

Justifying the State

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Justifying the State*

David Schmidtz

INTRODUCTION

To escape the state of nature, people would submit to an absolute sovereign. Therefore, absolute sovereignty is justified. So argued Thomas Hobbes. A minimal state, and only a minimal state, could arise by an invisible hand process. Therefore, the minimal state is justified. So argued Robert Nozick. In political philosophy, “therefores” often seem to come from nowhere.

My versions of these arguments are caricatures, of course, but many of us are also left wondering by the real thing. Do Hobbes’s contractarian story and Nozick’s invisible hand story have anything to do with justifying the state? What would a story have to be like to engage such a task? These questions matter. Rational choice theories like that of Hobbes (and after him, Rawls) and natural rights theories like that of Nozick (and before him, Locke) are the wellsprings of current Anglo-American political philosophy, supplying not only our subject matter but our methods as well.¹ If they don’t make sense, then generally speaking, neither do we.

I will distinguish between two different kinds of justification in political theory. This distinction can help us avoid being distracted by problems that are mere artifacts of contractarian methodology, only appearing to be relevant to justifying states *per se*. This will help us explain what is irreparably wrong with hypothetical consent arguments, why we find them appealing nevertheless, and what kind of argument can actually make use of that appealing hypothetical element. The distinction will also clarify the limited sense in which invisible hand processes can be relevant to a state’s justification.

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1. See Thomas Hobbes, *Leviathan* (New York: Macmillan, 1962); John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap, 1971); John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1963); and Robert Nozick, *Anarchy, State and Utopia* (New York: Basic, 1974).

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TELEOLOGICAL AND EMERGENT JUSTIFICATION

This is how Alan Nelson sees the current scene in political philosophy:

In political philosophy, there is a general strategy for justifying states that has become dominant. The first step in implementing the strategy is to begin with some principles about morality and persons. . . . The second step is to show how a state would develop or could develop in sufficient accord with the principles of individual morality. The third step is to show that a state that does develop or would develop or could develop in this manner functions, in part, to promote morally desirable individual action.

In Anglo-American philosophy this strategy has become so dominant that alternatives may seem hard to come by.²

The approach Nelson describes is widely practiced, so much so that he cannot be far wrong to call it dominant (and I shall follow him in doing so). Gregory Kavka's brilliant new book on Hobbesian contractarianism, for example, correctly ascribes the dominant approach to Hobbes, and the contractarian tradition has yet to depart from it.³ This is too bad, for the dominant approach muddles two quite separate methods of justification.

I call the two methods teleological and emergent justification. To justify an institution is, in general, to show that it is what it should be, or does what it should do. The teleological approach seeks to justify institutions in terms of what they accomplish. The emergent approach takes justification to be an emergent property of the process by which institutions arise.⁴

2. See Alan Nelson, "Explanation and Justification in Political Philosophy," *Ethics* 97 (1986): 154–176, p. 155.

3. Kavka provides the following reconstruction of the Hobbesian argument. Note the parallel between it and (juxtaposing the second and third steps) Nelson's justificatory schema. (a) Anticipation (i.e., engaging in preemptive first strikes) is a more reasonable strategy in the state of nature than is lying low, but the collective result of this individually rational strategy is war and misery. (b) The problems encountered in an appropriate kind of civil society are less severe than the problems of insecurity and anticipation in the state of nature. (c) Therefore, rational parties in a state of nature would form a civil society of an appropriate kind in order to leave that state of nature (see Gregory Kavka, *Hobbesian Moral and Political Theory* [Princeton, N.J.: Princeton University Press, 1986], paraphrase of pp. 108–9). Contractarianism is, roughly, the theory that states are justified either by obtaining the consent of their citizens or by being the kind of state that rational agents would consent to.

4. This distinction does not, of course, exhaust logical space in the way that a less interesting distinction between teleological and nonteleological justification would. On the other hand, most and perhaps all of the historically important attempts at justification can be usefully classified as either emergent or teleological, although some attempts will fit the paradigm better than others. For instance, an argument that the state commands our loyalty because it was teleologically justified in the past is neither emergent nor teleological, but neither is it an argument that many would care to defend. In any event, I think there is much to be learned about a given argument by seeing how well it fits the emergent or teleological molds. For example, see the discussion of hypothetical consent arguments in the following text.

