while government by definition must aggress by prohibiting non-aggressive competitors; second, a competitive system will *in practice* involve less aggression than will a minarchic system, because anarchy involves a more extended system of checks and balances (the number of protection agencies makes collusion among them more difficult than collusion among branches of a single government), a more effective incentive system (because the market internalises externalities), and greater accountability (the familiar superiority of market democracy over political democracy).

No Truce With Kings

Nor would anarchist objections be met if, as has sometimes been suggested,³⁵ the minarchist state were to confine itself to acting as a sort of licensing agency, granting licenses to protection agencies that operate in accordance with a certain set of legal rules, and coercively putting protection agencies out of business or overriding their decisions if they either operate unlicensed or violate the conditions of license. Let’s see why not.

To begin with, we must consider whether such a licensing agency is to be envisioned as imposing a full legal code in all its detailed specificity, or only a set of general legal principles.

Suppose it’s the former. How could the licensing agency be justified in doing this? It seems implausible to assume that there’s only one possible correct legal code; while presumably there is just one correct set of legal *principles*, there will always be many different specific ways of applying such principles. Sometimes those different ways will be equally legitimate; in those cases requiring agencies to employ specification A in lieu of equally legitimate specification B constitutes aggression (a moral objection to the licensing agency). At other times one specification will have some superiority over another³⁶ – but, for familiar Hayekian reasons, the best

³⁵ See Hasnas 2003; Bidinotto 2004a.

³⁶ In some cases, one specification that has no *inherent* superiority over another may acquire such superiority from context; for example, there are different, equally legitimate,

way to *discover* which specification is best is ordinarily going to be through market competition (a practical objection to the licensing agency).³⁷ In either case, pure anarchy is preferable to the licensing agency.

Perhaps what's supposed to justify the licensing agency in imposing a single specification is not that there's only one correct specification but rather that a legal system can't function properly unless all parties accept the *same* specification. (For example, driving on the left and driving on the right are equally good systems, but it matters that everyone driving on the same road accept the *same* system.) Well, it depends. Sometimes uniformity matters and sometimes it doesn't. (England and Scotland are part of the same legal system, but have different laws on many matters; ditto for Nevada and Utah. Yet residents of those states manage to do business successfully with one another.) In any case, private legal systems have a history of providing legal uniformity when it's needed; the Law Merchant, let's recall, succeeded precisely because it provided *more* legal uniformity than the government courts.

Neither a moral case nor a practical case has been made for coercively imposing a single legal specification on all protection agencies. Where uniformity is needed, the market will provide it, and coercive imposition is superfluous; where uniformity is not needed, coercive imposition is disastrous.

Suppose instead that the licensing agency confines itself to imposing only those general principles that are required by justice. Surely imposing *those* principles is justified; so why wouldn't the licensing agency then be permissible?

Well, let's see what we're supposed to be imagining. Here we have a variety of competing protection agencies, and *one* of them takes upon itself the job of forcing all the other ones to conform to the general principles of justice. Is it the *only* organisation doing this? Does it forbid new entrants into *this* field, thus functioning as a *second-order* monopoly – permitting competition in protecting rights, but not in the *certification* of protectors of rights, even when other certifiers would be certifying in accordance with the right principles? If so, it is an unjust aggressor; for if *ex hypothesi* the coercive imposition of these general principles of justice is permissible, then it is permissible for anybody, not just for this one agency. Such a monopoly would also be dangerous on incentive grounds; it would in effect be in

“default” construal of unstated terms in a contract, but the fact that a certain construal has become common practice and was known to be so by the contracting parties can be legitimate grounds for imposing that construal when enforcing a contract.

37 One source of minarchist confusion about market anarchism may be a conflation of two different sorts of “monopoly.” A market anarchist can certainly think that some rights-claims are correct and others are mistaken, and that agencies acting on correct views have the moral right to defend their clients, by force if necessary, against agencies acting on mistaken views. In that sense, market anarchists have no objection to the idea that *actions based on correct views of justice have a right to a “monopoly” against actions based on a mistaken view of justice*. What market anarchists deny is the further inference that this “monopoly” is best achieved through a monopoly agency or institution. On the contrary.

charge of licensing its competitors, a system unlikely to work better for protection agencies than it does for other businesses.³⁸

On the other hand, if the licensing agency does allow other agencies to compete with it in forcing protection agencies to use the right principles, how does it maintain sufficient power to impose its will on the *entire* network of competing agencies? After all, it will then be just one of many competitors in the same field, with no guarantee of a dominant market share. In other words, it'll just be one more protection agency, with no unique status at all.

There is simply no way to have a government unless it claims some sort of monopoly for itself. Either the activity it monopolises is an inherently permissible activity or it is not. If it is permissible, then in forbidding competitors in this activity the government is behaving as an aggressor. And if it is impermissible, then the government shouldn't be engaging in it. The licensing-agency version of minarchy is trying to have its cake and eat it too.

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38 The suggestion, by Rand 1964 (pp. 125-34) among others, that a monopoly government might be legitimate if it charged only user fees rather than taxes, must likewise be rejected. Even if there should emerge a minarchic regime that did not technically rely on taxation, such a state would still have to engage in activities that are the moral and economic equivalent of taxation. The U. S. Postal Service, for example, likes to brag that it is not funded by taxes. This is true. But it remains a coercive monopoly, since competition in the field of first-class mail delivery is illegal in the United States. Because of the knowledge and incentive problems notoriously associated with monopolies, the Postal Service inevitably costs its customers more – both in actual fees and in quality-related opportunity costs – than would a free market in mail delivery. This differential cost may not technically be a tax, but the respects in which it differs from a tax seem neither morally nor economically significant. We may call it a *de facto* tax. A monopolistic legal system will necessarily be engaged in *de facto* taxation for precisely the same reasons.

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