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Government vs. Governance: Libertarianism and Private Communities

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Abstract
Libertarians tend to oppose hierarchical authority and advocate the privatization of public goods. However, not all collective action problems can be solved so easily; collective problems may require collective solutions. Fortunately, the essence of the market process is not the atomic individual, but consent. Libertarians should endorse hierarchical, bureaucratic solutions as long as membership is voluntary. I provide a general theory of the proprietary community as a solution to collective action problems. Such a community embodies consent, jurisdictional competition, and residual claimancy (incentive alignment), mitigating collective action problems in a hierarchical and consensual—but nevertheless market-based—manner.

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I. Introduction

Libertarians may be thought to be inveterate opponents of authority and hierarchy. After all, they demand *freedom*. Typically, economists argue that government is necessary to provide public goods. Libertarians tend to reply that (nearly) every public good can be provided privately by the free market. Who will build the roads? Why, the market will!

However, not every public good can be privatized so easily. Collective action problems are real. And collective problems may require collective solutions. Pennington (2011, pp. 233–35) notes that "very few [collective goods] are completely indivisible in supply" and "most are territorial." He argues that a "simplistic form of 'privatization' where resources are simply parceled out to individual

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owners" is not always preferable to "variations of cooperative or shared ownership." Similarly, Ostrom (1990, pp. 12–18) criticizes those who believe the only way to solve the tragedy of the commons is by dividing a meadow into separately owned parcels. Fortunately, the essence of classical liberalism is not atomic individualism, but consent and freedom of contract (Pennington 2011, p. 235). Libertarians should not be averse to hierarchical and bureaucratic governance as long as it acquires its authority by a legitimate process that rests on the authentic consent of the governed.

This paper argues that not every collective good can always be provided by firms that compete within a territory to serve individual paying customers. It may be necessary for private firms to provide a variety of bundled goods with a monopoly within a restricted territory. In other words, it may be more feasible to privatize some public goods as territorial club goods (cf. Buchanan 1965) rather than as purely private goods. These territorial club goods will be nonrivalrous in two different ways: first, consumption will be joint rather than separable, being equal for everyone within the territory. Second, there will not be rivalrous competition within the community but only among separate communities (Pennington 2011, pp. 233–35). These territorial clubs are able to internalize spatial externalities that impose jointness of consumption on all their residents (Foldvary 1994). For example, it would not be easy for a landlord to sell "quiet" to individual residents, but he will tend to set a noise policy for all his tenants in order to maximize his net revenue.[1]

What distinguishes these firm-like private communities from typical governments, however, is that they acquire their property and authority by a legitimate process that rests on consent. Moreover, their governance tends to be structured in a way that promotes residual claimancy and incentive alignment, benefiting their residents. Libertarians should endorse what Spencer Heath MacCallum (1970) calls "the art of community." The essence of liberty is not competition within a territory, but consent—even consent to a hierarchical governing authority.

This paper is organized as follows: section 2 illustrates the advantages of proprietary governance using the simple examples of roads and police. I show that the importance of proprietary governance is not always appreciated or sufficiently emphasized (cf.

[1] A landlord might be able to sell "quiet" as a private good by heavily soundproofing individual apartments. However, this solution would tend to be more expensive than setting a noise policy for the entire apartment complex.

Makovi 2017). This discourse motivates our more abstract, theoretical discussion in section 3, showing how and why proprietary governance is an effective means of solving collective action problems in general. Section 4 closes with two examples of collective action problems that proprietary governance could possibly resolve in interesting ways, namely improving women's rights in societies where women are legally disadvantaged, and prosecuting sexual assault on educational campuses. I conclude that libertarians should not fail to consider hierarchical, bureaucratic means of solving collective action problems, as long as their governing authorities are private and rule with consent.