Teleological justification posits *goals*, and compares the practically attainable forms of government in terms of how they do or will serve those goals. In contrast, *emergent* justification posits *constraints* of a particular kind, namely, constraints on the process by which the state comes to be. Emergent justification turns on a state's pedigree.

Consider some examples. One could argue that instituting a Leviathan is *teleologically* justified if a Hobbesian war would otherwise be inevitable. In contrast, one could argue that a Leviathan will be *emergently* justified if it emerges from the state of nature by consent. (For the moment, think of the appeal as being to actual or tacit consent. I discuss hypothetical consent arguments below.) This emergent approach has both invisible hand and contractarian versions. In the former, the Leviathan's emergence is an unintended result of people individually binding themselves to the lord. In the latter, people bind themselves by collective agreement.

One could also justify particular institutions within the state in either of these two ways. For example, one could try to justify teleologically the passing of a certain statute by showing what the statute will accomplish. Or one could try to justify emergently the same statute by showing that it was duly passed by the appropriate legislative bodies. To have emergent justificatory significance, the legislative process must not violate moral borders. (I use the phrase 'moral borders' to refer to rights in particular and also to anything else that separates what can permissibly be done to a person from what cannot.) This leaves open the question of whether the process's significance consists in the property of not violating moral borders or in some other property, but in either case, if the process violates moral borders, this will undermine such emergent justificatory significance as it would otherwise have had.

To show that a state actually emerged by consent would be a very strong form of emergent justification but, by the same token, showing that it did not satisfy this strong standard would be correspondingly weak as a basis for condemnation. In contrast, to show that a state emerged without violating rights would be a relatively weak emergent justification but, by the same token, showing that a state's emergence did not even satisfy this minimal standard would be the basis for a relatively strong condemnation. Any attempt at emergent justification could ordinarily be rebutted by showing that the process of emergence violated rights. Emergence by consent is very special in this respect, however, for consent is its own proof against rebuttal. Insofar as a state arises by consent, the only rights its emergence could violate are those that cannot be alienated by consent. Hence, most, if not all, of the rights-claims that might have rebutted its emergent justification will have been dealt with at a stroke.

Neither teleological nor emergent models are normatively self-contained. The teleological approach presupposes the legitimacy of certain goals. The emergent approach presupposes certain constraints applying to processes by which states arise. Both approaches presume some sort of position on the nature of moral borders around persons, in the one

case because the state can be judged according to whether its emergence leaves such borders intact, in the other case because the state can be judged according to how well it serves the goal of protecting them. (Among the positions that a utilitarian version of the teleological approach may take, of course, is the position that rights in particular or even moral borders in general are "nonsense on stilts.")

Needless to say, chains of justification must come to an end, and no chain has enough links in it to satisfy everyone. But we can, in principle at least, specify how the two approaches to justifying the state link up to ethics in general. Although neither approach is normatively self-contained, it would be a mistake to infer that the teleological approach presupposes a consequentialist moral theory while the emergent approach presupposes a deontological moral theory. Consequentialists naturally endorse the teleological approach to justifying the state, but a consequentialist might insist that both kinds of justification are essential, out of a belief that if we do not insist that institutions be emergently justified, the institutions we ultimately end up with will not be teleologically justified either. An institution whose emergence tramples moral borders will probably trample moral borders as long as it exists, or so a consequentialist who cares about moral borders might reasonably fear. So the emergent approach can appeal to consequentialists and deontologists alike.⁵

The teleological approach can be of similarly broad appeal. Note that an emergent justification couched in terms of moral borders would begin and end with an argument that the process of emergence itself did not violate moral borders. Some deontologists may conclude that a

