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# Liberalism and Economic Liberty

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# II Liberalism and economic liberty

## INTRODUCTION

Can the state decide how much people must be paid for their work, say, by setting a minimum wage? Can it limit how many hours people may work in a day or week? Can the state require that people must be licensed to sell medical services, alcohol, or groceries? Can the state require that people save for their own retirement, or that they contribute some determined amount to medical insurance? Can the state levy taxes to provide putative public goods such as roads or national defense, or to fund medical care or housing for the needy? These are questions about economic liberty. They require us to consider what authority the state has to regulate economic activity.

We can consider these questions in a slightly different way. If we approach the authority of the state in terms of the authority of citizens to regulate themselves as a collective, then it is natural to view questions about what the state can do in terms of what free and equal citizens can justify to each other. Can citizens justify to each other imposing requirements about the wages they must be paid or the hours they can work? Can citizens justify to each other the requirement that various professionals must be licensed? Can citizens justify to each other mandatory saving for retirement or mandatory participation in an insurance scheme?

These two ways of asking questions about economic liberty invite two different approaches to answering them. Asking the questions in the first way invites reasoning that foregrounds the social results of free economic agency. On this line of reasoning, economic liberties are seen as means to the achievement of social goals such as peace and prosperity. Asking the questions in the second way, by contrast, foregrounds the possibility that economic

agency may be a morally charged forum of self-expression. On this line of reasoning, economic liberties are expressions of the respect that is due every member of society as a free and equal citizen. By a liberty, we understand a sphere of human agency that ought to be legally respected and protected. Liberties obligate citizens to respect and protect the activities of their fellow citizens in some sphere of agency.

What aspects of economic activity ought to be protected as liberties in this sense? The main schools of liberalism divide over this question. In this chapter, we provide a map of the various divisions of liberalism, showing in every case how the problem of economic liberty functions as an exacting conceptual tool that separates rival schools of liberalism from each other. To begin, we need a better understanding of the source of disagreement: what, precisely, is this divisive problem of economic liberty?

#### THE SIGNIFICANCE OF A LIBERTY

The problem of economic liberty can be understood along two dimensions: the first concerns *what* significance economic liberties should have; the second concerns *why* they should have this significance. The significance of a liberty is a function of two variables: weight and scope. The *weight of a liberty* is the importance it should be accorded in political deliberation vis-à-vis other societal considerations that might inform the exercise of political authority. The weightier the liberty, the more significant it is, meaning that fewer or stronger societal considerations can justify regulating the sphere of agency protected by this liberty.

For liberals, all spheres of human agency carry a presumption of liberty: No sphere of human agency can be politically regulated without sufficient and impartial justification. How to cash out the presumption of liberty more precisely is a hard question. Let us simply stipulate that the presumption of liberty is carried by any legislation that is democratically enacted in accordance with a constitution the principles of which are acceptable to all citizens.

The presumption of liberty is the lowest weight a liberty can have. Indeed, a sphere of agency protected merely by the presumption of liberty is a liberty only in a minimal sense of the word, since it can be

regulated as needed to pursue other social values. The weightiest a liberty can be, by contrast, is absolute. An absolute liberty is a sphere of agency that cannot be regulated for any reason except to secure that same liberty for all. There is a continuum of weights between the presumption of liberty and absolute liberty. The most important of the categories on this continuum is the category of basic liberties.

A basic liberty can be regulated only to secure that an adequate scheme of basic liberties is equally secured for all citizens. A basic liberty is weightier than the presumption of liberty, since the sphere of agency it protects cannot be regulated to maximize productive output or for whatever other interest carries the majority of citizens of the day. A basic liberty is less weighty than an absolute liberty, since it can be regulated to ensure that an adequate scheme of basic liberties is provided for all (and not only to ensure that the particular type of liberty in question is provided for all, as with absolute liberties).

The *scope of a liberty* is the set of activities falling within the protected sphere. The scope of a liberty must, accordingly, be defined relative to its weight. If a liberty is absolute, the scope of that liberty is the set of activities that cannot be regulated for any other reason than to provide the liberty in question. Likewise, the scope of a basic liberty is the set of activities that may be regulated only to secure an adequate scheme of basic liberties for all. Since the presumption of liberty covers all activities not already within the scope of absolute or basic liberties (assuming for simplicity that these exhaust the options), it makes little sense to talk about the scope of a liberty protected merely by the presumption of liberty. This is part of the reason why spheres of agency protected merely by the presumption of liberty are liberties only in a minimal sense.

The *significance of a liberty* is a function of its weight and scope. The significance of a liberty falls on a scale between minimally significant at one end (mere presumption of liberty) and supremely significant at the other end (absolute weight and of wide scope). Freedom of speech, for example, is currently given high significance in most liberal democracies: it is constitutionally entrenched and it protects a wide range of speech-acts from government regulation. Whether freedom of speech should be given this significance is, of course, a normative question that must be decided by reference to principles of justice.