II. Two Simple Cases: Roads and Police

In *The Machinery of Freedom*, David D. Friedman ([1973] 2014, pp. 70–72) advocates "sell[ing] the streets," that is, "transferring the present system of governmentally owned streets and highways to private hands." He argues that gas taxes inefficiently charge drivers the same price regardless of the time of day, leading to rush hour congestion. Charging tolls would encourage drivers to change their working hours, use alternative forms of transportation, and even relocate. Friedman notes that modern electronic transponders would minimize the transaction costs of charging tolls, as cars would not need to slow down or stop at toll booths. However, Friedman barely suggests bundling roads with any other services, merely saying, "the difficulties [with privatizing roads] are much less for newly created communities, some of which are already being set up with private road systems." Except for that brief remark, Friedman's argument concentrates on toll roads, which are apparently provided as an independent good, not bundled with anything else.[2]

By contrast, in *For a New Liberty*, Murray N. Rothbard ([1973] 2006, pp. 249–65) elaborates at great length concerning how road services might be bundled with other services. In fact, Rothbard discusses such bundling before he ever mentions charging tolls. Although the chapter is titled, "The Public Sector, II: Streets and Roads," Rothbard almost immediately opens with the case of police

[2] Cf. Powell (2009), who also concentrates on limited access toll roads. Powell does briefly mention that homeowners' associations and housing developments may finance their own roads, especially when congestion and tolls are not a concern (s.v. "How to Handle Local Roads"). Benson (2007, pp. 34–35; 2015, p. 84n20) discusses private roads in residential developments, Disney World, and St. Louis (where residents may purchase streets from the government).

protection (p. 249). He argues that if Times Square were owned by the "Times Square Merchants Association," the association would have an economic interest in providing general police protection for all its customers (p. 250). A merchant association would minimize police brutality and guarantee the safety of its customers for the same reason a landlord provides his tenants with air conditioning and hot water (p. 251): because safety and amenities are capitalized in property values. Still ostensibly discussing the privatization of streets, Rothbard argues that black property owners could hire private security and "end police brutality against customers . . . and end the current spectacle of police being considered by many communities as alien 'imperial' colonizers, there not to serve but to oppress the community" (p. 253).[3] Rothbard notes that private stores already provide themselves with their own security guards. He suggests that privatizing roads would "simply extend this healthy and functioning [private police] system to the streets as well" (p. 253). Rothbard is not speaking of traffic enforcement alone. He is saying that roads would be bundled with general police services of all kinds, including antitheft services to protect the homeowners and merchants along the road.[4]

Rothbard also considers the problem of local streets to a greater extent than other authors, who sometimes concentrate on limited-access toll roads. Rothbard asks whether a private street owner could decide to block access or charge an extortionate fee (p. 252). He replies that purchase or lease contracts would specify long-term easements.[5] In other words, a private constitution of sorts would prohibit opportunistic behavior.

Only after ten pages of discussing police, discrimination, diversity, and local streets does Rothbard finally begin to discuss the limited-access toll roads that most other scholars focus on (pp. 258ff.). He notes—as Friedman does—that gas taxes are ineffective at alleviating congestion (p. 259). Charging tolls would encourage drivers to change their schedules and take alternative forms of transportation (p. 261). Modern technology eliminates the need for inconvenient toll booths (pp. 262–63).

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[3] Cf. Ostrom and Whitaker (1974).

[4] Powell (2009n6) cites Benson (2007) concerning bundling police and private roads to internalize the externalities of drunk driving. However, neither discusses bundling roads with general police services.

[5] Cited and quoted by Block (1979, pp. 220, 237n15).

However, Robert C. Ellickson (2017, p. 376)—a self-described Hayekian—criticizes both Rothbard and Friedman, whom Ellickson says

> imagine a world in which individuals would govern their interpersonal interactions entirely by means of consensual contracts. These contracts would be enforced not by governments, but by competing private protective associations with whom individuals would have voluntarily contracted. These associations would employ arbitration to reconcile differences between, for example, the private firms that would own various roads.

This is not an entirely accurate characterization of Rothbard who—as we have seen—suggested that roads may be supplied by associations that bundle real estate, police, and roads together. However, Ellickson's description does apply to Friedman, who argues that every individual would have a contract with a private security firm. Conflicts among security firms would tend to be resolved by mutual arbitration because these firms would recognize that violence is wasteful (Friedman [1973] 2014, pp. 110–16). And there are other anarchists who occasionally satisfy Ellickson's description. For example, Leeson (2011, p. 307) claims that "every supposedly non-excludable governance good is in fact excludable," and he argues (2011, p. 302) that a wide variety of "disarmament contracts" or "full-time police protection" may be offered to individuals. Like Friedman, Leeson imagines dedicated firms who sell security and police on a nonterritorial basis to individuals. Therefore, Ellickson's criticism is worth paying attention to, regardless of its target.

