

Liberalism, Capitalism, and Libertarianism

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[This paper is a combination and revision of portions of three papers previously published: 'Capitalism in the Classical and High Liberal Traditions,' in *Social Philosophy and Policy* vol. 28, no.2 (2011) 19-55; 'Equality of Resources, Market Luck, and the Justification of Adjusted Market Distributions,' Symposium on Ronald Dworkin's *Justice for Hedgehogs*, in *Boston University Law Review*, 90 (April, 2010, no.2): 921-948; and 'Illiberal Libertarians: Why Libertarianism Is Not a Liberal View,' *Philosophy and Public Affairs*, vol. 30, no. 2 (2001) 105-151. The revised portions of these papers presented here are to form part of a manuscript on liberalism and libertarianism that I am currently working on, to be entitled *Three Liberalisms*. I apologize for the length of this paper. If you need to skip parts of the paper, I would suggest §§VI and VIII of Part One, pp.29-35 and 41-45 first. If you are pressed for time, I would suggest reading Part One, §I-II, pp.2-12 which is introductory, and then especially §§IV-V pp. 18-29, and Part Two §II, pp. 52-67, since these contain the more original and perhaps most controversial parts of the paper.]

PART ONE: LIBERALISM AND ITS RELATION TO CAPITALISM

I. Essential Features of Liberalism

Liberalism holds that citizens have certain basic rights and liberties that are of fundamental political significance. These rights and liberties are basic in that they are preconditions on the pursuit of other social values, such as economic efficiency, the general welfare, and moderating the degree of inequality in the distribution of income and wealth. None of these rights and liberties are absolute, but the reasons for limiting their exercise are to protect other basic rights and liberties and maintain essential background conditions for their effective exercise. For example, freedom of speech and expression can be limited when it imminently endangers others' safety or freedom of their person, but not because the ideas expressed are found to be offensive by vast majorities of people. Liberal basic liberties are also *inalienable*: they cannot be given up voluntarily or permanently transferred to anyone, though some liberties are forfeitable upon conviction for serious crimes. No liberal government would enforce a contract in which a person sold himself into permanent servitude, or alienated the freedom to change religions, or legally bound himself to vote only as his employer insisted. An integral feature of a liberal constitution is the protection of the basic rights and liberties necessary to establish and maintain the civil freedom and equal status of citizens.

What rights and liberties do liberals generally find to have this extraordinary status? Liberals now would all agree that among the basic liberties are freedom of thought, expression, and inquiry, freedom of conscience and of association, freedom and security of the person, and free choice of occupation. They also agree that the right to hold personal property is part of freedom of the person, since control over personal belongings and security of one's living space is necessary to individuals' independence and sense of self-respect. Finally, though not seen as a basic right by classical liberals

prior to the 20th century, nearly all liberals now accept a democratic government with universal franchise. All citizens then should enjoy equal political rights and liberties, including the right to vote, hold office, and freely participate in political life.

Where liberals primarily disagree is on the nature and status of economic rights and liberties, including the extent of freedom of contract and rights of private property, especially in land, raw materials, and other productive resources. Classical liberals generally hold that the economic liberties are on a par with basic liberties; if they are not strictly basic, then economic liberties resemble basic liberties in that they can only be restricted for very special reasons.¹ Freedom of contract and rights of property are not absolute for classical liberals; for example, the inalienability of the basic liberties itself puts restrictions on freedom of contract and rights of property. Nor would classical liberals accept or see as legally enforceable individuals' attempts to permanently alienate their rights to equal opportunities to educate themselves and compete for open employment positions, or their rights not to be discriminated against on grounds of race, religion, gender, or other classifications. One of the primary distinctions between classical liberalism and libertarianism (I argue in Part Two) is that libertarians regard freedom of coercively enforceable contracts as of such fundamental importance that it overrides the liberal restriction on the inalienability of basic liberties and also overrides

¹ Following Joseph Schumpeter, I associate classical liberalism with the economic liberalism of the classical economists, beginning with Adam Smith in the 18th century, and David Ricardo, Thomas Malthus, and others (including J.B. Say in France) in the 19th century (with the exclusion of J.S. Mill, for reasons to be discussed). Classical liberalism in the 19th century was associated with the doctrine of laissez-faire, "the theory that the best way of promoting economic development and general welfare is to remove fetters from the private enterprise economy and to leave it alone." Joseph A. Schumpeter, *History of Economic Analysis*, (Oxford University Press, 1954) p. 395. Friedrich Hayek and Milton Friedman were major 20th century classical liberals, along with James Buchanan and the "Virginia School" of public choice theory, Gary Becker and the "Chicago School," Ludwig von Mises of the Austrian School of Economics, David Gauthier among philosophers, and Richard Posner and Richard Epstein among legal scholars. Not all these thinkers strictly endorse each one of the features of liberalism I discuss distinguishing it from libertarianism, but all subscribe to a predominant majority.

equality of opportunity and equal rights to apply and compete for open positions.² For liberals generally a person cannot alienate the basic rights, liberties and opportunities that define one's status as a free person or equal citizen.

While classical liberals regard the economic liberties as having great importance, they are not really regarded as genuine basic liberties. For classical liberals recognize that freedom of economic contract and rights of property differ from basic liberties in that they can be restricted for reasons other than maintaining others' basic liberties and rights to equal opportunities. For example, classical liberals accept that contracts for the purpose of fixing prices or putting restraints on competition and trade should not be enforceable; for in addition to foreclosing economic opportunities for others, such contracts are economically inefficient. Unregulated monopolies in certain resources leading to economic inefficiencies are generally forbidden by classical liberals. Also, classical liberals accept government's powers of eminent domain for legitimate public purposes (on condition that compensation is paid for such "takings"). And most accept zoning restrictions of certain kinds, e.g. noise restrictions or the exclusion of manufacturing and commercial development in residential neighborhoods.

This suggests that, however much economic liberties are revered by classical liberals, they are not really regarded as among basic liberties. For unlike the basic liberties, classical liberals generally allow for restrictions and regulations on economic liberties in order to procure and maintain the conditions necessary for free competitive markets and economic efficiency, as well as maintaining health and safety, and procuring other public goods.³ The most enduring and (I believe) persuasive classical liberal

² By 'libertarianism' I mean primarily the doctrine argued for by Robert Nozick, but also accounts by Jan Narveson, Murray Rothbard, John Hospers, Eric Mack, and others (including perhaps Ayn Rand).

³ Friedrich Hayek, in *The Constitution of Liberty*, (University of Chicago Press, 1960), discusses, among other legitimate government measures restricting economic liberty: prohibitions on contracts in restraint of trade (p. 230), regulation or prohibition of

justification of extensive economic liberties is cast in terms of the conditions required to establish and maintain economically efficient market allocations of resources and distributions of income and wealth. The enforcement of a scheme of extensive private property and other economic rights and liberties within a system of free competitive markets designed to achieve conditions of economic efficiency in both the allocation and distribution of income and wealth is, as I understand it, the most fundamental feature of capitalism. It is also the primary feature of classical liberalism that distinguishes it from what I call the ‘high liberal tradition’ (discussed in §II below).

Marx understood capitalism as both a social and economic system, the predominate feature of which is two distinct and mutually exclusive economic classes with different functions and conflicting interests: The class of capitalists own and control the means of production; and the class of workers own no capital but own and control their labor power. The “petit bourgeoisie,”—shopkeepers, craftsmen, and other small businesspeople that own both their labor power and means of production—Marx found to be of no economic or historical significance. Since small businesses have always occupied a central position within the U.S. economy, and the U.S. is emblematic of contemporary capitalism, Marx’s class-based definition of capitalism was never really adequate to describe capitalism or class conditions in the U.S. While capitalism during certain periods has been marked by class divisions and conflict, this seems incidental to what I will take to be central to a capitalist economy.

Rather than Marx’s class-based definition, I regard capitalism as an economic and social/political system which enforces a legal scheme of extensive private economic rights and liberties within a system of free competitive markets, wherein these economic rights and liberties are specified and markets are designed to achieve conditions of

monopolies (265), regulations governing techniques in production (224-5), safety regulations in building codes (225), and restrictions on land use (229).

maximal productive output and economic efficiency in both the allocation and distribution of income and wealth. Essential to this understanding of capitalism is then: (1) a political system of extensive private property and contract rights, and other legal background conditions, (2) that are specified and adjusted to achieve efficient markets and the resulting maximization of productive output and, therewith, (3) maximal opportunities for consumption among those willing and able to pay for goods and services thereby produced. Finally (4) the capitalist standard for the just or fair distribution of income and wealth is fundamentally tied to efficient market outcomes.

So defined, capitalism is not the only economic system that relies upon markets and private property in means of production. Other alternatives will be discussed later (viz., property-owning democracy). But capitalism is the economic system that is defended by classical liberals, particularly the classical economists and their modern day heirs. Thus it should come as no surprise that capitalism, like the liberalism of the classical economists, has been closely associated with utilitarianism and attuned to utilitarian arguments.⁴

On this understanding, a system of robust private property rights and freedom of contract is not sufficient for capitalism. For capitalism also requires free and efficient markets for the allocation of productive resources and the distribution of income and wealth. Liberals generally, including classical liberals, maintain that when markets break down due to monopolistic concentration of market power, or when markets are incapable of adequately supplying goods or services that are important to individuals' independence and well-being, it is government's role to intervene and address such "negative

⁴ Even Austrian School liberals such as Hayek, who emphasize the informational virtues of free markets (why is this important but for efficiency?) tend towards utilitarianism. See, John Gray, *Hayek on Liberty* (Oxford: Basil Blackwell, 1984) pp. 59-60, on Hayek's indirect utilitarianism. Ludwig von Mises's argument for economic freedom also relies upon efficiency; he rejects natural rights and says economic freedom, including free labor, is important because "It is able to create more wealth for everyone." *Liberalism in the Classical Tradition*, (Liberty Fund) Chapter I, §2.

externalities” or “neighborhood effects” by restoring competition and providing for

“public goods.” Adam Smith says:

The expense of defending the society...of the administration of justice...of maintaining good roads and communications [as well as] institutions for education and religious instruction, [are] no doubt, beneficial to the whole society, and may, therefore, without injustice, be defrayed by the general contribution of the whole society.⁵

Smith’s regard for government’s “administration of justice,” “protecting...every member of society,” “maintaining public institutions,” (Smith, 687-88), and enacting measures that are “beneficial to the whole society” (p. 815) suggests another significant feature of liberalism, namely, the *public nature of political power*. Political power is not conceived of as a private power to be exercised for the benefit of those who exercise or can afford it, or to benefit only members of certain religious, ethnic, or otherwise privileged groups. It is rather a public power that is held in trust by governments, to be impartially exercised, and, as Locke says, “only for the public good.”⁶ The public nature of political power as impartially exercisable only for the public good is integral to the liberal idea of the rule of law, and is another feature of liberalism that distinguishes it from libertarianism. Libertarians we’ll see reject the idea of public good and regard political power as a private power, to be supplied to people pursuant to private contracts in proportion to their willingness and ability to pay.