## ECONOMIC LIBERTIES

Economic liberties are liberties of the person as an economic agent. We can identify four categories of economic liberties corresponding to the main spheres of economic agency:<sup>1</sup>

1. Liberties of working (of the person as laborer): liberties to employ one's body, time, and mind in productive activities of one's choice and according to the terms one has freely consented to (such as to donate, sell, trade, and buy labor).
2. Liberties of transacting (of the person as entrepreneur): liberties to manage one's own affairs, to buy and sell goods, to save and invest, to start, run, and close a commercial enterprise such as a business or farm, and to engage in the activities of running such an enterprise: to hire workers, buy and use land, display, advertise, and sell one's products or services.
3. Liberties of owning property (of the person as owner): liberties of acquisition, holding, and transfer of property (whether personal or productive), of using and developing one's property for commercial and productive purposes, to sell, trade, invest and bequest one's property.
4. Liberties of using property (of the person as consumer): liberties to use, consume, destroy, or otherwise do as one pleases with one's goods, resources, and services.

But how significant are these economic liberties? Some liberals maintain that liberty of contract as a liberty of working is both wide and absolute. Thus, contractual relationships can be regulated only to secure freedom of contract for all (if so, even contracts of workers in the sex trade cannot be regulated, except to secure liberty of contract for all). Conversely, other liberals maintain that freedom of contract is of limited weight and so can be regulated in pursuit of a fair and efficient distribution of opportunities and resources, or for reasons of public safety (in which case, contracts in the sex trade could be regulated for a wider range of reasons).

Let's say that a conception of economic liberty is an account of what economic liberties should have what significance. A theory of economic liberty is a conception of economic liberty together with its justification. We use a notion of thickness to help us compare different conceptions of economic liberty. The thickness of a conception of

economic liberty depends on the three identified variables: range, weight, and scope. The wider the range of economic liberties that are given higher weights and wider scope, the thicker is that conception of economic liberty.

In light of the preceding, we can map different conceptions of economic liberty on a continuum of thickness. At one extreme we find the maximally "thick" position that the full range of economic liberties are extremely significant. Call this economic rights absolutism. At the other extreme, we find the "thinnest" liberal position that the full range of economic liberties are protected merely by the presumption of liberty. Call this economic rights minimalism. Between these two extremes lie a number of possible conceptions. For example, one might argue that all or some of the economic liberties are basic, but no economic liberties are absolute.

This map is, of course, incomplete in several ways. Cardinal ranking seems out of the question, and even an ordinal ranking must be incomplete. For example, there is no way to say whether the just mentioned conception is thinner or thicker than a conception that holds some economic liberties absolute and the rest are protected merely by the presumption of liberty. These problems aside, we now have a rough measure for sorting different liberal theories of economic liberty: namely, according to the thickness of their conception of economic liberty. This approach allows us to distinguish the three main divisions of liberalism: libertarianism, classical liberalism, and high liberalism.<sup>2</sup> (Later in the chapter we consider two nonliberal approaches to economic liberty: socialism and market-anarchism.)

#### LIBERTARIANISM, CLASSICAL LIBERALISM, AND HIGH LIBERALISM

Libertarians affirm a thicker conception of economic liberties than do classical liberals, who, in turn, affirm a thicker conception than do high liberals. Speaking generally, libertarians maintain that most of the economic liberties are absolute;<sup>3</sup> classical liberals maintain that more or less the full range of economic liberties are basic liberties;<sup>4</sup> and high liberals maintain that almost the full range of economic liberties are protected merely by the presumption of liberty.<sup>5</sup>

These different conceptions of economic liberty generate different accounts of distributive justice. Libertarians tend to think that

distributive justice is fully realized by the protection of economic liberties and that any state redistribution of resources impermissibly violates economic liberties. Thus, Nozick's famous opening to *Anarchy, State, and Utopia*: "Individuals have rights ... So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do."<sup>6</sup> On Nozick's interpretation, these rights include the full range of economic liberties and are given more or less absolute weight.<sup>7</sup> So economic rights severely limit what the state and its officials may do – primarily, the state should secure that (natural and acquired) rights are respected for all.

Classical liberals also tend to think that distributive justice is realized by protecting the economic liberties: Distributions that emerge as the unplanned consequence of voluntary interactions are, by that very fact, distributively just. Nevertheless, classical liberals are more open to state regulation of economic liberties. Regulation of one economic liberty can enable the exercise of another. For example, classical liberals have no problem with regulation that prevents monopolies or other market failures (more on this topic below). Similarly, economic liberties may be regulated in order to maintain other basic liberties.

High liberals, finally, tend to think that distributive justice is a concern of justice that is distinct from and has priority over the protection of the economic liberties. High liberals affirm a thin conception of economic liberty, where most economic liberties are protected merely by the presumption of liberty. Economic liberties ordinarily can and should be regulated in pursuit of distributive justice and other social goals.

#### PHILOSOPHICAL FRAMEWORKS

Why do these different schools of liberalism affirm these different conceptions of economic liberty? To find out, let us examine the philosophical framework characteristic of each school.