Ellickson (2017, p. 378) complains that anarcho-capitalism has an "unrealistic sense of the transaction costs" entailed by "overlapping private associations" with "competition among rival protective associations within a given territory." Ellickson (p. 387) approvingly cites Milton Friedman, who argues that toll collection would be feasible for limited-access highways but not for the streets around Times Square. Ellickson concludes that local roads must remain under government management. He assumes that since tolls cannot be collected, the road cannot be privatized. Of course, electronic tolls—as suggested by both Rothbard and David Friedman—may reduce the transaction costs to nearly zero. But let us grant Ellickson's assumption that the costs of toll collection are prohibitive. Even so, his conclusion follows only if we assume that

the road is owned by a dedicated firm whose sole source of revenue is tolls. If tolls cannot be collected, then privatization is impossible.

Ellickson's assumption may be consistent with David Friedman's argument. But we have seen that Rothbard specifically mentions that Times Square could be managed collectively by an association of merchants. This would reduce transaction costs by treating Times Square as a single firm (cf. Coase 1937). According to Rothbard, the road-owning firm could provide a variety of other services related to its real estate. The inability to collect tolls would be no obstacle for such a firm, which might provide free roads as a loss leader for its other revenue sources. For example, a shopping mall might provide free parking and roads to ensure customers can reach its storefronts. Indeed, discussing a "nightmare vision" in which every section of road is assigned to the immediate homeowner, creating "500 toll booths per mile," Block (1979, pp. 216–17)—a follower of Rothbard and fellow anarcho-capitalist—replies that local roads could follow what he calls the "shopping center model," in which an entrepreneur develops both the roads and the houses that front them.[6] In fact, Ellickson himself proceeds to defend privatizing streets under the auspices of a homeowners' association or shopping mall (Ellickson 2017, p. 387; cf. Ellickson 1982).[7] In a sense, he actually agrees with Rothbard and Block.

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[6] Like Friedman and Rothbard, Block (1979, p. 217) notes that tolls would probably be collected electronically anyway, without the need for vehicles to slow or stop. Cf. Block (1979, p. 224) and Vickrey (1963, pp. 457–58).

7 However, Ellickson (2017, pp. 381–85) argues that without eminent domain, an anarcho-capitalist New York City could never have arranged its streets in a grid. The rectangular grid was planned by the Commissioners' Plan of 1811 which, Ellickson notes, was "generated . . . [by] government diktats, not voluntary contracts" (p. 383). Block (1979, p. 218) seems to concede, saying that eminent domain is not necessary because roads need not follow the shortest path, and roads can be built to curve around holdouts. In addition, developers can purchase options to multiple routes (Block 1979, p. 218). This concedes that grids may be infeasible without eminent domain. However, it is not clear whether it is so worthwhile for roads to be built in a grid. New York City's grid plan was controversial and occasioned lawsuits (Hartog 1983, pp. 158–75). Although eminent domain may reduce some transaction costs, the lawsuits it entails are a source of nontrivial transaction costs. Moreover, eminent domain imposes psychic losses that cannot be estimated (Block 1979, p. 219). Furthermore, Ellickson (2017, p. 384) himself notes that eminent domain can be abused, such as in the *Kelo* case. He (2017, p. 373) also states that the costs of zoning laws outweigh the benefits. Therefore, it is not obvious that the benefits of a street grid outweigh the costs of eminent domain. Moreover, both Walt Disney World and Disney's residential town of Celebration, Florida, are governed as city-sized planned communities (Foldvary

In short, Ellickson's argument that transaction costs are too high to permit the privatization of roads assumes—with Friedman—that roads would be owned by dedicated road firms. If tolls cannot be collected, then only tax-funded government can provide those roads. On the other hand, Ellickson's defense of homeowners' associations is actually consistent with Rothbard's (and Block's) form of anarcho-capitalism.[8]

Ellickson's criticisms are important, however, and they do point out a potential problem with at least one form of anarcho-capitalism, regardless of its author. It may indeed be infeasible for all roads to be provided by dedicated toll-charging road firms, and that is why it is important for libertarians to consider private governance as an alternative. Even those anarcho-capitalists who do recognize bundling through private governance have perhaps not emphasized it enough—at least not enough to catch the attention of a sympathetic Hayekian such as Ellickson.