5. A principle that specifies how institutions may legitimately arise is a principle of emergent justification. If we then ask why we are using that particular principle rather than some alternative, we may give various reasons why we use that principle. We may say that the principle is a principle we all agreed to use. Or we may say that using that principle has the best results. But although our rationales for the principle may be either emergent or teleological, it remains the case that the principle we are trying to rationalize is, after all, still a principle that specifies how institutions may legitimately arise. Hence, regardless of what we deem to be its rationale, it is still a principle of emergent justification. For example, being ratified by a constitutionally bound legislative body is one way in which an institution can be emergently justified. Although we look to the legislative body as a vehicle for emergent justification, however, we remain free to judge the legislative body itself in terms of how it functions, as well as in terms of how it emerged. Moreover, some criteria of emergent justification do not emerge by human action at all. Hence the nonevent of their emergence can be neither defended nor criticized. We could, for example, claim that we have certain moral rights and obligations by nature and that, to be emergently justified, a state must emerge without violating them. One could not emergently justify a particular set of natural rights claims, however, for their emergence is not an issue. Unless there is a third alternative, one would have to justify them teleologically. My book begins where this article ends, discussing such things as how political institutions can be emergently justified despite having emerged by nonconsensual processes. For example, I argue that the state can be emergently as well as teleologically justified in assuming the exclusive right to punish, even if individuals also have the right to punish, and even if they do not voluntarily give up that right (see David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument* [Boulder, Colo.: Westview, 1990]).

strong enough emergent justification is sufficient in itself to underwrite the institution's claim to support. On the other hand, everyone cares about how governments perform, including Kantians. When a deontologist asks if the maxim "Support institution X" is universalizable, he will not be asking about the consequences of his contemplated support. Yet, his maxim's meaning will still depend on the nature of institution X. And it would not be inconsistent with deontology to notice that institutions can and sometimes must be partly defined in terms of their functional properties. A deontologist may hold that the state's function, and indeed its duty, is to protect moral borders around persons, and then to leave citizens to do as they please within those borders. Where a consequentialist would hold that the state's purpose is to promote the good, a deontologist may hold that the state's purpose is to promote the right. Deontologists typically would not hold that the purpose of *persons* is to promote the right, for persons are ends in themselves. But states are not ends in themselves, or at least a deontologist need not view them as such. A deontologist may consistently judge that a state that protects moral borders satisfies such conditions as are necessary for it to command their support. At the same time, most deontologists would not consider possession of this functional property sufficient, for they would denounce a group that initially ran roughshod over moral borders so as to create and solidify the political power base that subsequently enabled the group (now calling itself a government) to protect moral borders effectively. Thus, like some of their consequentialist colleagues, deontologists may judge that an institution must not only be teleologically justified but must be emergently justified as well.

HYPOTHETICAL CONSENT

How important is it to distinguish between teleological and emergent justification? As an example, consider Hobbesian contractarianism. As Jean Hampton interprets the Hobbesian project, we must show that creating Leviathan is necessary to save people from Hobbesian war.⁶ On the other hand, the assumptions we make in showing that Leviathan is necessary must leave open the possibility that people will be able to create Leviathan by consent. She offers an account of conflict as arising from human passions but rejects it "because it makes the sovereign's institution either unnecessary or impossible."⁷ An alternative account of conflict as having its source in rational refusal to abide by unenforced contracts is "just as problematic for Hobbes's argument" because "it makes conflict so deep-seated that it is impossible to see how people can escape it. In particular, if people are unable to keep contracts in the state of nature, it would seem to be impossible for them to keep a contract to institute

6. Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986).

7. *Ibid.*, pp. 63–68, 73–74.

a sovereign.”⁸ In sum, the problem is that “Hobbes’s account of conflict seems to generate sufficient strife to make the institution of the sovereign necessary, but too much strife to make that institution possible.” Hampton has some interesting thoughts on how Hobbes might escape this dilemma.⁹ The upshot of her argument, however, is that *if* the dilemma proves insoluble, then even granting Hobbes’s premises, his argument cannot justify absolute monarchy. Leviathan can only emerge by agreement under conditions that make Leviathan unnecessary.

We leave aside details of Hampton’s argument, for the point to make here is that this dilemma is not so much a dilemma for Hobbes as for the dominant approach *per se*. Once we abandon the dominant approach by distinguishing between emergent and teleological justification, the dilemma amounts to the following. On the one hand, if people are able to make and keep contracts, Leviathan may be emergently justifiable, but it will not be teleologically justifiable because it will not be necessary. On the other hand, if people are unable to cooperate with each other, Leviathan will be teleologically justified, but it will not be emergently justifiable because people by hypothesis lack the wherewithal to create a Leviathan by agreement.