There are three main liberal philosophical frameworks: natural rights theory, consequentialism, and contractualism. A natural rights liberal maintains that some rights and liberties are innate and inviolable, though they may be alienable by crime or free consent. A consequentialist liberal treats rights and liberties as means to some independently defined end (such as happiness or human perfection).

A contractualist liberal approaches rights and liberties as parts of the terms of social cooperation that must be reasonably acceptable to all citizens conceived of as free and equal members of society. In this manner, different philosophical liberalisms view economic liberties through different lenses, each with a distinctive conceptual tint.

Conceptually speaking, the two levels – framework and school – are only loosely connected. A consequentialist liberal, for example, might defend a classical liberal or a high-liberal conception of economic liberty. Yet, there are philosophical strains. Thus, a consequentialist liberal would find it hard to support economic rights absolutism, since the indirect nature of a consequentialist approach to liberties looks fit to establish only a conditional absoluteness.

The preceding explains why we find no less than three distinct sorts of disagreement about economic liberty among liberals. There is the first-order disagreement about what is the right conception of economic liberty. But this dispute is rooted in two second-order disagreements. First, a disagreement about what framework – natural rights, consequentialist, or contractualist – provides the appropriate lens through which to consider the significance of economic liberties (call this inter-framework second-order disagreement). And second, a disagreement about what the right conception of economic liberty is, given an agreed-upon framework (intra-framework second-order disagreement).

For many decades, the main pattern of linkages between frameworks and schools was stable. Libertarians typically defended their conception from a natural rights framework. Classical liberals tended to support their conception on broadly consequentialist (utilitarian) grounds. And high liberals typically supported their conception from a contractualist framework. Yet, increasingly, this pattern is being disrupted. In the following we first look at the traditional tendencies and then tour one main site of disruption.

#### NATURAL RIGHTS LIBERTARIANISM

Libertarianism is the position that most or even all of the economic liberties are supremely significant and as such cannot be restricted or regulated, except to ensure that they are protected for all.<sup>8</sup> Normally, this position is defended from within a natural rights framework based on a claim of original self-ownership, or on a principle of natural liberty.<sup>9</sup>



There is a wrinkle here. On some libertarian theories, economic rights absolutism is compatible with just about any sort of state. A natural extension of the self-ownership idea implicit in the libertarian position is that persons may and can alienate their rights by free consent. In the extreme a person may contract to become slave to another – in that case, the other has authority to decide on her behalf. The free alienation of rights can create interpersonal authority that allows persons to use force against each other in ways that were otherwise impermissible. Likewise, a group of persons may well decide to create political authority that is authorized to collect taxes, regulate labor, and so on. So, on this picture, though the economic rights are *originally absolute* (prior to legal deeds by which interpersonal authority is created), their alienability means that they must be respected and protected only insofar as there are no past contracts to the contrary. So, on such a natural rights framework, whether and how a state ought to respect and protect economic liberties depends on the past contracts of the members of society.

Libertarianism has had a hard time asserting itself as an equal member of the liberal family. (Some have even questioned whether libertarianism is a liberal philosophy at all.)<sup>10</sup> One difficulty for libertarians has been the challenge of articulating an attractive natural rights framework. Some libertarians look to Locke for their arguments, but Locke relied on questionable assumptions about the status of humans as parts of God's creation and plan.<sup>11</sup> And even if Locke had not relied on controversial metaphysical premises, he explicitly rejects the sort of economic rights absolutism that libertarians defend.<sup>12</sup> Others have looked to Kant's theory of autonomy and the idea that all persons are ends in themselves and have sought to show that Kant's theory implies a very thick conception of economic liberty. Yet, Kant rejected this implication,<sup>13</sup> and it is, in any case, doubtful that respect for autonomy implies anything close to economic rights absolutism. Contractualists have argued that Kant's theory of autonomy requires that economic liberties be regulated and restricted insofar as this is necessary to secure a fair distribution of opportunities and goods.<sup>14</sup>

Another set of problems concerns what many people have seen as unattractive commitments of libertarianism. If economic rights are absolute, there is very little the state is morally permitted to attempt to do to protect the weak from exploitation or to provide for those who through no fault of their own are unable to provide for

themselves. Some libertarians bite this bullet. Others advert to the space thus reserved for charitable activity. But the lack of *moral permission* for the state to address such issues is a feature of libertarianism that gives many people pause.

Moreover, if freedom of contract is both absolute and of wide scope, as some libertarians argue, then it allows contracts of prostitution, slavery, and perhaps even the sale of vital bodily organs (say, one's heart). These permissions raise deep concerns, especially when combined with the absence of state support even for those who through no fault of their own find themselves in extreme need. The misfortunate might face a choice between starvation and a contract of slavery. The libertarian position appears to sanction such a choice and even to require that the state use its power to enforce such contracts.<sup>15</sup>

#### UTILITARIAN CLASSICAL LIBERALISM

One of the oldest and most successful defenses of economic liberties has been that the free exercise of economic agency tends to minimize waste, maximize the productive output of society, secure an optimal distribution of goods and resources, and avoid the dangers of concentrated governmental power. Despite the allure of planning, the spontaneous order that emerges from the free interactions of self-interested agents is, perhaps paradoxically, a more reliable route to peace and economic prosperity.<sup>16</sup> Classical liberals have thus defended economic liberties on utilitarian grounds as indispensable or efficient tools for promoting general well-being.