In fact, Ellickson could have made an additional argument against Friedman's form of anarcho-capitalism, citing Friedman himself. Friedman ([1973] 2014, p. 110) points out that although an arbitration agreement entails mutual consent, it "provides no solution for the man whose car is dented by a careless driver, still less for the victim[s] of theft [who] are unlikely to find a mutually satisfactory arbitrator." In other words, even if the plaintiff has a mutually

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1994, pp. 114–33; Stringham, Miller, and Clark 2010). Although neither community's roads are arranged in a grid, it is obvious that Disney could have planned grids if it had wanted to—that is, if the anticipated benefits had exceeded the costs. Finally, even the unplanned sections of New York City were already approximately grid-like, and the contemporary street grid in the southern tip of Manhattan—in the area of Wall Street—largely follows the pattern established in New Amsterdam, long before the Commissioners' Plan of 1811 (NYC 99 2015a, b; Hartog 1983, pp. 55, 57; Wang 2015).

[8] In addition, Ellickson (2017, pp. 385–88) presents another claim against anarcho-capitalism, arguing that lighthouses cannot be maintained by private enterprise: "In an anarcho-capitalist Britain, far more coastal vessels would have crashed on the rocks," he writes. He rightly observes that in Britain, according to Coase, the private lighthouses were still funded by a government monopoly. But Candela and Geloso (2018) show that in Britain, the private lightship at Nore was successfully financed by subscription. The operators did not provide the service unless enough subscriptions were obtained. ("Enough" meaning that some degree of free-riding was tolerated.) (Cf. what Brubaker [1975] calls "pre-contract excludability.") In addition, the operators collected payment at ports through price discrimination, without government enforcement. These two methods solved—or at least sufficiently mitigated—the collective action problem.

voluntary agreement with a private security firm, there is no corresponding agreement with the defendant. The initiation of legal action by the plaintiff against the defendant constitutes an externality, a third-party effect. Friedman notes (pp. 111–12) that on this basis, many predict violent gun battles between the respective legal teams of plaintiffs and defendants. Friedman replies (pp. 112–16) that violence is wasteful, and that it is more likely that their legal teams will come to some sort of agreement, especially by agreeing to arbitration. A firm will not be able to attract customers unless it can convince them that it has cooperation agreements with competing firms. Rothbard ([1973] 2006, p. 275) makes virtually the same argument, saying that violence is bad for business, and that two security firms would submit to arbitration. However, Rothbard returns to the case of private governance, and adds that "clashes would be minimal because the street owner would have his guards, the storekeeper his, the landlord his, and the homeowner his own police company" (p. 275). In other words, bundling police with property internalizes the externality. Every crime or conflict occurs on somebody's property. If police are bundled with property, then there is no externality. By entering someone else's property, one implicitly submits to whichever security firm the owner has retained. The defendant has an implicit agreement with the plaintiff's security firm by virtue of occupying a portion of the plaintiff's property.

Stringham (2006, pp. 519, 524) observes the same externality that Friedman does:

> Although the person who requests the [law enforcement] service and the producer benefit from a transaction, the same cannot be said of a third party if it has no contractual relationship with the other. . . . The purchaser has a contractual relationship with the private police, but those subject to the investigation often have no contractual relationship with the police.

Stringham's (2006, p. 521) solution is similar to Rothbard's. He argues that when security is bundled with property, then guests would implicitly agree to the owner's terms, and "the disputes would be between people who were contractually bound, like those who have signed an arbitration clause."[9] Therefore, Stringham (2015, p.

[9] Cf. Stringham (2015, p. 130): "What happens when parties walk down the street and come into conflict with each other? Does this not create externalities between people who have no prior contractual relationship? . . . But when the roads are

129) argues that "bundling police with real estate differs from both the idea that police must be provided by a monopolistic government and what many consider the only alternative, having multiple itinerant police groups in each area."