Cast in these terms, there is no longer a dilemma. Instead of saying the necessary conditions for justification render justification impossible, we now say only that the necessary conditions for *teleological* justification render *emergent* justification impossible. This forces us to make a choice, but it is not a dilemma. Hobbes can quite happily agree that emergent justification is impossible because the purpose of his contractarian exercise is to explain why the covenant is in people’s rational self-interest, not why rational bargainers would agree to it. If the problem with the state of nature is bad enough to supply a rationale for Leviathan, it does not matter to Leviathan’s teleological justification whether the problem is also bad enough to preclude Leviathan’s emergence by rational agreement.¹⁰ What does matter is that, even if people are not rational enough to create Leviathan by agreement, they surely are rational enough to obey Leviathan once Leviathan is in place. Thus, the essential Hobbesian claim is that with an absolute sovereign we have relative peace, and without an absolute sovereign we have war. If correct, this claim suffices to justify teleologically absolute sovereignty, regardless of how or even whether absolute sovereignty emerges. Leviathan’s emergence by consent may be out of the question, but Leviathan’s emergence is also beside the point.

8. *Ibid.*, pp. 74, 79.

9. *Ibid.*, pp. 136 ff.

10. Could problems with reaching a collective agreement be thought relevant as a *practical* obstacle to Leviathan’s instantiation? I do not see why. As far as I know, neither Hobbes nor anyone else ever seriously entertained collective bargaining as a means of generating a Hobbesian Leviathan in the real world.

Let me elaborate, for the issue has significance for hypothetical consent arguments in general. As an example of a hypothetical consent argument, the Hobbesian argument looks like this:

1. If Leviathan is the only alternative to Hobbesian war, then rational bargainers would consent to Leviathan.

2. Leviathan is the only alternative to Hobbesian war.

Therefore,

3. Rational bargainers would consent to Leviathan.

Once we reject the dominant approach, which this argument exemplifies, and treat emergent and teleological approaches as separate methods of justification, two things happen. First, we see that hypothetical consent arguments have no bearing on emergent justification. Leviathan's emergent justification will be found in Leviathan's actual history, or it will not be found at all. Second, we see that if the hypothetical consent story is an attempted teleological justification, then the point of the story is to compare Leviathan to its alternatives rather than to give an account of its history, which means that the real work being done here is the teleological work of 2. Once we have 2, nothing is added by going on to get 3.

Of course, consent can be a *sign* that Leviathan is preferable to Hobbesian war. More generally, consent can be a sign that a government is teleologically justified. (That is, what warrants hypothesizing consent in the first place is that people would have good reasons to consent.) But a government can be teleologically justified even if collective action problems would prevent the sign of its justification from materializing. Admittedly, the likelihood of strategically minded individuals holding out for special concessions from the rest of the collective threatens to falsify 1, for it suggests that even bargainers who see an urgent need to create Leviathan might still have rational reasons to impede its creation by holding out for special favors. Had hypothetical consent offered the possibility of emergent justification, one might be concerned to find ways of getting around this problem. Such concerns, however, are utterly irrelevant to the state's teleological justification, for the falsehood of 1 only presents an obstacle to moving from 2 to 3. Since, once we have 2, there is nothing to gain by moving to 3, it makes no difference to the state's teleological justification whether 1 is true or false. So the hypothetical consent argument is as irrelevant to teleological justification as it is to emergent justification. Premise 2's truth-value is relevant to Leviathan's teleological justification, but the argument as a whole is not.

Moreover, although consent may be, among other things, a sign that a government is teleologically justified, consider what happens if we try to use *hypothetical* consent as a sign of teleological justification. Let us formalize the idea that hypothetical consent is a sign of Leviathan's teleological justification as the "vice-versa" of 1. If rational bargainers would consent to Leviathan, then Leviathan must be the only alternative to

Hobbesian war. We can then employ this premise in the following argument.

4. If rational bargainers would consent to Leviathan, then Leviathan must be the only alternative to Hobbesian war.

5. Rational bargainers would consent to Leviathan.

Therefore,

6. Leviathan must be the only alternative to Hobbesian war.

The difficulty in using hypothetical consent as a sign of teleological justification now becomes clear. When we actually observe consent, we can take our observations as data. If 5 was based on observation, it would be unobjectionable. But we do not observe hypothetical consent; we assert it. To warrant this assertion, we must argue for it. How, then, can we argue for 5? We cannot appeal to 6 as a basis for 5, because we are supposed to be deriving 6 from 5. But any reason we give for hypothesizing consent in 5 would have to be something like the teleological justification of 6. In other words, we need something like 6 *before* we would have reason to hypothesize the rational consent in 5 as a sign of 6's truth. Hence, hypothetical consent cannot do any real work.