I suggested that classical liberalism, like capitalism itself, has been closely associated with utilitarianism. Utilitarianism provides a foundation for each of the main features of classical liberalism, including its support for robust property and contract rights conjoined with its emphasis on market efficiency, maximizing wealth, and market

⁵ Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations*, (Liberty Fund) Bk. V, ch.1, pp. 814-15.

⁶ John Locke, *Second Treatise on Government*, ¶3.

distributions.⁷ It should come as no surprise that nearly all the great classical liberal economists, including Adam Smith, David Ricardo, Thomas Malthus, J.S. Mill, F.Y. Edgeworth, and Alfred Marshall, were utilitarians. Its association with utilitarianism also helps in understanding the evolution of laissez-faire capitalism into contemporary “safety net” capitalism. Utilitarians since Hume argue⁸ that a fixed sum of money causes greater utility for a poor person than a rich person. Most utilitarians conclude that governments should guarantee the most disadvantaged, or at least the disabled, resources needed to raise them to the threshold of a minimally decent life. Though contemporary classical liberals contest the extent of the welfare state and its limitations of economic freedoms, still they generally accept that it is the role of government to provide a “safety net” for persons incapable of providing for their own welfare. The disincentive to work that so-called “welfare” creates must be considered, classical liberals insist, but still they generally accept government’s duty to meet subsistence needs for those unable to provide for themselves.⁹

I’ve touched upon central features of liberalism and shown how classical liberalism exhibits each of them. These include equal basic inalienable rights and liberties; freedom of occupation with equal opportunities to compete for open positions; free competitive markets; governments’ duty to respond to market breakdowns and provide public goods; a social minimum that is at least sufficient to meet the subsistence needs of those unable to provide for themselves; and the public fiduciary nature of political power. The libertarianism of Robert Nozick and others rejects each of these

⁷ Some welfarists or “philosophical utilitarians” argue for capitalism and classical liberalism on Hobbesian contractarian grounds; but their argument is still driven by efficiency and individual utility maximization. David Gauthier, *Morals by Agreement*, (Oxford, 1986); James Buchanan and Gordon Tullock, *The Calculus of Consent*.

⁸ David Hume, *An Enquiry Concerning the Principles of Morals*, §3, “On Justice.”

⁹ On classical liberal support for “poor relief” see Hayek, *The Constitution of Liberty*, p. 285-6, and *Law, Legislation, and Liberty*, Vol. II, p. 190, n.8. Adam Smith accepted English Poor Laws, which, he says, date back to the Elizabethan era (1597, 1601). *The Wealth of Nations*, pp. 152-57.

essential features of liberalism; libertarianism's resemblance with classical liberalism is only apparent. What leads many to conflate libertarianism and classical liberalism is that both endorse similar (not the same) expansive conceptions of economic rights and liberties, and therewith market capitalism as the appropriate mechanism for determining the just distribution of income, wealth, and economic powers and responsibilities.¹⁰ It is its conception of property rights and economic liberties that distinguishes classical liberalism from the high liberal tradition and gives rise to their different conceptions of distributive justice. Their conception of property rights and economic liberties also explains classical liberals' more conservative estimate of what is required to guarantee equal opportunities and a social minimum; the more limited extent assigned to government's role in regulating markets; a more restricted range of public goods; and a formal or legalistic conception of equality of opportunity. I discuss these differences within liberalism in the remainder of Part One (§§II-VI), and then in Part Two discuss why libertarianism is not a liberal view.

II. The High Liberal Tradition

Capitalism is essential to classical liberalism. It is not essential to liberalism per se. For a primary feature of capitalism is that the outcomes of free competitive market activity provide the fundamental basis for settling the distribution of income and wealth. Not all liberal conceptions endorse this feature of capitalism.

By the "high liberal tradition" I mean the school of liberal thought that originates in the 19th century with the political and economic writings of J.S. Mill; it includes T.H. Green's and John Dewey's "new liberalism" in the late 19th and early 20th century,¹¹ and

¹⁰ Libertarians differ from classical liberals in not recognizing government's authority to regulate contracts to maintain the fluidity of market, or to restrict property rights for the public good, or to tax people to pay for public goods or poverty relief. See Part II below.

¹¹ See T.H. Green, *Lectures on the Principles of Political Obligation*, (Cambridge University Press, 1986). For Dewey, see Alan Ryan's *John Dewey and the High Tide of Liberalism*.

its major representative in the second half of the 20th century is John Rawls. Important contemporary representatives include Ronald Dworkin, Bruce Ackerman, Thomas Nagel, Joseph Raz, T.M. Scanlon, Jeremy Waldron, Paul Krugman, and Samuel Scheffler, among others. Since Mill and Rawls are seminal as well as familiar figures and exhibit the main features of high liberalism in unambiguous fashion, I will elucidate the position by referring to their works.

Though Mill professes to be a utilitarian and Rawls a contractarian, there are close similarities in their conceptions of liberalism, democracy, and economic justice. Rawls and Mill both affirm a principle of liberty that protects largely the same set of basic liberties, the primary exception being equal political liberties.¹² Mill was an ardent defender of representative democracy and a universal franchise for all citizens—female as well as male. Still, he allowed unequal voting rights, with plural voting rights for those with greater education.¹³ Rawls by contrast contends that essential to a person’s good and sense of self-respect is being recognized by others as an equal person and having the status of equal citizen. All citizens should then enjoy equal rights to vote, hold office, and form and join political parties, and have the “fair value” of their political rights guaranteed. (TJ §82)

While classical liberals rejected a universal franchise until well into the early 20th century, few today would deny citizens formal equality of political rights to vote and hold office. Classical liberals however generally do not accept efforts designed to mitigate

¹² Rawls’s first principle of justice, the principle of equal basic liberties, says: “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.” *A Theory of Justice*, revised edition p. 266. In later work Rawls substituted the phrase “a fully adequate scheme” for “the most extensive total system”. Rawls, *Political Liberalism* (Columbia University Press, 1993) p. 291. The basic liberties that Mill and Rawls jointly recognize include liberty of conscience, freedom of thought and expression, freedom of the person and of occupation (Mill says, “freedom of tastes and pursuits”), and freedom of association. Rawls also includes among basic liberties political rights of participation, and the rights and liberties covered by the rule of law.

¹³ J.S.Mill, *On Representative Government*, ch.VIII, ‘Of the Extension of the Suffrage.’

gross inequalities of political influence and promote political impartiality by neutralizing the effects of wealth on political campaigns and legislative and administrative processes. High liberals by contrast contend that the liberal principle of maintaining the equal status of citizens requires that governments preserve the worth of everyone's political liberties regardless of people's economic position.¹⁴ This is to be achieved primarily by regulation of campaign spending and political contributions, and public financing of campaigns, so that private wealth does not distort or unfairly influence democratic and judicial processes. High liberals regard the dependence of legislators and other political officials upon private contributions for political campaigns as a distortion of elections and democratic deliberation since it tends to undermine impartial judgment and gives to the economically advantaged unfair influence. Classical liberals, including those now predominant on the Supreme Court, generally see restrictions on political contributions and campaign spending as an unjustified restriction on freedom of political expression.¹⁵ Money talks in classical liberal jurisprudence.

Classical and high liberals' disagreements about political equality ultimately stem from their differences regarding the nature and scope of economic rights and liberties. These differences will be the primary focus of sections 3-6 that follow. Again, I will regard Mill and Rawls as the paradigmatic representatives of the high liberal tradition. There are four significant features of Mill's and Rawls's views regarding economic justice that they share in common. I focus on these since they are the primary features that distinguish the classical and high liberal traditions. First, Mill and Rawls, like high liberals generally, deny that economic liberties and property rights in productive resources approximate or are to be treated as on a par with basic rights and liberties.

¹⁴ Rawls, *TJ*, 194-197; see also, Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2009) 128-9.

¹⁵ For example, see *Citizens United v. Federal Elections Committee*, 558 U.S. 50 (2010).

They reject (in Mill's terms) "absolute property" in favor of a more "qualified property" system, with greater regulation of economic contracts than laissez-faire allows.¹⁶

Second, both distinguish between and emphasize the dual functions that markets play in allocating productive forces on the one hand, and distributing income and wealth on the other. They argue that markets play their most crucial role in protecting freedom of occupation and choice of careers and securing the efficient allocation of productive resources; but they do not fundamentally tie the just distribution of income and wealth to markets and the price system. Third, Mill and Rawls, like other high liberals, both endorse a conception of equality of social and economic opportunities that goes well beyond the classical liberal view of legal equality and careers open to talents. Finally, fourth, with respect to control over capital and productive resources and the distribution of income and wealth, both criticize capitalism for its tendency to concentrate wealth and control over means of production in the hands of a relatively small class, and they advocate private property market systems which, unlike capitalism, do not have this tendency.

III. Private Property and Economic Liberties:

Mill says that the economic liberties are not protected by the principle of liberty since trade is a "social act" that is not "self-regarding." Mill's distinction between individuals' "self-regarding" conduct vs. other-regarding conduct with the potential for harm is, standing alone, hard to sustain. Many kinds of speech and association protected by the purportedly self-regarding freedoms of thought, expression, association are "social" and "other-regarding" insofar as their main purpose is to influence political and cultural opinion and conduct (e.g. "political speech," the Catholic Church, the Chamber of Commerce). The real basis for Mill's distinction between the "self-regarding" liberties

¹⁶ J. S. Mill, *Principles of Political Economy*, (Indianapolis: Liberty Fund, 2006), II, i, §3, p. 209. (cited as 'PPE' in text)

protected by his principle of liberty, and the economic liberties that are not, must lie elsewhere. He says the principle of liberty and economic measures are justified by the principle of utility, but ultimately his list of basic liberties and exclusion of economic liberties originates in considerations of “free individuality” and the “permanent interests of persons as “progressive beings.” Mill’s ideal of persons and their fundamental interests will be discussed below in §7.¹⁷

Rawls relies upon similar considerations to argue that the economic liberties are not among the basic liberties protected by his first principle of justice. He says that “the right to hold personal property” is among the basic liberties. But, “the right to own certain kinds of property (e.g. the means of production) and freedom of contract as understood by the doctrine of laissez-faire, are not basic [liberties]; and so they are not protected by the priority of the first principle.”¹⁸ Instead for Rawls the specification, scope, and extent of economic rights and liberties is decided by his second principle of justice, including the difference principle. It says:

Social and economic inequalities are to satisfy two conditions: first, they are to attach to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle).¹⁹

Rawls’s distinction between personal and non-personal property, including means of production, is not an economic distinction, nor does it track the legal distinction between personal and real property. Rather, personal property for Rawls consists of institutional rights and responsibilities regarding possessions that enable persons to effectively exercise their basic liberties (freedom of

¹⁷ Mill says in *Principles of Political Economy*, V, 11, §3, p.940, that in a democratic age, “There never was more necessity for surrounding individual independence of thought, speech and conduct, with the most powerful defenses, in order to maintain that originality or mind and individuality of character, which are the only source of any real progress.”