Ellickson (2017, p. 371) complains that "competition among rival protective associations within a given territory would not long endure."[10] Stringham (2006, pp. 521–22) replies that this is no challenge to the alternative form of anarcho-capitalism, which relies on a consensual rather than numerical definition of market competition. In his words,

> This position requires no specific number of firms or concentration ratios; what matters is that law enforcers have been preselected by all parties involved. If a market based system can exist without multiple agencies in each geographic area, the picture changes dramatically.

Unlike Friedman and Ellickson, Rothbard and Stringham link the privatization of the streets and the police. Streets and police do not necessarily need to be offered as independent goods. They may be bundled together if doing so reduces transaction costs or internalizes externalities.

What Ellickson's criticism of David Friedman demonstrates is that libertarians should be prepared to defend an alternative form of privatization, one that rests on consensual membership in a private community, rather than a form of privatization that requires every collective good to be partitioned as an excludable, private good. Fred Foldvary (1994, p. 8) argues that there is a weakness inherent in all arguments that collective goods can be converted into private goods: "these examples illustrate how some civic goods have been provided by private actors, but not that private provision is feasible regardless of time, place, and culture." In other words, it is not sufficient to show that specific collective goods could be provided privately in particular situations. No matter how many collective goods may be privatized, it is always possible that another collective good has been neglected. As long as there exists even one collective good that cannot be provided by the market, it is possible to justify the necessity of the state.

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privately owned, a manager can create a set of rules for all customers and thereby internalize externalities within their realm."

[10] However, Meehan (2017) argues that private security firms do not tend to consolidate as Nozick's theory of a natural monopoly of security would predict.

A weaker but more robust argument for privatization is to say that private communities could internalize externalities by converting public goods into club goods. Foldvary (1994, pp. 9, 26) argues, "In most cases, a comprehensive theory of market-process provision is lacking. Such a theory requires a different approach, in which . . . the spatial aspect of most civic goods is recognized . . . [because] most civic goods supplied by government are territorial." It is to such a general theory that we now turn. Although the conversion of collective goods into purely private goods is more attractive, their conversion into club goods is more robust—that is, less assailable.

III. The Theory of the Proprietary Community[11]

A proprietary community is an institution in which governance is provided by the owners of private property to voluntary members and participants. There are two types: land-lease associations and subdivisions. Land lease entails a landlord's exercise of sole proprietorship over property leased to tenants. Examples include apartment complexes, shopping malls, industrial parks, and RV campgrounds. By contrast, subdivision entails the existence of a common governance association with jurisdiction over individually owned private property. A real estate developer creates a governance association prior to subdividing the land and selling it off. A restrictive covenant is attached to all such sales, so that all the newly privatized land continues to be governed by the association according to its constitutional rules. Examples of subdivision include condominium associations and homeowners' associations (HOAs). In a condominium association, common property, such as green space, is owned collectively by shareholders. By contrast, in an HOA, the HOA itself owns the common space. Different kinds of communities tax and assess members differently, and they also distribute voting and decision-making powers differently. Few communities adhere to the rule of one-man-one-vote, and instead, they often grant one vote per property unit, dollar value, or square unit of space. Associations may assess fees variously on improved or unimproved value, or they may charge flat fees.[12] Regardless of the type, all proprietary communities provide a mixture of collective goods, many typically associated with municipal government. These

[11] Cf. McKenzie (2011, pp. 43–64).

[12] Foldvary (1994, pp. 86–193) and Boudreaux and Holcombe (2002, p. 294–302) use case studies to illustrate the advantages and disadvantages of different forms of governance and assessment. Ellickson (1982) discusses these rules theoretically.

may include security guards, waste disposal, fire protection, zoning or land-use regulations, and/or amenities such as swimming pools, tennis courts, and green space. HOAs tend to restrict how homeowners may use their own homes, such as by limiting permissible paint colors or by banning owners from operating businesses from their homes. The covenants, conditions, and restrictions (CC&Rs) of an HOA or condominium association lay out both the rules that residents must obey and the procedures by which new rules may be promulgated. Reichman (1976) fittingly refers to proprietary communities as "private governments," while Ellickson (1982, p. 1527) characterizes their governing contracts as "private constitution[s]."