Given certain empirical assumptions, this line of reasoning offers an indirect utilitarian defense of a moderately thick conception of economic liberty. The indirect utilitarian argument does not support treating economic liberties as special or giving them absolute weight. Rather, the economic liberties are treated as members of the set of liberties that must be given special weight in order to secure a good society. Such liberties can be regulated for the sake of designing the scheme of basic liberties that best serves the purpose. Indirect utilitarian liberalism in this manner tends to support the classical liberal conception of economic liberties – typically, that the full range of economic liberties should be treated as basic rights, but not as absolute.

The indirect utilitarian justification invites a certain laxness even when it comes to the basicness of economic liberties. After all, utilitarian justification is highly fact sensitive. Classical liberals have not been hostile to regulating economic agency, if it turns out to better serve the good of society, as we have already noted regarding the threat of monopoly.<sup>17</sup> Nor have classical liberals been averse to the state being involved in the provision of public goods (Smith himself saw the provision of public goods as one of the central functions of government).<sup>18</sup> Classical liberals such as F. A. Hayek and Milton Friedman have supported tax-based support for education and welfare programs insofar as these are reliable means to secure an educated workforce, peace, and stability, and perhaps for other moral reasons as well.<sup>19</sup>

Thus, in classical liberalism, the economic liberties are not quite basic, since they can be regulated by reference to the underlying values – but in this the economic liberties are once again on a par with the other (more or less basic) liberties. So another way to distinguish classical liberalism from libertarianism and high liberalism is to say that classical liberals tend to view economic liberties as of equal significance with other traditional liberal liberties such as freedom of thought, speech, and the rights of bodily integrity. By contrast, libertarians and high liberals both single out the economic liberties: libertarians by treating the economic liberties as *more* significant than other traditional liberties; high liberals by treating them as *less* significant.

The instrumentalist defense of rights and liberties has been something of an Achilles heel for classical liberals. Applied to political questions, this framework inherits all the ills of indirect utilitarianism in general. Classical liberals working in this framework are vulnerable to challenges from less liberally inclined utilitarians: if what we really care about is promoting happiness, then we (or the state) should violate rights if doing so promotes happiness – say, if we can violate rights secretly, or if it appears that the benefit of rare violations outweighs the slight instability they cost.

Conversely, less utilitarianly inclined liberals have argued that the utilitarian argument fails to capture the true importance of liberties, especially given the conditional nature of utilitarian justification. The importance accorded to rights is typically signaled precisely by their ability to trump utilitarian, or social averaging, considerations.<sup>20</sup>

Moreover, the indirect utilitarian argument seems unable to establish that the basic liberties should be equally provided for all members of society. At least, it makes the commitment to equal liberty dependent on empirical facts. If unequal liberty maximizes utility, the indirect utilitarian argument seems to require a principle of unequal liberty, an outcome that seems wholly incompatible with the ideals of the liberal tradition.<sup>21</sup>

The underlying concern of these criticisms is, of course, that the utilitarian framework mistakes why we should care about liberty in the first place. From a Lockean or Kantian perspective, the liberties (or at least the more significant liberties) are not instruments to other social ends. They are norms grounded in the status and value of individual agency.<sup>22</sup>

Of course, not all utilitarians are classical liberals (or liberals, for that matter), and not all classical liberals are utilitarians. Below we shall see how classical liberalism can be restated on grounds closer to the Kantian view of why liberties matter. First, however, let's consider the more traditional Kantian interpretation of the significance of economic liberties, namely, the contractualist high liberalism offered by John Rawls.

#### CONTRACTUALIST HIGH LIBERALISM

According to contractualism, the principles of justice are the principles that free and equal rational persons would agree to as the fundamental terms of social cooperation.<sup>23</sup> Rawls designs the original position to identify these principles.

Rawls invites us to imagine parties selecting principles of justice while operating under a set of information constraints.<sup>24</sup> These constraints famously include a "veil of ignorance" that makes the parties unaware of particular facts about those they represent and the society they inhabit. Along with some general facts, the parties know that they have a conception of the good and an interest in securing the means for pursuing it. Significantly, the parties also have a higher-order interest in securing for those they represent the preconditions for the development and exercise of the two powers of moral personality – the capacity to form, revise, and pursue a conception of the good and the capacity to develop and exercise an effective sense of justice.<sup>25</sup> The original position ranks candidate principles of justice according to how well the parties can expect their interests to be

satisfied in a society well ordered by these principles. The highest-ranking principles are the principles of justice.