¹⁸ *A Theory of Justice*, pp. 53, 54.

¹⁹ Rawls, *Justice as Fairness*, (Cambridge MA: Harvard University Press, 2001) pp.42-43.)

conscience, expression, association, etc.), take advantage of fair equal opportunities, and achieve individual independence as they pursue a plan of life freely chosen from the wide range of permissible ways of living. The distinct implication of Rawls's position is that, while exclusive control over one's residence and personal belongings are necessary for individual independence and freedom of the person and of association, laissez-faire rights of ownership of means of production and near-absolute freedom of economic contract are not necessary for these general purposes (however much certain individuals might want to enjoy these rights given their specific life-plans--to be wealthy, for example.) If laissez-faire property and contract rights are to be justified at all on Rawlsian terms, it must be shown that a laissez-faire economic system satisfies the difference principle and is, compared with other alternatives, to the greatest benefit of the least advantaged. That is an empirical question, which Rawls, like Mill, does not think can be decided in laissez-faire's favor.

The bases for Rawls's and Mill's liberalism and accounts of economic justice reside in ideals of persons and their relations. These ideals provide the ultimate explanation for their refusals to include property rights and economic liberties among the basic rights and liberties as libertarians do, or treat them as near equivalents as classical liberals do. This deeper explanation will be discussed in more detail in §VII below. Here I'll discuss the kinds of qualifications to property and economic liberties that Mill and Rawls endorse, and some intermediate reasons they provide.

Mill famously distinguishes between absolute and qualified property.

The laws of property have never yet conformed to the principles on which the justification of private property rests. They have made property of things which never ought to be property and absolute property where only a qualified property ought to exist. They have not held the balance fairly between human beings, but have heaped impediments upon some, to give

advantage to others; they have purposely fostered inequalities, and prevented all from starting fair in the race.²⁰

For Mill, the justification of private property in productive resources lies, in the first instance, in its “expediency” in facilitating production. He condemns absolute property rights in land for their inefficiency. “In the case of land, no exclusive right should be permitted ... which cannot be shown to be productive of positive good.” (*PPE* 231-32) Thus, ownership of land that is cultivated “does not imply an exclusive right to it for purposes of access.” And if land is not intended to be cultivated, “no good reason can be given for its being private property at all.” Anyone permitted to own it “holds it by sufferance of the community.” (*PPE* 232).

No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.” (*PPE* 230)

With respect to bequests, Mill says they are one of the attributes of property (*PPE* 223). Owners, for reasons of “expediency” and to encourage savings, should have the right to bequeath by will “his or her whole property, but not to lavish it enriching some one individual, beyond a certain maximum, which should be fixed sufficiently high to afford the means of comfortable independence.” (*PPE* 225)

I see nothing objectionable in fixing a limit to what anyone may acquire by the mere favour of others, without any exercise of his faculties, and in requiring that if he desires any further accession of fortune, he shall work for it. (*PPE*, 225)

Rawls too would regulate bequests and limit rights of inheritance. Rights to personal property do not include the absolute right to transfer all and everything owned to whomever the owner chooses.²¹ Instead of taxing estates both Rawls and Mill contend

²⁰ Mill, *Principles of Political Economy*, II, i, §3, p. 207

²¹ Rawls explicitly excludes rights of acquisition and bequest from the basic right to hold personal property. *Justice as Fairness*, p. 114. The extent of these rights are settled

for a tax on inheritances, and limiting rights of individuals on the receiving end of gifts and bequests to a specified amount. Inheritance taxes have the socially desirable effects of encouraging owners to spread their wealth around to more people and to charitable and other beneficial institutions, as well as limiting the adverse consequences of large individual accumulations of wealth on the equitable distribution of social and political power.

Both Mill and Rawls reject “natural property” and “natural rights” to property in possessions. They endorse versions of an institutional “bundle of rights” view, and contend that property is a social/legal convention that can be designed in different ways, depending upon the specification of the incidents of property (including the many rights, powers, duties, and liabilities, to possess, use, transfer, and dispose of things, both tangible and intangible). Rawls and Mill both are influenced by Hume’s account of property as a social convention. Hume says that property is not a quality of objects or natural relation of persons to things, but an “internal relation” (or relation of ideas) that exists by “convention.”²² Rawls too regards property as a conventional institution, the incidents of which can be specified and designed in multiple ways. One of the primary tasks for an account of distributive justice is to set forth and justify principles for the specification and regulation of the rights and responsibilities of possession, use, transfer and disposal of the tangible and intangible things we ordinarily call “property.” For Mill this role was ultimately to be served by the principle of utility—for Rawls, by his second principle of justice, primarily the difference principle. On either account—and this is perhaps a central feature of the high liberal tradition—the rights and other incidents of

by the difference principle. On rights of bequest he says: “An estate need not be subject to tax, nor need the total given by bequest be limited. Rather the principle of progressive taxation is applied at the receiver’s end. . . . The aim is to encourage a wide and far more equal dispersion of real property and productive assets.” *Justice as Fairness*, 160-161.

²² David Hume, *Treatise on Human Nature* (Oxford University Press, 1960) p. 527, 491.

property are adjusted to meet the requirements of antecedent principles of justice, as these are applied to different social and historical circumstances.

The conventional specification of property relative to social circumstances is not peculiar to the high liberal tradition. Hume was a (nascent) classical liberal. Similarly, Friedrich Hayek and Milton Friedman both endorse the Humean conventional conception of property. Friedman says:

The notion of property...has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions.²³

Friedman says that, among the essential roles of governments, is “the definition of the meaning of property rights”—by which he means its legislative and judicial specification. Of distributive justice Friedman affirms the classical liberal principle of market distributions, but qualifies it:

The ethical principle that would directly justify the distribution of income in a free market society is “to each according to what he and the instruments he owns produces.” The operation of even this principle implicitly depends on state action. *Property rights are matters of law and social conventions....[Hence] The final distribution of income and wealth under the full operation of this principle may well depend markedly on the rules of property adopted.*” (CF,162, emphasis added)

The implication is that we stand in need of some principle to specify the rules of property that underwrite the classical liberal precept: “To each according to what he and the instruments he owns produces.” Ownership and property rights are but placeholders until this principle is specified and justified.

Like other classical liberals within the Anglo-American tradition since Hume and Adam Smith, for Friedman the ultimate grounds for robust property rights, economic freedoms, and market distributions depend, not on claims of natural property rights

²³ *Capitalism and Freedom*, (Harper Collins, 1964) p. 26 (cited as CF)

regarded as “self-evident propositions,” (CF, p.26), but on considerations of economic efficiency and social utility.

IV. The Allocative vs. Distributive Function of Markets:

A second distinctive feature of high liberalism is made apparent by Mill’s and Rawls’s accounts of the proper role of markets. This clarifies their attitudes towards capitalism and helps to explain why they, and high liberals generally, reject capitalism as understood by classical liberals. Mill distinguishes between laws of economic production and laws of distribution. He contends that laws of production are of universal applicability, whereas distribution is not and is guided by institutional arrangements that differ among societies. The laws of production, Mill says, “partake of the character of physical truths,” whereas “the Distribution of Wealth...is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like.”²⁴

Similarly, Rawls distinguishes between the role of market prices in allocating productive resources and their role in the distribution of income and wealth. “The former [allocative function] is connected with their use to achieve economic efficiency, the latter [distributive function] with their determining the income to be received by individuals in return for what they contribute.” In using the market to allocate productive factors, “prices are indicators for drawing up an efficient schedule of economic activities.”

It does not follow however that there need be private persons who as owners of these assets receive the monetary equivalents of these evaluations.²⁵

The general implication is the same point made by Mill, namely, that a society’s use of markets to determine the distribution of wealth is separate and apart from its use of

²⁴ John Stuart Mill, *Principles of Political Economy*, II, I, §1, p.199. (PPE)

²⁵ Rawls, *A Theory of Justice*, p. 273/241.rev. Rawls indicates that he draws on the work of J.E. Meade for this distinction.

markets to allocate productive resources.²⁶ In general, the efficient allocation of productive resources does not require that the income that results be distributed by market activity. Rights to income may be determined in a variety of ways in an efficient market economy, depending upon a society's specification of property rights in productive resources, labor's legitimate share, others' special needs and disabilities, and the kind and extent of public goods a society provides its members.

Liberals generally endorse free markets and the price system for at least two reasons they hold in common. First, unlike heavily planned economies, a market system is crucial to realizing the basic liberty of persons to freely choose their own careers and place of occupation. Markets are in this way conducive if not essential to realizing both freedom of the person and equality of opportunity to compete for open positions. Planned economies and traditional societies constrained by class customs restrict individuals choices in these matters or give them none at all; a person's occupation and workplace are either assigned by someone in authority or by social class and custom—your profession and path in life is the same as your father's or mother's. The second reason liberals generally endorse markets is that the market allocation of productive resources and of labor are believed to be more likely to result in an efficient allocation of these forces of production than is a non-market system. Markets thereby normally minimize economic waste (assuming proper regulation).²⁷ There are other justifications for markets emphasized by classical liberals which are not endorsed by high liberals (for example, free markets are morally required by the basic liberty of economic contract, or to guarantee political liberty (Friedman)).

²⁶ Rawls's more specific point here is that even a socialist society with public ownership of the means of production can use prices to allocate factors of production. This is what he calls "market socialism" or "liberal socialism."

²⁷ Normally but of course not always, e.g. the recent overbidding and oversupply in the housing market, due in large part to deregulation of finance.

Significantly, both of these arguments—from freedom of occupation/equality of opportunity and allocative efficiency-- appear on the side of production and the allocation of labor and resources for purposes of productive economic activity. In the absence of a particular conception of property, they do not by themselves imply anything in particular about who has rights to the economic product that is the efficient outcome of the activities of freely associated producers and entrepreneurs. Assuming that the three traditional “factors of production”—land, labor, and capital-- all contribute their share to final product, the question is left open as to how, and how much of, the resulting profits, interest, and rent, thereby created are to be distributed among those cooperating to produce it.²⁸ This question is determined largely by a society’s specification of property rights in productive resources and the rights of workers and owners of capital to income on the product created by their respective contributions. Other determining factors include a society’s conceptions of its duties toward the disabled and socially disadvantaged, and how much of its joint social product is to be devoted to public goods.