The complaint here is not that 5 is false but, rather, that we would need to know that 6, or something very much like 6, was true before we would be warranted in asserting 5. Even if the argument is perfectly sound, it is still a bad argument because we cannot *verify* its soundness unless we have prior knowledge that its conclusion is true.

To give another example, suppose for the sake of argument that if ideally rational agents would consent to an arrangement, this counts as evidence of the arrangement's *fairness*.¹¹ Given this supposition, if we know nothing about an arrangement other than that rational agents actually consented to it, we would still know enough to infer that the arrangement was fair. By the same token, if rational agents would only consent to fair arrangements, then we need to know whether the arrangement is fair before we can say whether rational agents would consent to it.¹²

More generally, if we actually observe people consenting, then that in itself is reason to suppose they would consent under those circumstances. Absent such observations, we must never simply assume that people would consent to something; we have to give reasons why they would or should consent. (So if I say the state is justified with respect to you because you would have consented to it under the appropriate conditions,

11. As in Rawls, pp. 12 ff.

12. According to Spencer Carr ("Rawls, Contractarianism, and Our Moral Intuitions," *Personalist* 56 [1975]: 83–95), for a theory of political obligation to be a social contract theory, "it must not be the case that one can delete all reference to any contract and still have the denuded theory yield all the obligations that it did with the references left in" (p. 86). Carr suggests (pp. 86 ff.) that Rawls's argument is not a social contract argument at all in this sense. My analysis suggests that Carr's conclusion also applies to Hobbes's argument and to hypothetical consent arguments in general.

you might quite reasonably respond by asking, “What makes you think I would have consented?” My answer would have to be that a rational person such as yourself would have good reasons to consent.) If we discover a good reason why people should consent to the state—call it “reason X”—we will then be free to contrive hypothetical stories about rational agents reacting to reason X by consenting to the state, but the real story will already have been told by reason X itself. (The hypothetical story adds nothing whatsoever. It certainly does not add consent, since the story is only hypothetical.) In other words, hypothetical consent cannot constitute justification; to suppose hypothetical consent is to presuppose justification. Hypothetical consent proceeds *from* teleological justification rather than *to* it.

Distinguishing between teleological and emergent justification has helped us see that there really are two quite different arguments in Hobbes, that they do not stand or fall together, and that ultimately the teleological strand of the Hobbesian argument is really the only strand with justificatory potential. More generally, the distinction suggests that hypothetical consent arguments are also combinations of two separable strands of argument. The emergent strand has no justificatory potential, however, for a state can only be emergently justified in terms of the process by which it actually arose. The teleological strand has justificatory potential, but the realization of this potential is presupposed by rather than supplied by the argument that rational agents would consent under the hypothesized circumstances.¹³

ACTUAL CONSENT

Does this mean the emergent approach never has justificatory potential? No. Unlike hypothetical consent, actual consent has justificatory force over and beyond the teleological force of the reasons people have for consenting. Freely given consent is intrinsically a kind of authorization;

13. John Simmons rejects hypothetical consent as a basis of political obligation. Simmons believes people can acquire political obligations only by their own voluntary actions. Simmons, however, distinguishes between what we are obligated to do and what we ought to do. It can, e.g., sometimes be true, according to this distinction, that we ought to help a little old lady across the street even though we are not obligated to do so. Governments are like little old ladies in this respect. Even if actual consent is the only sound basis of political obligation, nevertheless we sometimes ought to obey a government because of that government's virtues, even though we have no obligation to do so (see A. John Simmons, *Moral Principles and Political Obligations* [Princeton, N.J.: Princeton University Press, 1979]). Although this need not be considered a problem, I see Simmons's move from “obligation” to “ought” as circumventing the commitment to voluntary action as the basis of political obligation that grounded his rejection of hypothetical consent models to begin with. Given Simmons's claim that *legitimizing* the state requires a deliberate act but *justifying* it does not (p. 199), the mark of a successful justification is that the justification reveals the virtues of certain governments, and the fact that they have such a justification weighs in favor of obeying them regardless of whether we have consented to them. This move is a move to what I call a teleological approach.