One of the most important characteristics of such proprietary communities is that membership is perfectly voluntary, with truly unanimous consent (Ellickson 1982, p. 1520). Although the private community is a monopoly within its territory, its relationship with its residents rests on voluntary contract (Stringham 2006, pp. 521–22). There is no appeal to legal or philosophical fictions such as "tacit consent" or "conceptual unanimity." Every resident or tenant must agree to a contract—either a restrictive covenant or a rental agreement. They agree to be bound by the constitution because the benefits are expected to outweigh the costs (cf. Buchanan and Tullock [1962] 2004). A resident may not be entirely pleased that they must navigate a bureaucratic process before painting or landscaping their own property, but this inconvenience is more than compensated by the fact that their neighbors cannot paint their houses in garish colors or litter their front yards with rusted hulks. A resident may not be satisfied with each and every collective good offered by the community, yet prefer the bundle of goods being offered to any alternative being offered elsewhere. Proprietary communities engage in jurisdictional competition with one another, and residents will be attracted to the community that offers the most attractive bundle of goods (Tiebout 1956; Leeson 2011; Ellickson 1982, p. 1548; Boudreaux and Holcombe 1989, pp. 272–74). Landlords and developers will be entrepreneurs engaged in an active effort to continually innovate new, better constitutions.[13] According to

[13] Competition is a discovery procedure, and ex ante, nobody can know the outcome of the competitive process (Hayek 1948, 1978; Vihanto 1992). Cf. Ellickson (1982, p. 1562): "The Supreme Court itself presaged the public-choice literature when it noted in *Anderson v. Dunn* over a century ago: 'The science of government is . . . the science of experiment.'"

Pennington (2011, pp. 234–35), the provision of public goods by the proprietary community

> does [not] rest on a simplistic form of 'privatization' where resources are simply parceled out to individual owners. . . . [Instead,] competition takes place at the level of the proprietary structure as institutional entrepreneurs, whether individual or collective, compete to attract people into their community rather than other [communities].

A regime of competing private communities would constitute a "framework for utopias," where people with different preferences and conceptions of the good may all be (relatively) satisfied (Nozick 1974, pp. 297–334; Stringham 2006, p. 531n15).

Another important characteristic of the proprietary community is that the landlord or developer is a residual claimant to the costs and benefits of constitutional negotiation and enforcement (Boudreaux and Holcombe 1989; Foldvary 1994, p. 89), especially in the case of land lease (MacCallum 2002; Stringham 2006, p. 528; Ellickson 1982, pp. 1548–49). The costs and benefits of policies are capitalized into property and rental values.[14] The owner primarily bears these costs and benefits, creating a strong incentive to promote beneficial policies. For example, the landlord of an apartment complex is in a better position than a municipal government to know how much noise to tolerate and at what times of day. And if the landlord makes a mistake in setting a noise policy, he will bear the costs of his poor decision because his property will be less valuable than it could be. Compared to a larger, distant government, the landlord will often have access to more knowledge and will possess superior incentives to act on that knowledge. Similarly, a developer who attaches a superior restrictive covenant will be able to sell his subdivided parcels of land for a higher price. Both the landlord and the developer have an incentive to provide collective goods and internalize externalities whenever this costs less than the (anticipated) increase in sales or rental revenue (Foldvary 1994, p. 32). If the governing association is to be democratic, then landlords and developers have an incentive to discover the optimal voting rules with the best incentive alignment, because this information will increase property values. For example,

[14] Studies consistently find that property values in private communities are higher than those in similar or surrounding neighborhoods: Radetskiy et. al. (2015), LaCour-Little and Malpezzi (2009), Pompe (2008), Agan and Tabarrok (2005), Bible and Hsieh (2001), and Hughes and Turnbull (1996).

they will tend to allocate one vote per property rather than per person.