V. The Argument from the Fairness of Market Distributions

Here many classical liberals and libertarians have argued that economic agents—both workers and those who own and control capital—should each receive the value of the contribution they make to productive output. Drawing on marginal productivity theory, many contend that each participant in a joint economic enterprise contributes his or her share of factors of production (labor, land and raw materials, or capital, both real and liquid) toward final product. According to standard microeconomic theory, we can measure the economic value of each of the inputs to production by determining its marginal contribution to final product. The *marginal product* of each factor that each

²⁸ Mill says of wealth and productive output, “These things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomever they please, and on whatever terms. Further, in the social state...any disposal whatever of those can only take place by the consent of society, or rather of those who dispose of its active force.” *Prins. Political Economy*, II, p. 199-200.

participant owns and controls is then what he contributes towards final output. Since each participant is responsible for what he contributes, then in accordance with the precept of justice, “To each according to his contribution,” economic agents *morally ought* to share in and have a right to the distribution of income and wealth proportionate to the value of their marginal product.

This is a popular argument among classical liberals and libertarians.²⁹ It appeals to notions of fairness in the distribution of the product of economic cooperation: “Just as workers have a natural right to the fruits of their labor, as measured by the wages representing the value of their contribution, so too owners of capital have a right to profits, interest, and rent since these measure the marginal product of *their* contribution.”

What are we to make of this argument from fairness--that economic agents' share should be proportionate to their (marginal) contribution? Assume for the moment that workers' have a right to the value of their contribution. Here we have to set aside the fact that in a market economy what an individual contributes depends on such contingencies as firms' demand for one's skills, which varies with demand for firms' products, as well as how many others offer similar talents and skills, etc. Still, there is a genuine naturalistic sense in which workers can be said to contribute their labor towards productive output, as well as a naturalistic sense in which land, raw materials, and real capital make a contribution. For it is a natural fact, regardless of the form taken by social conventions and institutions, that nothing could be produced in the absence of labor (including knowledge, expertise, and technology) combined with land, natural and manufactured resources, and the instruments of production. Under capitalism and other private property systems, owners of capital and other resources are also causal agents in the production process, due to their ownership and control of means of production. But

²⁹ See Friedman, *CF*, pp. 166-167; Robert Nozick, *ASU*, pp.187-188; see also, 301-302, 304-305. In Nozick's Utopia, “[E]ach person receives his marginal contribution to the world.” (p.302) David Gauthier, *Morals by Agreement*, pp.92-93; see also p.97.

the sense in which owners of factors of production other than labor make a “contribution” to productive output is different from the sort of contribution made by labor, land and real capital. Owners’ contribution is notional compared with the contribution made by the factors of production they own; it is a manner of speaking wholly dependent upon the rights of ownership and control they enjoy by virtue of legal and other conventional arrangements.

To clarify the point, consider a slave economy. While it’s clear that the slaves on a sugar plantation make a substantial contribution towards agricultural product, to say that the *owners* of the slaves also make their “contribution” of labor (“after all, they own it”) is to use that word in a very different sense than when we say “workers contribute their labor.” Owners of slaves or of serfs “contribute” the labor of the persons they own or control in this notional sense. This much seems obvious.

Generalizing, the *same notional sense of “contribution”* is at work when it is said that owners of land, real capital, liquid capital, and other resources “contribute” to economic output. Their involvement may be causally necessary within the social context; production could not under the circumstances take place without their permission to use certain resources they control under conventional norms of property. But this “contribution” is not on a par with the natural contribution made by labor or the tangible (or intangible) resources they employ. The contribution made by the owners of productive resources is not a natural fact of either kind. Unlike workers, owners, regarded purely in their capacity as owners, do not themselves actually produce anything.³⁰ Often they are not even aware of doing anything (e.g., owners of shares of mutual funds). Their purported contribution is effected by virtue of the legal rights and powers that owners of capital resources are recognized as having by other members of

³⁰ Owners often manage and work in their own firms in small businesses; but then they no longer act purely in their capacity as owners but contribute their labor as well.

society. Legal rights and powers are institutional facts made possible by peoples' shared beliefs, collective intentions, general agreement,,and their social activities.³¹ Property exists by virtue of a background of institutional rules that are generally accepted and recognized as authoritative by (most) members of society, and people normally conforming their conduct to and cooperating according to these rules. It is by virtue of the institutional facts of private property that owners of capital are said to make a "contribution" to production.

My claim is not that owners make no contribution at all to productive output. They contribute their property, whether it be in real capital, money, or some other intangible. Property is very important, for some persons or groups have to legally own and control means of production to enable efficient economic activity. But this "contribution" is itself a colloquial way of talking about certain legal transactions and economic activities (borrowing, lending, investing, etc.). This way of talking becomes a self-serving conjuring trick when the inference is drawn that owners, in contributing their property, also contribute the (marginal) product of the capital resources they own, and therefore have a right to its entirety. Talking in this way sustains the widespread illusion that owners/entrepreneurs make contributions on a par with labor. In the end owner's "contributions" are simply a matter of peoples' attitudes and linguistic descriptions formed against a background of property rights and other institutional conventions (money, contract and commercial law, more generally government and the legal system) which themselves, while necessary to productive activity, exist by virtue of collective attitudes and agreements, and conformity to institutional rules.

³¹ On the distinction between brute facts and institutional facts such as private property and money, and the construction of institutional facts out of individuals' beliefs and other attitudes and their collective intentions and activities, see John Searle, *The Construction of Social Reality* (New York: Free Press, 1995), chapters 2-3.

Here economists have said that capitalists make a substantial or natural contribution after all, for they contribute their “abstinence” or “waiting to consume.” Owners of wealth and capital *could* consume what they possess, but instead invest their resources and undertake risks most others are unwilling to take. By undergoing this sacrifice, owners benefit society by capital formation. Had someone not abstained from consumption and saved wealth and resources, there would be no capital for labor to work on or with.

Mill himself relied on this so-called “abstinence theory of interest” when, in response to the socialist claim that labor is the source of all value, he argues that owners of capital have a right to a return on their investment too.³² But, conceding that owners may serve a valuable function and have a right to *some* return on investment, abstinence from consumption does not by itself imply that owners of capital should have complete rights to the monetary value of the *entire* marginal product of the resources they contribute. The mere fact that the capitalist *could* consume his capital instead cannot establish a right to the entire marginal product. After all, a professional thief could consume it too, but this fact surely does not entitle the thief to any return, either for refraining from theft of productive resources, or for abstinence from consuming and investing instead resources already stolen. The reason the capitalist (as opposed to the thief) can be said to contribute his or her “abstinence” is precisely that the capitalist is legally entitled and normally has a *right* to consume what she owns but decides to invest instead. From this it does not follow, without further argument, that the capitalist should have a right to the entire marginal product that is created by the resources contributed.

A similar point applies to the claim that owners of capital assume risks that others do not, and that this assumption of risk is their contribution to productive output. What owners risk are their legal rights to the capital and natural resources they invest in,

³² Mill, *Principles of Political Economy*, II, ii, §1, pp. 215-16.

including the economic value of their initial investment. Normally, except in the case of perishables, productive resources and consumer goods will survive even if a venture fails and owners lose their capital and resources to someone else (through bankruptcy) or have to sell their goods and resources at a loss. It is not so much the real capital or natural resources that are put at risk; rather it is entrepreneurs' legally recognized *property rights* that are put at risk, including their rights to the value of their initial investment. By itself putting their rights at risk does not imply anything in particular about how much of the marginal product owners should be entitled to in return for assuming this risk should their investment be successful. From the fact that they risk losing their rights to their entire investment, it does not follow that they should have a right to the entire value of the marginal product resulting from this contribution. They are due something, but more needs to be said to justify their right to the entirety.

The general point is that the argument from marginal productivity theory of distributions depends upon an ambiguity in using the term "contribution." It is this ambiguity between the de facto and notional sense of "contribution to" (or "worker's vs. owner's responsibility for") final product that is played upon by the argument for market distributions according to the marginal product of each parties' "contribution."³³

None of this is meant to deny that private property in productive resources often serves an important *function*. Economists will argue that without private ownership of productive resources, much of the productive surplus created by labor likely would be consumed were it distributed to workers, and would not then be saved and reinvested. By allowing for private property in productive resources, a society creates the strategic position of *owners*, providing an effective way to shepherd resources and save and reinvest the productive surplus. Allowing private ownership and control of productive

³³ Marx, in effect, remarks on this conflation of different senses of "contribution" in a section on the "Trinity Formula," in *Capital*, Bk. III. See, *Karl Marx: Selected Writings*, ed. David McClellan, (Oxford: Oxford University Press, 1977) p. 500.

resources creates a group of people who are willing to save their surplus income (profits, interest, and rent) and take risks on investments that lead to development of new products and services. If we did not allow people some kind of market return on risks they undertake with their wealth, then they would forego risktaking, and new innovations and other benefits of undertaking market risks would not be realized.

Assuming this argument is sound, it supports some kind of market economy with private ownership of productive resources and some degree of market returns for their use (as opposed to socialism where the public owns the means of production and receives the return on their use). Still the functional argument for private ownership just recited does not justify rewarding owners the *entire* marginal product of the capital they contribute to production. Rather the argument simply establishes the beneficial effects of private over public ownership, and implies nothing in particular about individuals' rights to income, the rate of taxation, or what the returns to ownership should be. Nor does the beneficial function served by private ownership even justify capitalism in the traditional sense argued for by classical liberals, for not all private property market economies are capitalist.³⁴ I conclude then that, whatever role marginal productivity theory plays in micro-economic explanations of the market price of labor and productive resources, that theory cannot be used to justify full market distributions of income and wealth going to the private persons who legally own productive resources. Once we go beyond the natural contribution made by workers' labor and productive resources, the idea of a

³⁴ For example, a property-owning democracy, which Rawls contrasts with welfare-state capitalism, structures institutions to encourage workers' private ownership and control of their industries. See Rawls, *Justice as Fairness*, 135-40. Martin Weitzman advocates replacing the wage-relationship with a system that ties workers' compensation to an index of a firm's performance, such as a share of revenue and profits. *The Share Economy* (Harvard U Press, 1984). John Roemer advocates profit-maximizing firms that distribute profits across society; everyone upon reaching maturity receive an equal or fair share of stock coupons with which to purchase stock, with a right to trade their stock and collect dividends, but no right to sell or transfer their coupons, which are redistributed upon death by government. *A Future for Socialism*, (Harvard U Press, 1994).

particular person's "contribution" towards or "responsibility for" productive output cannot be specified independent of the legal institution of property. Individuals' "contribution to" and "responsibility for" social product are institutionally dependent, indefinable outside an institutional and normally legal context.