Rawls argues that the original position will issue as first principle of justice that "Each person is to have an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all."<sup>26</sup> He also argues that the basic liberties have priority over any other social concerns – including the requirements of distributive justice set out in the second principle.<sup>27</sup>

The exact scheme of basic liberties protected by the first principle can be defined by reference to the higher-order interests of the parties. For Rawls, the basic liberties are all and only those liberties necessary for the adequate development and full exercise of the two moral powers.<sup>28</sup> If a liberty is not necessary for the development and exercise of one of the moral powers, then that liberty is protected merely by the presumption of liberty. Thus, as we have seen, it can be regulated as required by the second principle or in light of other social concerns.

Rawls argues that only two categories of economic liberties are basic:<sup>29</sup> first, the right to hold and have exclusive use of personal (nonproductive) property. Rawls suggests that this liberty is necessary for the adequate development and exercise of both moral powers. Second, liberty of occupation is required by freedom of association and in general for the adequate exercise of the second moral power.<sup>30</sup> Apart from these two, Rawls thinks that the activities of economic agency can and should be regulated as needed to realize the fair value of political liberties, equality of opportunity, and a fair and efficient distribution of income and wealth.

Unfortunately, Rawls does not say much about why he concludes that most economic liberties are not basic. In general, his argument must be that such liberties are *not* necessary for the adequate development and exercise of the two moral powers.<sup>31</sup> But the details of this argument are unclear. This lack of clarity in Rawls's argument invites doubt that he has really established what he claims. In the following we shall see how neoclassical liberals exploit the gap between Rawls's basic ideas and conclusions to argue that the contractualist framework leads to a classical conception of economic liberties, one which recognizes a wider range of economic liberties as basic rights.

## NEOCLASSICAL LIBERALISM

Like classical liberalism, neoclassical liberalism defends the position that more or less the full range of economic liberties are basic and thus should be regulated only as needed to secure an adequate scheme of basic liberties for all.<sup>32</sup> Neoclassical liberals differ from classical liberals in three ways.

First, and most important, they work from a contractualist framework. Instead of working within the consequentialist (or econometric) framework of traditional classical liberals, neoclassical liberals argue that the principles of justice are those that could meet with the consent of all citizens conceived as free and equal.

Second, because they work within the contractualist framework, neoclassical liberals offer an alternative definition of what makes a scheme of basic liberties "adequate." For traditional classical liberals, recall, adequacy is defined relative to the end of maximizing happiness or prosperity. The adequate scheme of basic liberties is that which best serves this end. By contrast, neoclassical liberals define adequacy in terms of the proper development and exercise of the powers of moral personality. The adequate scheme of basic liberties is the set of liberties necessary for the exercise of these moral powers.

Third, while classical liberals such as Hayek support a variety of social programs, they reject the idea of social justice. Officially at least, traditional classical liberals support a tax-funded safety net and system of educational supports only insofar as such policies support utilitarian aims (such as social stability).<sup>33</sup> Neoclassical liberals, by contrast, follow high liberals in affirming an ideal of distributive (or "social") justice and in maintaining that liberal justice requires a direct concern for the least well off members of society.

Neoclassical liberals, in short, are like classical liberals in that they maintain that the full range of economic liberties are basic. But they are like high liberals in that they defend their conception of economic liberty from a contractualist framework that also issues distinct requirements of distributive justice. Whether the political implications of neoclassical liberalism are closer to those of classical liberalism or high liberalism is a matter of dispute. On one hand, neoclassical liberals such as John Tomasi affirm a thick conception of economic liberty: There is an important domain of economic agency that cannot be restricted even to secure equality of

opportunity or to improve the lot of the least well off. On the other hand, equality of opportunity and improving the lot of the least well off are recognized as distinct requirements of justice that outweigh other social considerations (such as efficiency).<sup>34</sup>

How do neoclassical liberals get to the classical liberal conception of economic liberty from the contractualist framework that is usually thought to support high liberalism? Recall the incompleteness of Rawls's argument that most economic liberties are protected merely by the presumption of liberty. This lack of argument invites the charge that Rawls's exception of the economic liberties from the scheme of basic liberties is unjustified.

Tomasi offers a three-pronged version of the charge of unjustified exceptionalism.<sup>35</sup> First, given that liberal thinkers traditionally include the economic liberties among the basic liberties, the burden of proof is on those who claim that they are not on the list. But high liberals offer little argument to lift this burden. Second, to show that the economic liberties are not basic, high liberals would have to show that the economic liberties are not necessary for the adequate development and exercise of the two moral powers. However, if we look at the arguments that high liberals give for why other basic liberties are necessary for the moral powers, these arguments seem to apply equally to the economic liberties. The economic liberties protect essential interests in security and independence, and the various spheres of economic agency – the activities of the human being as a worker, as entrepreneur, owner, and consumer – can be as central to personal identity as the religious and political aspects of our existence. Finally, the argument that Rawls offers in defense of including the economic liberties of personal property and freedom of occupation on the list of basic liberties seems to apply equally to other economic liberties. The freedom to sell, trade, and donate one's labor seems no less essential to the moral powers than freedom to choose one's occupation. People define themselves, and express their values, not only by *what* work they choose to do, but also by the *way* they choose to work.