Land lease promotes a stronger residual claimancy and incentive alignment than subdivision because the landlord bears a continuing interest in the property values, whereas the subdivider's interest is speculative and one-time only.[15] And while the developer is a residual claimant when he sells his subdivided plots, the HOA is usually not a residual claimant, because the HOA's revenue stream is contractually guaranteed, without any close connection to service quality. In neither case is governance likely to be perfect. But in both cases, residual claimancy will tend to align incentives in a way that promotes successful problem solving (Stringham 2015, p. 28).[16]

The proprietor's residual claimancy also discourages negative-sum rent seeking and redistribution (Ellickson 1982, p. 1524; cf. Vihanto 1992, pp. 420–24, and Ellickson 2017, pp. 391–92). Any attempt to engage in rent seeking or redistribution would lower the property values and harm the proprietor. Therefore, the proprietor benefits from a constitutional ban on negative-sum rent seeking (Ellickson 1982, p. 1526). However, if members actually desire redistribution—either as an insurance policy (Buchanan and Tullock [1962] 2004, pp. 185–91) or because charitable donations create positive externalities (Tullock 2005b, pp. 4, 7)—then a constitutional guarantee to redistribute wealth will actually increase property values and revenues.

Sometimes, the externalities to be internalized may affect a physically large area: "not all public goods are of the same scale" and "various scales of organization maybe appropriate for different public services" (Ostrom, Tiebout, and Warren 1961, pp. 831n1, 833). When the externalities are too large to be internalized by a small community, then proprietary communities would have an incentive

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[15] Boudreaux and Holcombe (1989, 2002) regard land lease and subdivision institutions as equivalents, whereas MacCallum (1970, 2002), Stringham (2006, p. 528), and Ellickson (1982, p. 1548) favor land lease because it creates a strong residual claimancy. Nelson ([1999] 2002, p. 334) argues that residents favor subdivision while businesses favor land lease because they have different needs that give rise to different principal-agent problems. Residents may prefer constitutional stability and policy endurance, while businesses may be more willing for their constitutions to keep pace with the economy. Cf. Hughes and Turnbull (1996). By contrast, MacCallum (2002) argues that the prevalence of residential subdivisions over land lease is a market distortion caused by federal tax policies.

[16] Salter (2015, 2016a, b) argues that effective governance rests on two properties: residual claimancy and jurisdictional competition (and cf. Newhard 2016). These are precisely the qualities possessed by proprietary governance.

to form regional alliances and "associations of associations" (Foldvary 1994, p. 210; Stringham 2006, p. 529; Pennington 2011, pp. 234–35). It may be objected that the transaction costs would be too high. But the transaction costs of constitutional bargaining are high as well. Democratic state constitutions do not simply appear out of nowhere. They must be negotiated at great expense. Indeed, the United States Constitution of 1789 was not ratified in a day. On the other hand, where the transaction costs are still too high, then the communities themselves may simply be very large. For example, Walt Disney World is governed as a single proprietary community (Foldvary 1994, pp. 114–133), and so is the associated town of Celebration, Florida (Stringham, Miller, and Clark 2010). Disney essentially behaves as a zoning authority for its own cities. Foldvary (1994, pp. 166–89) also considers the case of Reston, Virginia, an 11.56 square mile planned community with 56,000 residents (at the time of his study). The continued existence of such relatively large planned communities suggests that their institution is a viable means of reducing transaction costs and internalizing large-scale externalities.

IV. Conclusion

We have seen that it may not always be possible to convert every collective good into a purely private good. Even a sympathetic Hayekian such as Ellickson (2017) is not convinced that such conversion is feasible. However, it will be more generally feasible to convert collective goods into club goods that are provided by a firm-like private community. For example, Rothbard and Stringham argue that police and security services would be bundled with streets and other real estate. This would eliminate the third-party effects a plaintiff and his security firm might impose on a defendant. Although this form of privatization is weaker, it is also more robust. When jointness of consumption cannot be avoided, a private community may nevertheless internalize spatial externalities by providing club goods to all the voluntary residents of its territory.

Classical liberals and libertarians should not be afraid to embrace the private community when necessary. Although such an institution is hierarchical and bureaucratic, it nevertheless rests on consent and private property. There is nothing illiberal about governance by a hierarchical authority as long as that authority is legitimately obtained by peaceful means and voluntarily accepted by its subjects.

Libertarians should happily cultivate "the art of community" (MacCallum 1970).