There remains then the problem of distributive justice that appeals to marginal productivity theory were supposed to resolve, namely justifying market distributions of income and wealth resulting from productive activity. Assuming that in a market system we can ascertain the economic contributions made by labor and productive resources according to their respective marginal products, this cannot morally justify market distributions to owners according to the marginal product of the factors they own. Since capitalists' contribution is not a natural contribution (in the way that the contribution of workers and productive resources clearly is) but is an institutional artifact, the question is, "why should owners receive the entire income or marginal product of the resources they legally own, in the form of profits, interest and rent?" It begs the question to say "they own it" since the very problem to be addressed is the justice of existing property relations and what the rights of return on ownership should be. The argument for market distributions of marginal product then must depend upon something other than appeals to marginal productivity theory and considerations of fairness. Ultimately, it presupposes some unstated laissez-faire theory of property rights, framed most likely in terms of utilitarianism or natural property rights, which contends that people should be entitled to complete rights to income generated by the use of economic resources they own and control.³⁵ Some such argument must be presupposed by the contention that individuals are due the full marginal product of resources they own.

³⁵ Friedman makes the utilitarian argument for reward according to product, *Capitalism and Freedom*, p. 166. Nozick argues for a natural right of initial appropriation that bestows absolute property rights. *Anarchy, State and Utopia*, pp. 67-182.

Finally, in contrasting owner's notional contribution with the natural contributions of labor, my point is not that workers should have complete rights to their contributions or to "the fruits of their labors." Nor am I arguing the traditional socialist position, that since only labor actually produces anything of value, it should be entitled to the entire product. As mentioned earlier, in a market economy where the price of labor is set by demand, the value of what an individual contributes via his or her labor depends on contingencies totally unrelated to what a laborer actually produces: including factors such as firms' demand for one's skills, which varies with demand for firms' products, as well as how many other workers offer similar talents and skills, etc. These contingencies in turn depend upon whether and to what degree a society educates its members and provides opportunities for them to develop their talents and skills, and other many other social facts. Two workers in different societies can devote the same amount of labor time and effort to producing the same product or service (e.g. a shirt, or computer chip, or kidney transplant), and yet received markedly different wages for their "contributions." It's noteworthy too that, though labor's contribution is natural in a way owners of capital is not, our understanding of workers' product and the fruits of workers' labor are also institutionally dependent. In a socialist economy without competitive markets, such as the former Soviet Union, the idea of the marginal contribution of labor makes little sense. There the concepts of workers' contributions and the fruits of workers' labor are interpreted very differently than in a market economy. Instead of marginal product, measures of labor time and effort expended, and the relative dangers, unpleasantness, and arduousness of labor might be relied on to determine the contribution workers make to productive output.

If this is correct, then it suggests that the question whether individuals should be rewarded according to their contributions to productive output, cannot be settled independent of questions regarding the nature of institutional property relations and of the

economic system that is in place, and the justice of these conventional arrangements. The common sense adage “To each according to his or her contribution,”-- if it has any relevance to distributive justice at all³⁶--is at best a secondary precept whose meaning varies with the background institutional and economic conditions. Its moral relevance and weight presuppose more fundamental principles of economic justice.

VI. Equal Opportunity and Economic Liberty

The traditional argument for equality within the liberal tradition is more an argument for social equality rather than political equality. When de Tocqueville published *Democracy in America* in 1835, the majority of adult American citizens were regarded as “passive” and without the right to vote, including males who did not meet property qualifications, women, and African-Americans. What made the United States democratic in de Tocqueville’s sense was not so much democratic government as it was the absence of aristocracy, inherited class privilege, and legal barriers to positions and occupations. These ideas of “careers open to talents,” and “the natural liberty of exercising what industry they please” (Adam Smith) regardless of birth or lineage or (most) religious affiliations, were affirmed by classical liberals beginning in the 18th century.³⁷ Only much later were these ideas to be extended to race and gender.

One argument for the equal opportunity to compete for open positions lies in the classical liberal economic liberties. Workers should be free to market their services, employers should be allowed to employ whomever they choose, and merchants and other businesses should be free to engage in the exchange of goods and services with whomever they please, without being burdened by the legal enactment of others’

³⁶ My own view is that--whatever relevance the adage might have in determining the appropriate shares of workers, management and owners *within* a firm, in deciding among themselves the wage rate vs. shares going to owners--the traditional adage is of no relevance socially, in determining everyone’s claims of distributive justice.

³⁷ Smith, *Wealth of Nations*, p. 470.

religious, social, or racial biases. Moreover, opening positions purely to talents and skills increases economic efficiency. The classical liberal position of equal opportunity played a major role in democratizing society by breaking down the barriers of inherited class privilege and legal discrimination according to social position, religion, wealth, and eventually race and gender.

Still the classical liberal view of economic liberties did little to directly mitigate broader social (as opposed to legal) discrimination. Owners and employees still had the right in theory and in practice to refuse goods, services, and employment by virtue of their robust property and contract rights. Race discrimination in hotels, restaurants, real estate sales, and many other areas of life was common in the U.S., even in the absence of “Jim Crow laws” in the South and elsewhere which legally mandated it. Segregation and racial discrimination by businesses were legally protected in most of the U.S. until the 1960’s, even when not legally required. Of course, classical liberals do not endorse racial or other forms of discrimination. The vast majority reject it in theory as much as other liberals do. Classical liberals often contend that, because of freedom of contract, these sorts of problems will eventually sort themselves out. A business or entrepreneur that discriminates on grounds not related to economic efficiency is at a disadvantage, since they are imposing higher costs on themselves. Free markets (purportedly) will tend to drive out of business those who discriminate on grounds other than economic efficiency.³⁸

This is one of many examples where, what is true in economic theory of perfectly competitive markets is not true in fact of our social world of the “second best.” Where there is widespread racial or ethnic bias, discrimination on these grounds is a precondition to economic success. Even where enlightened businesses might want to serve despised minorities, their trade would soon suffer due to engrained social customs

³⁸ See Friedman, *Capitalism and Freedom*, pp.109-110.

and prejudices. Until relatively recently in most parts of the South and in many other areas of the U.S. the hotel, restaurant, or business that freely served Blacks would soon serve only Blacks, since Whites would cease doing business there (or worse). Only with the Civil Rights Acts of 1964 in the United States, which banned racial discrimination by employers and “public accommodations,” was this problem of social inequality addressed (to the extent that it could be by law), and did things begin to change. All employers or businesses that do business with the public are now legally prohibited from discriminating among job applicants or customers “on the basis of race, color, religion, sex or national origin.” Economic contracts are no longer regarded as purely private transactions between willing parties, but are now recognized as having social consequences, sometimes serious, for others.

In response to such anti-discrimination measures and former “Fair Employment Practices Legislation” (FEPC) Milton Friedman objected that measures similar to the Civil Rights Acts are serious violations of individuals’ freedom. He says:

Such government intervention reduces freedom and limits voluntary cooperation. . . .FEPC legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state . . .to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws of the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle to FEPC. (CF 113)

The laws are said to be similar in principle since in both cases government exerts its coercive powers in a way that “reduces freedom and limits voluntary cooperation.” The political injustice done to the entrepreneur, restaurateur, or hotel owner who is legally required under the Civil Rights Act to fairly consider black job applicants or to serve Jews and Hispanics is then put on the same plane with the injustice done, not only to businesses and employers, but also blacks and Jews who are legally prohibited from

entering employment positions or frequenting public places or businesses in the Jim Crow South and in Nazi Germany. In both cases, freedom is limited and cooperative relations are no longer voluntary.

There is a conflation here between the reasons that underlie freedom of economic contract with those underlying freedom of association in one's personal life. Freedom of association is among the liberal basic liberties. It is a precondition of freedom of conscience that we be able to personally associate with others of like mind and conscientious convictions, and also a precondition for our realizing such great values as personal relations of love, friendship, and personal intimacy. For Friedman, economic contracts between strangers are to be regarded as if they were on a par with such private relations—both are forms of voluntary cooperation and as such freedom of contract should be given the same degree of protection as freedom of religious associations or of personal or intimate associative relations between friends or spouses. It is as if there would be no moral difference between my being legally required to sell goods to a black person that I offer for sale to the public, and my being legally required to invite black guests over for dinner if I also choose to invite non-blacks.

One important difference between freedom of association and freedom of contract is that contractual relations, unlike associative relations between friends, lovers, and members of private clubs, fraternities, or religious groups, are legally sanctioned and enforceable. We can enter into and break off friendships, intimate relationships, club memberships, religious and other affiliations and it is none of government's business (with some exceptions). Government's lack of enforcement primarily distinguishes freedom of association from freedom of contract. Unlike freely associative relations, there is no right of exit from contractual relations without legal consequences; one either has to pay damages, restitution, or execute one's contractual obligations in cases of specific performance. Freely entered contracts thus have the imprimatur of government

and are specifically designed to invoke the exercise of public political power.³⁹ There is no parallel to this in the case of freedom of association; instead there is a presumption of a right of exit without legal consequences (unless one has made a contract explicitly invoking government's powers, as in civil marriages.) For high liberals, it is in large part the exercise of public political power, to define and enforce legally recognizable contracts, that gives liberal governments the legitimate authority to specify certain terms, conditions, and restrictions that contractual relations must satisfy.

Of course, given liberals' endorsement of free market relations, there has to be good reasons for governments limiting freedom of contract by requiring (as in the case of FEPC and the Civil Rights Act) that merchants do business with certain customers they'd rather avoid. Friedman contends there is not. Continuing the argument above he says that, since both laws coercively restrict voluntary cooperation, "Opponents of [the Hitler Nuremburg] laws who are in favor of FEPC cannot argue that there is anything wrong with them in principle"⁴⁰—thus suggesting that there is no principled basis for limiting voluntary cooperation in one case but not the other. But for high liberals, the basic reasons that the Nuremburg laws are unjust are not that they limit voluntary cooperation. (As Friedman and other Classical liberals recognize, there are often legitimate reasons for limiting voluntary cooperation, e.g. in cases of price fixing, conspiracies in restraint of trade, bribery, obviously criminal conspiracies.) The main reasons Nuremburg, Jim Crow, and other racist laws are fundamentally unjust are multiple: (1) they publicly deny the equal moral and civic status of racial and ethnic groups, and (2) legally restrict their basic freedoms of occupation and choice of careers as well as (3) their rights to equal opportunities to compete and take part in social and economic life. These are the

³⁹ See *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that private restrictive covenants barring Blacks from ownership of real estate are unenforceable since they violate Equal Protection. The Court said it is illegal for governments, and the judiciary, to enforce such covenants since the state then plays an integral role in promoting racial discrimination.

⁴⁰ *Capitalism and Freedom*, p. 113.

selfsame reasons and principles for which high liberals also restrict freedom of economic contract (in the Civil Rights Act and elsewhere) in ways that many Classical liberals will not countenance. Friedman is then mistaken; the principles that expose the obvious injustice of the Nuremburg and Jim Crow Laws are the same principles that justify compelling those who do business with the public to not engage in invidious discrimination in their economic transactions.