by consenting, one gives others a right to expect from oneself that which one has consented to do, to give, or whatever.¹⁴

Nor is actual consent particularly rare or difficult to secure within a range of typical human endeavors. To give an example not directly relevant to the creation of governments, we observe consent on a small scale whenever we observe an ordinary exchange of goods between two people. What do we ordinarily think of as justifying such exchanges? There are two answers. We could argue that the exchange's results further the participants' goals (better than their alternatives). For epistemic reasons if nothing else, however, we usually are more inclined to focus on whether the process of negotiation and exchange is unforced, not fraudulent, and so on. In other words, when the process accords with these and any other constraints applying to it, it fully realizes the justificatory force latent in actual consent. The first approach is teleological, looking to the exchange's outcome. The second is emergent, looking for compliance with constraints on the process by which the outcome arises.

Two questions arise concerning the emergent approach. First, what sort of large-scale process would count as realizing the kind of justification that emerges with the small-scale process? Second, does this process ever actually occur on a sufficiently large scale to emergently justify a state? Consider contractarianism as a theory about how emergent justification might work. In a contractarian bargaining process, members of a large group seek a collective agreement. Consent to the agreement is taken as a sign that the agreement is mutually advantageous. It is by no means a guarantee, however. (At least, it does not guarantee *ex post* advantage, which is presumably what bargainers really care about.) People enter the agreement without the benefit of hindsight. Nor does actual consent presuppose rationality in the idealized way that hypothetical consent does. But actual consent carries emergent force regardless, so long as, for example, failures of foresight are not due to fraud.

Of course, translating the prospect of mutual advantage into actual consent is a problem. It may be good strategy for a given person to drive a hard bargain, withholding assent to a mutually beneficial collective agreement for strategic reasons, thereby putting the entire group in limbo unless they accept the holdout's demands. And if they do accept

14. At times, Hobbes himself seems to appeal to the justificatory force of actual consent. For example, Hobbes says a person becomes subject to a conqueror by promising, through express words or other sufficient (possibly tacit but nonetheless actual) sign, to do as the conqueror commands (conclusion, pp. 504–5). He also says that commonwealth by *acquisition* and commonwealth by *institution* (chap. 17, p. 133) differ only insofar as people consent out of fear of the conquering *sovereign* in the former, and out of fear of *each other* in the latter (chap. 20, p. 151). We could read this as a discussion of how sovereigns come to be emergently justified. But the idea of a conqueror becoming justified by forcing his captives to pledge allegiance as the price of escaping with their lives is hardly plausible. I think it is more charitable to Hobbes to read his discussion as a purely descriptive account of the possible ways in which sovereigns can actually emerge, with no normative implications intended.

the holdout's demands, they may find that the supply of holdouts is inexhaustible. (Ideally rational bargainers might see this very fact as a reason not to hold out, but since we are discussing the possibility of actual consent, we do not get to assume that people conform to our notion of what is ideal.) We might hope for collective bargaining to produce actual consent to the state. Realistically, however, we must admit that individual self-interest stands in the way. The obstacles to collective bargaining that we might wish away when we construct hypothetical bargaining environments are, in the real world, serious obstacles indeed.¹⁵

There is an alternative. *Contractarian* accounts of the state's emergence are distinguishable, at least in a rough sense, from *invisible hand* accounts. In contractarian models, intentional collective action leads to an intended and mutually agreeable result. In invisible hand models, bargaining occurs among shifting and relatively small subsets of the collective. The larger scheme of stable society evolves through a series of relatively small-scale exchanges and is an unintended result of such exchanges. There are various agreements between individuals, but there is nothing resembling an agreement to create the emerging social order. The social order emerges spontaneously.

So, invisible hand processes preserve the contractarian process's tendency to produce mutually advantageous outcomes, while reducing the scope for, and localizing the consequences of, strategic behavior. Why? Because there is no wider agreement to be thwarted by strategic holdouts. If a person drives too hard a bargain, his would-be trading partners go elsewhere. An invisible hand emergent justification need not require everyone (or any arbitrarily selected percentage) to consent to the details or even the general character of the emerging social order. There is no collective action *problem* because there is no collective action.