I close with two examples of perplexing problems or controversies for which feasible solutions may be found in the proprietary community. First, consider the case of empowering women in nonfeminist societies. Michael van Notten (2005)—with his editor, Spencer Heath MacCallum—argues that the Somali Xeer law has many libertarian or classical liberal traits. Every Somali's clan functions as an insurance firm, offering surety to its members. Individual Somalis are free to associate with any clan of their choosing, and clans are free to expel members. Every crime is treated as a tort against an individual, not against the clan, and all penalties are restitutory damages.[17]

However, van Notten (2005, pp. 104–105) concedes that the Xeer has one distinctly illiberal trait: women are legally disadvantaged. Van Notten (p. 107) adds that it is difficult to integrate foreigners into the Xeer system in order to facilitate foreign investment. It should be obvious that it will not be feasible to sell "feminism" to the Somalis as a private economic good. Van Notten (pp. 125–26) admits that unfortunately, he has little to say about how to improve the status of women in Somalia. On the other hand, van Notten (2005, pp. 113–21) offers a solution to the problem of foreign integration: he suggests the formation of what he calls "freeports," similar to contemporary special economic development zones. Van Notten—who married into a Somali clan—asked his elders how the Xeer could accommodate foreign investment. One elder replied that a foreign corporation could constitute itself as a self-insuring clan, enabling foreign investors to seamlessly integrate into the Somali legal system. Such a freeport clan would rent land, according to the leasehold model that MacCallum defends elsewhere.[18] Van Notten notes that competition may spur native Somali clans to adopt successful business practices of the freeport clans.

[17] The Xeer is remarkably similar to other clan-based surety and feud-based systems, such as Anglo-Saxon customary law, Irish Brehon law, and Medieval Icelandic law. Friedman ([1973] 2014, pp. 235–38) notes the similarity of surety systems across time and space.

[18] MacCallum—who edited Van Notten (2005)—contributed his own chapter on the freeport clan (pp. 159–71). Van Notten (2005, pp. 197–223) also contains a proposed legal membership agreement for a freeport clan, coauthored with MacCallum.

I would like to suggest that this same freeport institution could benefit women as well. Presumably, a Western corporation will treat its women employees in a (relatively) egalitarian manner. And as the Xeer allows free association, Somali women would theoretically be allowed to associate with the freeport clan rather than a native Somali clan. If the Western corporation accepts Somali women as members, these women will be able to align themselves with a more egalitarian governance institution. Perhaps the Western freeport clan could operate a company town, similar to Disney's town of Celebration, providing a variety of amenities to employees—all of which would be available to women equally with men. If enough Somali women began leaving their own clans to join the freeport clan, competing Somali clans would have an incentive to become more feminist themselves (cf. Lemke 2016).

Therefore, I suggest, it may be possible to use the institution of the private community not only to facilitate foreign investment and legal integration—as van Notten and MacCallum argue—but also to propagate feminism to the Somalis in a noncoercive manner consistent with Xeer law. Thus, a seemingly intractable problem of expanding women's rights may be soluble using interjurisdictional competition among private communities. Legal equality for women would be provided neither by government as a public good nor by individual private firms, but as a club good.

Second, consider the prosecution of sexual assault by university authorities. Let us grant that there is a real problem of campus sexual assault. The solution, however, is highly controversial. Many lawyers and law professors have argued that the universities' "preponderance of the evidence" standard—explicitly mandated by the Department of Education's 2011 "Dear Colleague" interpretation of Title IX—violates the due process of law (Bernstein 2015, pp. 123–30; American College of Trial Lawyers 2017). Libertarians will tend to say that sexual assault should be prosecuted by the police and courts with a sufficiently strict standard of evidence: either "clear and convincing" or "beyond a reasonable doubt." By contrast, many victims' advocates—including the "Dear Colleague" letter itself—insist that colleges must do whatever they can to prosecute sexual assault in order to create a safe and encouraging educational environment for all students.

Perhaps a solution may be found in the theory of the proprietary community. Permit universities to autonomously choose their own judicial procedures and standards of evidence. Let universities bundle

their educational services with the police and security services of their choice—free of government mandates. Some universities may choose to apply the standard "preponderance of the evidence," others "clear and convincing evidence," and still others "beyond a reasonable doubt." Some students may prefer to attend a university with a more lenient standard of evidence, while others may prefer a stricter standard. The problem for libertarians is not hierarchy or bureaucracy per se. What is needed is for students to be free to express or revoke their *consent* to sexual assault policies.

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