A more robust conception of social and civic equality and equality of opportunity are then the primary reasons that High liberals restrict freedom of economic contract in ways that most Classical liberals reject. John Stuart Mill's argument for the equality of women in economic, political, and social life gives early expression to the High Liberal position that civic equality and equality of opportunity is not simply to be regarded as a formal requirement that forbids the legal exclusion of women and other classes of individuals from taking advantage of social, political, and economic opportunities.⁴¹ Equality of opportunity is a social requirement regarded as necessary to secure and maintain the equal social and civic status of all citizens in the public domain.

The public funding of educational opportunities is similarly explained within the High Liberal tradition. Adam Smith saw the benefits of publicly funded education to a nation's efficient productive capacities.⁴² Also, as Friedman says, education involves "neighborhood effects," the costs of which cannot be charged to those who benefit, and which thus should be publicly assumed.⁴³ Thus many classical liberals see general education of all children as among the public goods to be provided by government. Here

⁴¹ See, *The Subjection of Women*, in Mill, *On Liberty and Other Essays*.

⁴² See Smith, *The Wealth of Nations*, Bk V, ch.1, Art.ii, Smith says that the public benefit of compulsory education is that "the inferior ranks" are more disposed to work and be orderly and respectful of themselves, others, and their superiors, and less prone to disorder, superstition, and sedition. (p. 788)

⁴³ "The education of my child contributes to your welfare by promoting a stable and democratic society." Friedman, *Capitalism and Freedom*, p.86.

again, for high liberals, classical liberals' economic justification of equality of opportunity does not pinpoint the real reasons for a right to publicly funded education. As discussed below, there is an ideal of persons and their relations as equals that underpins the high liberal view of the substantive requirements of equality of opportunity.

VII. Distributive Justice: income, wealth, and economic powers:

The idea of distributive justice does not meet with much favor among classical liberals, or especially libertarians, since it suggests to them that someone has the authority to redistribute market income and wealth to meet some pattern or end-state.⁴⁴ I use the term 'distributive justice' more broadly than this, to refer to the standards to be relied upon to assess whether people have just entitlements to the income, wealth, and economic powers that they legally own, control, or exercise. So understood, capitalist market distributions against a background of extensive private property rights is the fundamental standard of distributive justice for classical liberals. This assumes that economic agents have paid their proportionate share in taxes to maintain the institutions of justice and provide for public goods. Thus the Marginal Productivity Theory of Distributions discussed earlier says that the share of income owed to workers and owners is to be determined by the market value of their respective contributions, which are construed as the (marginal) product created by their labor or property. For classical liberals, market distributions are *the* fundamental standard of distributive justice. It may not be the only standard—people acquire rights to gifts and bequests, gambling winnings, abandoned property, and so on—but markets still provide the fundamental determining principle of distribution of the income resulting from productive economic activity itself.

⁴⁴ See Nozick, *Anarchy, State, and Utopia*, pp. 149-50. Hayek condemns the idea of "social justice." His second volume of *Law, Liberty, and Legislation* is entitled '*The Mirage of Social Justice*'.

Advocates of the high liberal tradition generally reject predominantly market driven theories of distributions. While they regard market transfers as an effective instrument for distributing a substantial portion of the distributive shares that members of society are due, they reject (free and efficient) market distribution itself as the standard for economic justice in the distribution of income and wealth. Rawls contends that the fair distribution of income and wealth is to be determined by the “pure procedural” outcome of a “social process” wherein economic institutions and property are designed according to Rawls’s second principle of justice. Markets play an instrumental role in achieving this distribution, but they are not themselves the standard for determining just entitlements. Nor is the market the only procedural mechanism for realizing the fair distribution of income and wealth for high liberals. Rawls, like many others, envisions income supplements as among the instrumental means of distribution of income required by distributive justice. Rawls’s ultimate standard for determining just distributions is the difference principle conjoined with fair equality of opportunity. Distributive shares are fully just when economic institutions work over time to make the class of least advantaged workers in society better off in terms of their share of relevant primary social goods (income, wealth, and economic powers) than they would be in any other economic system that is compatible with the basic liberties and fair equal opportunities.

This is not to say that all high liberals reject capitalism or even the standard of market distributions altogether. Some do not, but rather contend that market distributions, while essential, are not sufficient for establishing just distributions. Thus, welfare state capitalists might affirm market distributions as one among other fundamental principles of economic justice. But they deny the classical liberal position that the economic liberties and property rights are co-equal with the basic personal liberties. For example, Ronald Dworkin’s position, “equality of resources,” justifies a

form of welfare state capitalism.⁴⁵ It says that once the consequences of arbitrary natural and social inequalities and accidents of fortune have been neutralized by social insurance measures, entitlements to income and wealth are determined by our economic choices and how we fare in market activity. Dworkin seeks to equalize starting positions in life and neutralize the effects of “brute luck,” which include differences in natural talents, social position, and misfortunes for which people are not responsible. (Mill expresses a similar luck-equalizing/responsibility-based position regarding remuneration of labor.)⁴⁶ Each person has then a duty to pay his or her fair share in taxes toward maintaining an economic system that meets this and other liberal conditions. But Dworkin does not try to neutralize “investment luck” (a form of “option luck”) or otherwise restrict the inequalities in income that free and efficient market activities and distributions may cause. He believes that, once individuals have paid their share towards public goods, social insurance, and other conditions necessary for maintaining a just political and social system, they should be entitled to their gains through market activity. Dworkin’s example and that of other advocates of welfare state capitalism show that high liberalism does not necessarily imply a rejection of capitalism. What it requires rather is a rejection of laissez-faire property and contract rights, unregulated markets, and unqualified capitalist market distributions, including the reliance on (free and efficient) markets as the fundamental standard for the distribution of income and wealth.

The rejection of markets as the fundamental standard for just distributions of income and wealth is the most obvious respect in which high liberalism differs from the

⁴⁵ Dworkin’s position on economic justice is set forth in *Sovereign Virtue*, especially chapters 1, 2, 7-9; and in *Justice for Hedgehogs* (2011) especially chapter 16.

⁴⁶ Mill says in *Principles of Political Economy*, II, i, 4, p.210:

The proportioning of remuneration to work done, is really just, only in so far as the more or less of work is a matter of choice: when it depends on natural difference of strength or capacity, this principle of remuneration is itself an injustice: it is giving to those who have: assigning most to those who are already favored most by nature.

classical tradition. I want to focus now on a different characteristic of some (though not all) high liberal positions that suggests a more thorough rejection of capitalism as traditionally understood. This feature is implicit in Mill's and Rawls's (also John Dewey's) advocacy of institutions which enable laborers' control of their work environment and at least partial ownership of productive resources. I'll approach this topic by noting a peculiar feature in Rawls's view. Rawls rejects welfare state capitalism in favor of "property-owning democracy," a private property market system with widespread private ownership of means of production. How can he do this consistent with the difference principle? Assuming, as Classical liberals argue, that free market capitalism is capable of producing greater economic output than any alternative economic system, how can Rawls avoid endorsing some form of welfare-state capitalism under the difference principle? For given efficient markets, increasing economic output, more reinvestment, and greater overall income and wealth, it seems that there will always be more income and wealth created to redistribute to the less advantaged in a capitalist economy than in any alternative economic arrangement. Therefore it would seem that the least advantaged should fare better under welfare state capitalism than in any other economic system. How then can Rawls reject the capitalist welfare-state?

The answer to this puzzle must be that Rawls's difference principle is the ultimate standard for distributing not only income and wealth, but also the primary social goods Rawls calls "powers and positions of responsibility." By 'powers' he means legal and other institutional powers of various kinds; these include powers of economic decisionmaking and control over productive resources. What primarily distinguishes property-owning democracy from welfare state capitalism, Rawls says, is that the former involves less inequality in primary social goods—income and wealth, and economic

powers and positions—and greater worker ownership and control over productive resources and over their workplace conditions.⁴⁷

Here again, Rawls's account resembles J.S. Mill's. In *Principles of Political Economy* (3d ed.) Mill discusses 'The Probable Futurity of the Laboring Classes,' (Bk. IV, ch.7). He says that, unlike laissez-faire, his own position is based on "equality," and that the desirable form of production is "association without dependence." The wage-relationship is undesirable since it makes workers "servants," dependent on owners for their subsistence and well-being. Moreover it puts workers and owners in conflict and has a demoralizing effect on the working classes. Mill optimistically predicts that eventually "the relations of masters and workpeople will be gradually superceded by partnership in one of two forms: in some cases, association of the labourers with the capitalists; in others, and perhaps finally in all, association of labourers among themselves."⁴⁸ Mill goes on to discuss these two arrangements. first the share arrangement between owners and laborers where profits are divided among them; and second, "the association of the laborers themselves on terms of equality." (PPE, 775) Either arrangement would give workers an interest in production and the success of the firm, and work to cure workers' indifference and their hostility and conflict with owners. Mill's prefers the second arrangement, involving ownership and control of firms by workers where accumulations of capital "become in the end the joint property of all who participate in their productive employment. [This] would be the nearest approach to social justice and the most beneficial ordering of industrial affairs for the universal good." (PPE, 793-94)

These "Associations" or "Co-Operations" of workers presuppose a framework of competitive markets for labor and productive resources. To be successful, Mill says, they must allow for incentives within the firm as well as worker-approved individual

⁴⁷ Rawls, *Justice as Fairness*, pp. 135-40, 158-62, 176-78.

⁴⁸ *Principles of Political Economy*, IV, vii, §4, p.769.

managers rather than collective management by workers themselves. Thus unlike Marx and other socialists, Mill affirmed a need for markets and competition among firms; he opposed a central and planned economy with public ownership; he endorsed some degree of inequality of income and wealth as necessary for incentives; and he opposed organized revolutionary activity by the working classes. But Mill still regarded it as essential to individual independence and the free development of “individuality” that employees not be subservient to their employers; that the wage relationship and the division between workers and capitalists be moderated if not dissolved; and that workers be given economic powers and ownership interests in the product of their labors.⁴⁹

Rawls refers to Mill’s “Associations of workers” as one among several possible economic arrangements within property-owning democracy.⁵⁰ Rawls shares with Mill a rejection of capitalism and the endorsement of a private-proprieted competitive market system where ownership and control of productive resources and wealth is widely distributed among workers and citizens generally. What is revealing about Rawls’s claim that distributive justice requires a property-owning democracy rather than a capitalist welfare-state is that it shows that his primary concern with distributive justice is not simply, or even primarily, the distribution of income and wealth—if that were all, then the capitalist welfare state probably might do a better job promoting the position of the less advantaged. Equally if not more important for Rawls is that workers be able to own a share of productive wealth and have some control over their own productive activities.