Consequently, the invisible hand is much more likely than collective bargaining to generate a government by consent. It gives an affirmative

15. Of course, collective bargaining would be less problematic if it could be ratified by less than unanimous consent. Indeed, Kavka supposes that "unanimity is not required. So long as the arguments for a given provision are compelling enough to command *nearly* unanimous (e.g., 95 percent) consent among the parties as characterized, the possible or probable existence of a stubborn minority of extremist refusers is no bar to the adoption of the provision" (p. 219). I do not want to disagree with Kavka; I do not want him to think of me as an extremist. But if a procedure ignores dissenters, this is a bar to emergent justification, notwithstanding the fact that the barrier might be surmountable. I think Kavka's claim is best thought of as implicitly an insight about teleological justification, namely, that we do not need unanimity in order to have the kind of consensus that counts as *evidence* that a provision will function well. Actually obtaining 95 percent approval of a certain provision generally indicates that the provision is teleologically justified, and a relatively tiny dissenting minority is not as such a contraindication. (It could become a contraindication, however, once we look at the specific issue; if the issue is whether the minority should pay higher taxes than the majority, dismissing the minority voters as eccentrics would be, at best, a mistake.)

answer to our question about whether the kind of consent we observe on a small scale also drives large-scale processes. But this advantage over collective bargaining has a price, for it raises another question. Consent drives both large-scale and small-scale processes, but does large-scale justification emerge from the large-scale consensual process in the same way that small-scale justification emerges from small-scale consensual processes?

Unfortunately, when the large-scale process in question is an invisible hand process, the answer has to be no. The problem is that what people consent to are individual transactions, rather than to the order that spontaneously emerges from them. In other words, that an outcome *arose by* consent does not entail that people consented to it. (Analogously, people are willingly doing what produces the greenhouse effect, but that does not mean they are consenting to its production.) It seems that the importance of the kind of invisible hand process described by Nozick, even if it were actually to occur, is analogous to the importance consent has in a two-person exchange when the parties consent without really knowing what they are getting into. It does mean something, but not necessarily a great deal.

We have been considering the invisible hand insofar as it pertains to justification by actual consent. Actual emergence by invisible hand process weaves into the resulting distribution of power and wealth the kind of rights-claims actual consent can create but hypothetical consent cannot. In contrast, what we get from hypothetical consent is (as with contractarianism) a story about how emergent justification could occur. Or perhaps we get a covert but still real teleological justification appended to an unnecessary story about people consenting to it *because* it is teleologically justified. But for a state to be justified on the grounds that people consent to it, people have to consent to it.

Thus, Dworkin's comment on Rawlsian contractarianism also applies to Nozick's invisible hand story;¹⁶ whatever role *actual* invisible hand processes play in emergent justification, invisible hand stories are merely stories. They are not even "pale forms" of the actual process.

In fact, the problem is somewhat worse for hypothetical invisible hand processes than for hypothetical social contracts. At least a hypothetical social contract presents the emerging state as something to which ideally rational agents would consent. A hypothetical *invisible hand*, however, does not even do this. What emerges by invisible hand is not what ideally rational agents hypothetically consent to. Rather, the thrust of an invisible hand story like Nozick's is that the state could conceivably emerge as the *unintended result* of a series of actions, each having consent. Such a story does not even depict the state as having *hypothetical* consent.

16. See Ronald Dworkin, "The Original Position," in *Reading Rawls*, ed. Norman Daniels (New York: Basic, 1976), p. 17.

TELEOLOGY AND HYPOTHESIS

The previous remarks notwithstanding, hypothetical invisible hand processes can have considerable justificatory force, but not in emergent justification. I suggested that a hypothetical consent story could serve as a *sign* of teleological justification. Actually, there is a more important role for hypothetical invisible hand stories in teleological justification. We care, or at least we should care, about invisible hand processes because most of what goes on in society is influenced by them. Our society's economy, its political system, even its ecology, have characteristics that are products of human action but not human design. We must take the invisible hand's pervasiveness into account before we can begin to say what form of government is teleologically justified. But that is not to say the invisible hand process per se has normative weight. Rather, it is to say that *outcomes* have normative weight and that invisible hand processes play a pervasive role in shaping outcomes.