If the economic liberties are as necessary for the adequate development and exercise of the moral powers as the liberties that high liberals claim are basic, then high liberals ought to embrace the conclusion that a fuller range of economic liberties are basic – to not do so is unjustified exceptionalism.

High liberals would reject this charge of unjustified exceptionalism.<sup>36</sup> First, Rawls does not defend freedom of occupation because people define themselves by their choice of occupation, but because it is needed to exercise the other basic liberties, such as freedom of association. More generally, the neoclassical argument interprets the criterion of basic liberty to mean that any sphere of agency that might be central to some reasonable conception of the good should be protected as a basic liberty. Yet, even if Rawls's criterion of basic liberty needs clarification, it is clear enough that he does not share this interpretation of the criterion. Rawls's criterion is not primarily about protecting whatever conceptions of the good citizens may have, but about securing the conditions necessary for the adequate development and exercise of the moral powers, including the capacity to devise and pursue a conception of the good. Thus, it might be argued that Tomasi's claim that the economic liberties are as important for some conceptions of the good as the liberties Rawls affirms as basic is beside the point, and the charge of unjustified exceptionalism misses the target.

However that debate shakes out, both camps have work to do. High liberals need to clarify the criterion of basic liberties and explain why most economic liberties are omitted by this criterion. Neoclassical liberals must either show why the economic liberties are basic by the high-liberal criterion, or offer an argument for why we should abandon the high-liberal criterion in favor of a criterion by which the economic liberties are basic.

#### TWO CHALLENGES TO LIBERAL THEORIES OF ECONOMIC LIBERTY: SOCIALISM AND ANARCHISM

All liberal views rely on a distinction between liberty and what we might call "freedom." Liberty is the set of liberties that the state ought to respect and protect. Freedom is the set of options available to a person. For liberals, the abilities and means needed to exercise one's liberties and thus to be more fully "free" are conceptually external to those liberties. One can have a liberty even if one lacks the abilities or means needed to fully exercise it.<sup>37</sup> On this approach, a person too sick to go to church has no less religious liberty than a healthy person. Her inability means that her possibilities for exercising that liberty



are limited, so that she, in that sense, is less free to practice her religion than the healthy person. Similarly, a poor person has the same economic liberties as a rich person, even though she has fewer economic options.

On the liberal approach, the state should protect liberty, not promote freedom. At most, the state secures the background conditions of freedom by protecting and respecting liberties and securing conditions of distributive justice – however conceived.

Socialists reject the liberal distinction between liberty and freedom and they object to what they see as a liberal conflation of “inability” and “lack of means.” Lack of means, especially pecuniary means, presents *legal* restrictions on the exercise of a liberty.<sup>38</sup> These objections support two criticisms of liberal theories of economic liberty.

The first criticism is aimed at classical and neoclassical liberal conceptions of economic liberty (libertarians are immune and high liberals tend to agree): If a basic liberty is enjoyed only when the necessary means for its enjoyment are available, then the economic liberties can and should be regulated with the aim of ensuring that all citizens have the means for enjoying the full scheme of basic liberties, whether or not the economic liberties themselves are basic. For socialists, a thorough regulation of the activities of economic agency is consistent with taking the full range of economic liberties as basic.

The second criticism targets all liberal conceptions of economic liberty: If having a liberty means having access to the means necessary to exercise it, then having an economic liberty means having access to the means necessary to engage in that sphere of economic agency. The right to property is not, as liberal thinkers tend to define it, primarily a negative right that protects holders of property against certain types of interference from others.<sup>39</sup> The right to hold property is, rather, just that: an equal right to actually hold property. But if the liberties of ownership require that all members of society have more or less equal access to ownership of property, then the economic liberties can be protected and respected only in a system of public ownership and production.

Socialists, accordingly, agree with liberals that the state has an important role in protecting economic liberty (at least until the last stage of history, where the state can wither away).<sup>40</sup> However, socialists maintain that liberals mistake this role. When the liberal state

"respects" economic liberty, people are barred from taking democratic measures to secure true economic liberty for all. When the liberal state "protects" economic liberties, it enforces an oppressive system of entitlements that keeps the majority of society from access to economic liberty. Socialists thus argue that liberal theories of economic liberty serve as part of the ideology that justifies using the state as a means of oppression, rather than liberation.

Interestingly, market anarchists agree with the socialist claim that the liberal state is a means of oppression. But they reject the socialist idea that the state could serve a role in securing economic liberty. Indeed, market anarchists argue that it is *impossible* for a state to protect and respect economic liberties.

Market anarchists affirm a principle of non-aggression: It is impermissible to use violence, or to threaten violence, against other people or their property.<sup>41</sup> The non-aggression principle requires that people's control of their own lives and property be respected, so long as their actions do not themselves violate that principle. According to market anarchists, the non-aggression principle leaves no room for the state, which inevitably uses threats of violence to subject individuals to laws with which they do not agree and is funded through the seizure of property ("taxation").<sup>42</sup> Just as it would be wrong for one person to force rules upon or steal from his neighbor, so it is wrong for the state to do so. Market anarchists see the state not as a solution to the problem of aggression, but rather as a major contributor to it.