What men want is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions. To achieve this state of things, great wealth is not necessary.”⁵¹

⁴⁹ John Dewey also advocated arrangements that democratize work without socializing means of production. ‘The Ethics of Democracy,’ in *John Dewey, The Early Works*, vol. I, (SIU, 1969). On Dewey’s “guild socialism,” see Alan Ryan, *John Dewey and the High Tide of American Liberalism*, 111ff, 309-327.

⁵⁰ Rawls, *Justice as Fairness*, 176, 178.

⁵¹ Rawls, *A Theory of Justice*, rev. ed. P. 257.

Having a share of economic powers while engaging in “meaningful work” is for Rawls essential to fostering “perhaps the most important primary [social] good,” the self-respect of free and equal democratic citizens.⁵² This raises the important question, with which I’ll conclude Part One, of the competing conceptions of persons behind the Classical and High Liberal traditions.

VIII. The Bases of the Classical and High Liberal Traditions

I have discussed the main differences between the Classical and High Liberal traditions. While both endorse personal liberties as important, classical liberals also give priority to expansive if not unqualified rights of private property in productive resources and other economic liberties, regarding them as of nearly equal significance with basic liberties. Consequently, the just distribution of income, wealth, and economic powers is largely to be determined by property rights and the exercise of economic liberties within a framework of free and efficient markets. Property rights and economic liberties largely fix the scope of classical liberal equality of opportunity too; it is conceived formally, as careers legally open to talents with no legal discrimination against disfavored groups. Finally workers’ private ownership and control of their means of production is seen as hopelessly inefficient. Moreover, the measures needed for a property-owning democracy would require the curtailing of many economic liberties and powers that classical liberals regard as fundamental.

What accounts for these differences between classical and high liberals regarding economic justice? Historically, utilitarianism has provided the main philosophical justification for classical liberalism. Many philosophers see themselves as classical liberals and nonetheless reject utilitarianism or welfarism generally in favor of a more

⁵² See *TJ*, pp. 386-88 on the primary social good of self respect, pp. 477-78 on self respect and equal citizenship, and *Justice as Fairness*, p. 114, on property rights, personal independence, and self-respect.

Lockean or Kantian natural law position. These views sometimes are hard to distinguish from libertarianism, and when they are, I would contend that they are not classical liberal views. But nothing rides on the honorific title ‘classical liberalism,’ or ‘liberalism’ Either. What is important are the central features of positions calling themselves ‘liberal’ and the justifications provide for them.

I’ll conclude then with some remarks on what I see as the primary kind of argument that underwrites the high liberal tradition and the main features distinguishing it from classical liberalism. I’ll rely again on Mill and Rawls. Both invoke an ideal of persons and their essential good to support conceptions of the distinctive features of liberalism. For Mill this is a kind perfectionist ideal which he calls “individuality.” “The free development of individuality is one of the leading essentials of well-being.”⁵³ A person achieves individuality when he or she freely forms and lives according to a life-plan consisting of activities involving the free exercise and full development of the “higher faculties” of reason, understanding, creative imagination, feeling and emotions, and moral sentiments. Individuality, Mill says, includes both self-development of one’s “higher faculties” and self-government according to “the rigid rules of justice.” (OL 70, ch.3, ¶9) Though Mill says that his Principle of Liberty is grounded, not in natural right, but in utility, he famously qualifies this claim, saying that “it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.” (OL 15, ch.1, ¶11) Individuality is primary among these “permanent interests” and a large part of Mill’s conception of utility.

It is helpful to understand, Mill’s principle of liberty and more generally his account of political and economic justice and the rights of property as grounded in this perfectionist ideal of individuality. As the basic liberties protected by Mill’s principle of liberty are essential conditions of realizing individuality, so too this ideal of a person’s

⁵³ *On Liberty*, p. 63 (ch.3, ¶2)

“permanent interests” justifies for Mill representative democracy, the social equality of women, and the “socialist” revisions to capitalism (as Mill calls them) that he sees as a necessary corrective to laissez-faire if a market economy it is to prove superior to communism. Laissez-faire tends to undermine the possibility that many people will be in a position to freely exercise and develop their “higher faculties.” . Under laissez faire, “the great social evil exists of a non-labouring class” that subsists off the labor of others. (PPE 758) “The rich regard the poor as, by a kind of natural law, their servants and dependents,” and the working classes are without “just pride,” or a sense of self-respect; they “return as little in the shape of service as possible.” (PPE 767). The well-being of the laboring classes is principally dependent on their own mental cultivation and their taking care of their own destiny. (PPE 763) This can only occur under working conditions of “association without dependence.”

Rawls is explicit that an ideal of persons and their essential good grounds his principle of equal basic liberties and provides the standards for specifying which liberties are basic and have priority over other social values. The ideal of “free and equal moral persons” who have fundamental interests in the realization of their “moral powers” of practical reasoning and social cooperation combines with an ideal of a “well-ordered society” that is grounded in relations of reciprocity and mutual respect which are acceptable to all its citizens. These ideals of persons and society also underwrite Rawls’s second principle of justice, including the difference principle. As in Mill, for Rawls too, classical liberal property rights and the enforcement of the traditional doctrine of laissez-faire are not conditions of free and equal persons’ adequate development and full exercise of their moral powers and their achieving their rational autonomy, “and so are not an essential social basis of self-respect.” (JF 114) Nor are they generally acceptable terms of social cooperation among free and equal persons who desire to cooperate on grounds

of reciprocity and mutual respect. Instead laissez-faire undermines the likelihood that many citizens will ever achieve these essential goods.

It is helpful to see the liberties and procedures historically associated with liberalism and with constitutional democracy as intertwined with an ideal of persons and of society. The freedom and equality of persons are fundamental liberal values. Liberals have different interpretations of these values, and these are embedded in different ideals of persons and their social relations. Rawls's conception of "moral persons," their "fundamental interests," and a "well-ordered society," and Mill's ideal of persons' "permanent interests" in the free development of their individuality, provide the grounds for their high liberal conceptions of fundamental liberties and social and economic justice. Some conception of persons and their social relations are implicitly relied upon by classical liberals too, to bolster their arguments for capitalism and market distributions. Many historical and contemporary classical liberals (David Gauthier, Richard Posner, et. al.) see us as rational utility-maximizers who are willing to make trade-offs between all our desires and interests in pursuit of maximum individual utility. Libertarians generally reject such welfarism and advocate laissez-faire capitalist freedoms and absolute property rights on different grounds. In Part Two I contend that Libertarians regard persons as self-owners with absolute rights in their persons as well as their possessions, and society as a free association of self-owners whose social and political relations are entirely specified by private bilateral contracts. What capacities and features of persons justify our seeing ourselves and our social relations in this way?

Further progress in debates about liberalism and economic justice—including the importance of capitalism, extensive private property rights, and the essential role of markets and governments in establishing economic justice—largely depends upon awareness of the conflicting ideals of persons and their social relations that liberals

implicitly rely upon. At issue in these debates is not simply the nature of our economic and social relations, but ultimately the kinds of persons that we are and can come to be.

PART TWO: WHY LIBERTARIANISM IS NOT A FORM OF LIBERALISM

I. Libertarianism's Formative Principles

Libertarianism is commonly referred to as a liberal view. This is understandable. After all, libertarians endorse individual rights and liberties and the liberal idea that people ought to be free to determine their lives as they see fit, so long as they do not violate others' rights. But a great deal depends on how rights are specified within this liberal formula. My argument will be that libertarians define individual rights so as to take the view outside the boundaries liberalism. For it is not as if libertarians simply accept all the basic rights liberals do, then go liberals one better by adding additional liberties, namely, freedom of contract, and freedom to do with one's possessions as one pleases. Liberals already recognize that these rights, suitably construed, are important to exercise other basic liberties. But given the absolute terms in which libertarians define these additional liberties, they come to occupy a predominant position, and in effect eliminate any need (in libertarian's minds) for basic rights and for liberal institutions.⁵⁴

What are libertarianism's basic formative principles? Libertarians often depict their view as based in a moral injunction against coercion, or aggression, or against forcing people to do what they do not choose to do. Nozick, for example, emphasizes the "libertarian side constraint that prohibits aggression against another," and Murray

⁵⁴ There is much disagreement among libertarianism's major advocates. Nozick argues, contrary to anarchical libertarianism, that a minimal state's monopoly on political power is legitimate and necessary to protect rights and entitlements. There are also disagreements over the foundations of libertarianism (Nozick's Kantian and Lockean foundations va. Narveson's Hobbism). I pass over these disputes. My concern is with the basic principles and institutions held in common by libertarians distinguishing them from liberalism. Of course some political philosophers combine elements from each view and cannot be neatly categorized as liberal or libertarian.

Rothbard says his anarchism "abolish[es] the regularized institution of aggressive coercion."⁵⁵ But libertarians do not condemn all coercion or aggression. Libertarians clearly endorse the coercive enforcement of personal and property rights and contractual agreements. It is the need for coercive enforcement that provides the grounds for libertarian protection associations and the minimal state. Also it is misleading to suggest that the coercion required to enforce the rules of a libertarian society will be less than in other systems. Whether libertarianism requires less (or more) coercion depends upon its popular support and the degree to which members of a libertarian society see its principles as legitimate and accept the many restrictions they entail.

Libertarians may reply that the enforcement of a person's rights is not coercive interference with others' lives. "Coercion" on their account is not just any use of force, but the aggressive interference with another's rights. People are not coerced when prevented from actions (such as trespass or theft) they have no right to perform. This moralized definition of "coercion" does not accord with common usage; it implies that any justified use of force to enforce peoples' rights is non-coercive. Legitimate incarceration would not then be coercive according, nor the use of force to subdue and arrest a guilty suspect or to evict an interloper. The moralized definition of 'coercion' is simply stipulated; as such it does not advance libertarian' argument. Moreover, nothing of real consequence follows from libertarian declarations against coercion and aggression. Any political conception prohibits the *unjustified* use of force against others, and this is what the libertarian constraint against aggression and coercion really amounts to: It is a prohibition against infringement of peoples' moral rights and entitlements. If so, then arguments regarding the content of these rights and entitlements must carry the burden of justification in libertarian argument, not hollow claims about the prohibition of

⁵⁵. Nozick, *Anarchy, State, and Utopia*, (ASU) 33-35; Murray Rothbard, "Society Without a State," in *The Libertarian Reader*, Tibor Machan, ed., p.54.

coercion and aggression.

Nor is the fundamental libertarian principle an injunction that people should be subject only to duties and constraints they have chosen or consented to. The non-consensual constraints on conduct recognized by libertarians are quite extensive. Our duties to respect the lives and the physical integrity of others' persons, and their freedom of action and extensive property claims, our obligations to keep our contracts, avoid fraud, and make reparations for harms we cause, are not based in free choice, consent or any kind of agreement (actual or hypothetical). These are natural rights and duties, libertarians claim, which people have independent of social interaction. In spite of their emphasis on consent, voluntariness, and contract, libertarians are averse to appeals to consent or social agreement to justify their preferred list of moral rights and duties. Freedom of contract plays a central role in defining the particular rights and obligations people have *within* a libertarian society and accounts for the origin of Nozick's minimal state. But the idea of a *social* contract where reasonable persons equally situated agree to property rights and the duties and burdens these impose upon others has no role in justifying the absolute scope libertarians assign to property. The same is true of the justification of all libertarian moral rights and duties.