The teleological approach, rather than using invisible hand models to show how a state *emerged* (which would be irrelevant to teleological justification), instead uses them to help predict what would *follow from* a state's instantiation. If individually rational activity will not tend to undermine an otherwise collectively rational institution (i.e., will not tend to push it in the direction of either anarchy or tyranny), such stability speaks in the institution's favor, compared to less stable alternatives. In contrast, if only extensive coercion can prevent an institution's collapse, or only an eternally vigilant citizenry can stop it from sliding toward tyranny, such instability is a potentially fatal flaw. When we compare alternatives, we have to consider not only what the alternatives are but also what those alternatives tend to become.¹⁷

Invisible hand models developed en route to teleological justification may be purely hypothetical, but that is not a problem. The importance to *teleological* justification of hypothetical models is clear. We care about what will happen if we create a given kind of state. Creating a hypothetical model of it gives us the best information we can get short of actually going ahead and trying it. (Of course, if the historical record shows that people actually have gone ahead and tried it, so much the better. When the historical record is relevant, ignoring it would be foolish.) So an invisible hand story can be hypothetical and yet serve as part of a teleological justification, as long as the story is *realistic*. (In particular, since its purpose is to help us *predict* an outcome rather than to supply the outcome with a *pedigree*, the depicted process need not be *fair*.) Its purpose is to

17. Edna Ullmann-Margalit says that "even if the invisible-hand explanation turns out not to be the correct account of how the thing *emerged*, it may still not be devoid of validity with regard to the question of how (and why) it is *maintained*" ("Invisible-Hand Explanations," *Synthese* [1978], pp. 263–91, p. 275). This point about the invisible hand's explanatory role is analogous to my point about its justificatory role; whether the invisible hand processes that accompany an institution will incline that institution to evolve in a desirable way is generally relevant to whether the institution is teleologically justified.

show how alternative forms of government would actually turn out as responses to real problems.

CONCLUSIONS

I began by distinguishing between emergent and teleological justification. By helping us to see where one kind of justification ends and another kind begins, this distinction helps us avoid the dominant approach's tendency to generate puzzles that have no bearing on substantive problems in justifying the state. We can, for example, analyze hypothetical consent arguments as (possibly sound) teleological justifications joined to superfluous models of consensual processes that only have *emergent* justificatory force when they actually occur. I also discussed the role purely hypothetical invisible hand stories might play in teleological justification as thought experiments that can help us predict what would follow from a state's instantiation.

I read Hobbes as having an argument that Leviathan is teleologically justified. The way I read Nozick, the backward focus of his argument makes it irrelevant to teleological justification. Moreover, its hypothetical nature makes it irrelevant to emergent justification. His approach can suggest contrasts in terms of the *possibility* of emergent justification, but not in terms of emergent justification as such.¹⁸ Showing that only a minimal state can possibly be emergently justified would show something, but it would not emergently justify the minimal state.

We can judge a state in terms of how it arose. We can judge states in terms of how well they actually function. Or we can judge them in terms of how well they would function if instantiated. In all three cases, the nature of the justification in question is obvious. The first is emergent. The second is teleological. The third is both teleological and appropriately hypothetical. In contrast, Rawls and Nozick have asked us to judge states (or the principles that inform their institutions) in terms of whether they would emerge from a suitably described starting point. Explaining what such an exercise has to do with justifying states is a tall order.¹⁹

18. For illuminating discussions of the explanatory role that "existence proofs" play in economics and philosophy, see Nelson (pp. 170–74); and Alexander Rosenberg, "The Explanatory Role of Existence Proofs," *Ethics* 97 (1986): 177–86.

19. Gregory Kavka suggests (in a personal communication, October 1989) that the Rawlsian thought experiment has a heuristic value, helping us arrive at a ranking of alternative possible states. It helps us discover, appreciate, and express the elements of a state's justification. This seems right, although the message of the section above on hypothetical consent is that the thought experiment's value can be no more than heuristic and that the real justification it helps us appreciate and express, if it helps us at all, will be a teleological justification. If I were to try to connect Rawls's project to justification, I would not argue that rational agents or even their noumenal selves would endorse Rawls's two principles. Instead, I would adopt Rawls's definition of a well-ordered society as an explicit standard of teleological justification, and then argue that, by adopting institutions that satisfied Rawls's two principles, a society would be well-ordered, i.e., would advance the good of its members according to a public conception of justice (p. 5). Something like this is what it would take to underwrite the presumption of teleological justification on which the hypothesized endorsement by rational agents (or by their noumenal selves) depends.