Market anarchists believe that economic liberties of working and ownership ought to be protected. But they say that protection must be left to individuals or, more precisely, to groups of individuals working together voluntarily. Collective entities resembling a state, entities that provide constituents with goods ranging from defense to health insurance, and even courts and property law itself, may emerge and persist – so long as all involved consent to its rules. Market anarchists argue that, more successfully than the state, the free market can provide competitively priced and effective property rights protection.

#### CONCLUSION

The central problem of economic liberty concerns which economic liberties should be given what significance and why. Whole schools of

liberalism divide over this problem: The defining differences between libertarians, classical liberals, and high liberals are differences in their conceptions of economic liberty. Traditionally, the different conceptions of economic liberty were supported by different philosophical frameworks – libertarians defending a thick conception of economic liberty from a natural rights framework; classical liberals, a moderate conception of economic liberty from a utilitarian framework; high liberals, a thin conception of economic liberty from a contractualist framework. So long as disagreements about economic liberty were primarily inter-framework disagreements, liberal debates about economic liberty proceeded mostly in terms of the opposing sides identifying faults and weaknesses in the philosophical frameworks of their opponents. While this has led to more refined philosophical frameworks, it has had less of a refining effect on the arguments that lead from philosophical frameworks to conceptions of economic liberty.

But the landscape is changing. Increasingly, we see intra-framework disagreements. We focused on a prominent example, namely, the neo-classical challenge to high liberalism: that the contractualist framework supports a classical liberal conception of economic liberty. We expect and hope that intra-framework disagreements such as this will lead to refinement of the arguments offered in defense of the different conceptions of economic liberty. Such refinements are needed, not only to clarify the relation between philosophical frameworks and liberal conceptions of economic liberty, but also to allow liberals to respond to the challenges mounted by socialists and market anarchists.

The problem of economic liberty does more than separate scholars into rival intellectual schools. As much or more than any other issue, the problem of economic liberty also divides liberal citizens into rival and contending groups. This is yet another reason for liberals, and their critics, to attend more closely to the problem of economic liberty.

#### NOTES

1. Here we follow Nickel, "Economic Liberties," pp. 156–57.
2. The distinction between these three schools has been drawn in a number of different ways: see Freeman "Illiberal Libertarians"; Freeman, "Capitalism

- in the Classical and High Liberal Traditions"; Tomasi, *Free Market Fairness*; Tomasi and Brennan, "Classical Liberalism"; Mack and Gauss "Classical Liberalism and Libertarianism."
3. For paradigmatic statements of libertarianism, see Nozick, *Anarchy, State, and Utopia* and Narveson, *The Libertarian Idea*.
  4. Early versions of the classical liberal conception of economic liberty were offered by David Hume and Adam Smith. More recent varieties are offered by Hayek, Friedman, and Epstein.
  5. The use of the term "high liberalism" to designate this subset of the liberal family was introduced by Freeman in "Illiberal Libertarians". Among its members Freeman counts John Stuart Mill, T. H. Green, John Dewey, and John Rawls. The family also includes many contemporary liberals, including Ronald Dworkin, Joshua Cohen, Bruce Ackerman, Thomas Nagel, Charles Larmore, Corey Brettschneider, and Samuel Scheffler.
  6. Nozick, *Anarchy, State, and Utopia*, p. ix.
  7. It might be said that Nozick backs away from natural rights absolutism in his discussion of risk and compensation in chapter 4 of *Anarchy, State and Utopia* (see Sobel, "Backing Away from Libertarian Self-Ownership"), but for the purposes of illustration we ignore this complication.
  8. Different libertarianisms work with different theories of property and original acquisition and their conceptions of economic liberty vary with these theoretical underpinnings. Thus, right- and left-libertarians might disagree about which economic rights are natural rights, about what sorts of unilateral, bilateral, and omnilateral moves are necessary and/or sufficient for just changes to the distribution of rights, and thus also about the legitimate roles and extent of the state. For a brief overview of some of the moving parts in these debates, see Vallentyne, "Libertarianism."
  9. For backing and qualification of this generalization, see Zwolinski, "Libertarianism." Nozick is commonly cited as a self-ownership theorist. A prominent liberty-based argument for libertarianism is Narveson, *The Libertarian Idea*.
  10. Rawls, *Political Liberalism*, p. lviii; Freeman, "Illiberal Libertarians."
  11. Locke, *Second Treatise of Government*, esp. chs. 4–5. See also Waldron, *God, Locke, and Equality*.
  12. See Locke, *Second Treatise of Government*, §§73 (on inheritance), 120 and 138–39 (on regulation of property), 142 (taxation).
  13. See section 1 of the division "Public Right," in Kant, "Metaphysical First Principles of the Doctrine of Right." See also Ripstein, *Force and Freedom*, chs. 8–9.
  14. For an interpretation of Kant that supports this claim, see Guyer, *Kant on Freedom, Law, and Happiness*, chs. 7–8.

15. von Platz, "Absolute Freedom of Contract," pp. 107-10.
16. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*; Hayek, *The Constitution of Liberty*; Friedman, *Capitalism and Freedom*; Epstein, *Principles for a Free Society*.
17. For example, Hayek, *The Constitution of Liberty*, pp. 264-66; Friedman, *Capitalism and Freedom*, pp. 27-30, 132-33.
18. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, IV, p. ix.
19. Hayek, *The Constitution of Liberty*, chs. 19, 24; Friedman, *Capitalism and Freedom*, chs. 6, 11, 12.
20. Cf. Dworkin, "Rights as Trumps," pp. 153-67; Nozick, *Anarchy, State, and Utopia*, pp. 28-33.
21. Rawls, *A Theory of Justice*, rev. edn., p. 185; Rawls, *Justice as Fairness*, p. 96.
22. One might dispute that Locke agrees with this characterization of rights, since in his natural law framework the right promotes peaceful and good society. Yet, though the right is conducive to the good, that is not, for Locke, what makes it the right: "the rightness of an action does not depend on its utility; on the contrary, its utility is a result of its rightness" (Locke, *Essays on the Law of Nature*, p. 215).
23. Rawls, *A Theory of Justice*, rev. edn., p. 10; see also Freeman, "Social Contract Approaches."
24. Rawls, *A Theory of Justice*, rev. edn., §24 and pp. 110, 137-38; Rawls, *Political Liberalism*, pp. 22-28, 70; and Rawls, *Justice as Fairness*, §§6, 11, 25-26, 35.
25. Rawls, *Political Liberalism*, pp. 73-75; Rawls, "Kantian Constructivism in Moral Theory," pp. 312-13.
26. Rawls, *Political Liberalism*, pp. 5, 291. This version of the first principle contains several changes to the principle that Rawls made in light of criticism of the principle as it was stated in the first edition of *A Theory of Justice*; see Hart, "Rawls on Liberty and Its Priority" and Rawls's reply to Hart in *Political Liberalism*, Lecture VIII.
27. Rawls, *A Theory of Justice*, rev. edn., §39.
28. Rawls, *Justice as Fairness*, pp. 45, 112-13, 169; Rawls, *Political Liberalism*, pp. 24, 74, 187, 293, 308-25; Rawls, *A Theory of Justice*, rev. edn., p. xii; Rawls, "Reply to Habermas," esp. pp. 409-19.
29. See Rawls, *A Theory of Justice*, rev. edn., §§42, 43, 82; Rawls, *Justice as Fairness*, p. 114; Rawls, *Political Liberalism*, pp. 228, 232, 298, 335, 338, 363.
30. Notably, most often free choice of occupation is not included among the basic liberties in the list of primary goods; cf. Rawls, "Social Unity and Primary Goods," p. 362; likewise *Political Liberalism*, pp. 181, 308.

31. Rawls says this about some economic rights in *Political Liberalism*, p. 298; *Justice as Fairness*, p. 114.
32. The term "neoclassical liberal" was coined by Brennan and Tomasi in "Classical Liberalism." Nickel was one of the first to defend economic liberties along neoclassical lines; see "Economic Liberties." More systematic defenses of neoclassical liberalism are offered by Gaus in *The Order of Public Reason*; "On Justifying the Rights of the Moderns"; and "Coercion, Ownership, and the Redistributive State"; and Tomasi in *Free Market Fairness* and "Democratic Legitimacy and Economic Liberty."
33. Hayek, *Law, Legislation, and Liberty*, vol. II.
34. Freeman has criticized Tomasi on this point. See "Can Economic Liberties be Basic Liberties?" See also Tomasi, "Reply to Freeman."
35. Tomasi, *Free Market Fairness*, ch. 4.
36. The discussion in this paragraph draws on von Platz, "Are Economic Liberties Basic Rights?"
37. Hayek, *The Constitution of Liberty*, pp. 16–19; Narveson, *The Libertarian Idea*, pp. 20–21; Rawls, *Political Liberalism*, pp. 325–26. Rawls's distinction between liberty and the worth of liberty is supposed to answer the socialist critique (*Political Liberalism*, pp. 324–31; *Justice as Fairness*, pp. 148–50).
38. This challenge has historical credentials almost as impressive as those of liberalism itself. For a recent and very clear presentation of it, see Cohen "Freedom and Money." Alex Gourevitch uses a similar argument to contend that liberal theories of economic liberty are both confused and inconsistent ("What is Economic Freedom?" working manuscript presented at the Brown Political Theory Workshop, April 2012).
39. The classical statement of the incidents of the right to property is Honoré's "Ownership"; see also Gaus, "Property and Ownership."
40. Cf. Engels, "Anti-Dühring," p. 713.
41. Rothbard, *For a New Liberty*, p. 27.
42. *Ibid.*, pp. 47–48.