What of libertarian declarations that "people *interfere* with each other's liberty as little as possible." (Narveson, p.32) This cannot mean that libertarians minimize the number of interfering *actions*. It is easy to imagine a libertarian society without popular support where the majority of people do not accept (because they cannot afford to) its absolute property rules, are prone to forage for their subsistence, and meet with constant interference because of legal trespass or theft. The point of libertarian arguments for minimizing interference is to keep to a minimum, not interfering actions, but the kinds of political duties we have, especially enforceable obligations to transfer market-acquired holdings to benefit others. We are still in need of a deeper principle that justifies absolute

property and absolute rights to control and dispose of income and wealth regardless of the resulting restrictions this places on others' freedom, opportunities, and independence.

Can it be found in some notion of liberty or freedom? Libertarians commonly announce their view with such claims as: "the only relevant consideration in political matters is individual liberty." (Narveson, p.7); or "Libertarians agree that liberty should be prized above all other political values" (Machan, LR p.vii); or "the idea of libertarianism is to maximize individual freedom." (Narveson, p.175) Nozick too contends that "Liberty upsets patterns" of distribution (ASU, p. 160), and argues that patterned theories of distributive justice violate a commitment to individual freedom.⁵⁶

These announcements account for much of libertarianism's popularity; for few would deny the political importance of individual freedom. But libertarianism does not endorse freedom to any greater degree than liberalism does. Indeed, libertarianism assigns far less importance than liberals to freedom as individual independence and autonomy, the degree to which people are self-sufficient and can control their options and important aspects of their lives. Libertarians have a different conception than liberals of the kinds of liberties that are important, and of the kinds of constraints to be placed on people's conduct to protect others' liberties. It is a fundamental libertarian precept that people ought to have nearly unrestricted liberty to accumulate, control, and transfer rights in things (property), whatever the consequences or constraints may be for other people. To refine Nozick's claim --"Liberty upsets patterns"-- it is not liberty per se or any basic liberty that liberals recognize that upsets patterns of distribution. Rather, what upsets patterns is the unrestricted liberty to accumulate and to transfer to whomever one pleases absolute property rights. But why should these liberties be important, not to mention fundamental? We still need an argument for libertarian property and absolute transfer

⁵⁶. See Nozick, ASU, pp. 160-164, including Nozick's Wilt Chamberlain example and claim that income tax "is on a par with forced labor."

rights. Some more basic principle must underlie the right to these absolute liberties.

I have suggested that the concepts libertarians normally appeal to—liberty, consent, non-coercion, non-aggression, non-interference, autonomy, individual independence—gain their force and content by reference to a deeper principle. What is this principle? Libertarianism is grounded in a certain conception of people's individual rights, and in particular their property rights—the rights and powers that individuals may exercise in the possession, use, transfer, and disposal of things. The centrality of the concept of property is evident in Rothbard's and Narveson's views. Both conflate all specific liberties into a general right to liberty. Then they argue that the right to liberty, along with all other rights, are property rights, bolstered by an ultimate right, property in oneself. Narveson says:

“Liberty is Property...the libertarian thesis is really the thesis that *a right to our persons as our property is the sole fundamental right there is.*”⁵⁷

Likewise Rothbard writes:

“[I]n the profoundest sense there are no rights but property rights...each individual, as a natural fact, is the owner of himself, the ruler of his own person. Then, “human” rights of the person...are, in effect, each man's *property right* in his own being, and from *this* property right stems his right to the material goods that he has produced.”⁵⁸

Likewise, John Hospers defines libertarianism as "the doctrine that each person is the owner of his own life..."⁵⁹ Finally, Nozick invokes what he calls the "classical liberal notion of self-ownership." The problem with all non-libertarian principles of distributive justice, Nozick says, is that they involve "(partial) property rights in other people." (ASU, 172; cf. 281-83) Democracy violates self-ownership, for it is nothing but "ownership of

⁵⁷. Jan Narveson, *The Libertarian Idea*, p.66. See also, p.175: "the idea of libertarianism is to maximize individual freedom by accounting each person's *person as that person's own property.*"

⁵⁸. Murray Rothbard, *Power and Market*, p.238.

⁵⁹ Hospers, 'What Libertarianism Is,' in *The Libertarian Alternative*.

the people, by the people, for the people," (p. 290).

It is claims like these that confirm the suspicion that libertarianism is not so much about liberty as about property. Libertarianism's regulative principle is that individuals ought to have absolute rights to accumulate, use, control, and transfer rights in things. To ground these controversial institutions, libertarians extend the concept of property, via the notion of self-ownership, to each individual's own person and powers. The fundamental libertarian claim is then that each person is absolute owner of herself, her body and powers.⁶⁰ Because we each have absolute property in our persons, it is said to follow that each has absolute powers over what she owns or acquires consistent with others' ownership rights. Though rarely argued for, the basic assumption here seems is that, because persons have absolute ownership rights in themselves, they should acquire absolute property in unowned resources they appropriate, in the products of their labor made from them, and in whatever is exchanged for these products.⁶¹ Also, a person's liberties are among the things a person owns; in this sense "liberty is property."

Libertarians appear to take "property" to be an intuitively clear idea involving the nearly unrestricted freedom to control and determine what is done with a thing. But as a legal and moral category, property is more complicated. Property presupposes an elaborate system of institutional rules, which specify the kinds of rights, powers, duties and liabilities persons have with respect to the use, control, transfer, and disposal of things. Systems of property differ depending on how these rules are defined. Actions permitted within one property system (such as full rights to sell or bequeath one's estate) might be prohibited under others. Conceptually there are an indefinite number of property systems (though only some of these may be feasible, and far fewer are just.)

⁶⁰. On this, see G. A. Cohen, "Self-Ownership, World-Ownership, and Equality," and other papers in his *Self-Ownership, Freedom, and Equality* (Cambridge U Press, 1995).

⁶¹ See Rothbard, *Power and Markets*, p. 1f. This is a series of non-sequiturs.

The concepts of ownership and property rights are definable by reference to this institutional background; these are formal and secondary notions, given content relative to one or another system of property rules. To say a person (legally) owns something is to say that this person has certain key rights of use and powers of control within a property system; the family of rights and powers constituting "ownership" may differ from one conventionally established property system to another. By extension, moral claims regarding the right to property or rights of ownership commit one to specific claims about the kinds of rights, powers, duties and liabilities people ought to have within a just property system.

Earlier I claimed that a person's "product," "contribution," or "the fruits of one's labor" cannot be established independent of institutional contexts. Libertarians deny this along with the institutional conception of property behind it. They claim that ownership of one's person and powers implies ownership of the complete product of one's labors and ownership of the complete product of one's property. Fundamental to these arguments are ideas of non-cooperative natural property and pre-social ownership. Libertarians assume the lucidity of these concepts and take it as self-evident that property involves unrestricted rights to use and dispose of things. Absolute property in one's possessions parallels the libertarian idea of self-ownership, or absolute property in one's person.

Locke also said we have "property in our person." His point was that, since all are born free and equal, no one is born subject to another and each person has a natural right of self-rule. There is no suggestion of a freedom to dispose of ourselves and our possessions as we please. Once it is understood what libertarians mean by 'self ownership,' the idea quickly loses whatever intuitive attraction it has for most people. For what libertarian self-ownership entails is something Locke and all subsequent liberals deny: that a person has the moral capacity to make of himself a fungible thing.

II. Why Libertarianism is Not a Liberal View

(A) The Full Alienability of Basic Rights: I said earlier that the most essential liberal institution is the guarantee of the basic rights and liberties necessary to secure individual freedom and independence. Libertarians would have us believe that they accept all the basic rights liberals do and simply add more liberties, namely, absolute freedom of contract and of property. Libertarians then claim their view offers us even greater liberty, as if it they were just improving upon liberalism, drawing its natural conclusion. The problem is these added liberties, when combined with the libertarian account of self-ownership, undermine the idea of basic liberties. For what libertarian self-ownership ultimately means is that we stand towards our person, its capacities, and the rights of moral personality, in the same normative relationship as we stand to our rights in things. All rights are conceived as property rights. Rights to liberties of the person then become just one among several kinds of rights that persons own and have at their disposal. Basic liberties are of no greater moral or political significance than any other kind of property right. But given the crucial role of absolute freedom of contract--that all contractual agreements are to be publicly recognized and enforced--it follows that all liberties can be alienated, just like any economic good.

Consequently there is no place in libertarianism for the fundamental liberal idea of *inalienability*: that certain rights are so essential to maintaining the dignity and independence of persons they cannot be given up by consent. Nozick says, "My nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it." (*ASU*, p.58) Read within the context of a libertarian acceptance of complete freedom of contract, permitting another to do "anything" to oneself implies the capacity to give another the right to invoke the coercive powers of the state (or anyone else) to force you to comply with your prior agreements, no matter what you have agreed to or

how much you presently object to it. Not surprisingly then Nozick later says a free system allows a person to sell himself into slavery. (*ASU*, p.331; see also p.283)

Assuming the transaction is freely entered into, it is the role of the minimal state to enforce it against the unfortunate person who once consented to enslavement, but who now, quite understandably, has had a change of mind. It should follow that there is nothing morally objectionable about owning slaves and treating people as objects against their will; moreover, it is not unjust for the State, or any third party, to compel people to abide by their slavery or other servitude contracts.

It is a mistake to conceive of servitude agreements as simply private matters between consenting adults protected by freedom of association. If genuine freedom of association were involved, then either party unilaterally could terminate the relationship freely. But here we have something very different: contractual transfers of rights in oneself, the result of which negate a person's freedom of association as well as other basic rights and liberties. As argued earlier, contracts by their nature are no longer simply private relationships that leave others' rights and duties unaffected; they are publicly enforceable agreements altering nonparties' rights and obligations. Contracts impose upon others duties to recognize and respect contractual terms, and upon governments duties of coercive enforceability. These facts should not be obscured by the common locution of "private contracts."

Libertarians describe a right to the complete alienability of rights as if it were a matter of showing respect for people's freedom and voluntary choices. A better description of a social system that enforces complete or even partial dominion over human beings is that it is a perverse property system. For it is not as if libertarians put a premium upon *maintaining* individuals' freedom of action, much less so their independence or their capacities to exercise their rights and control significant aspects of their lives. Instead what is fundamentally important for libertarians is maintaining a

system of historically generated property rights whatever the consequences for individuals' freedom, independence, interests, or even the integrity of their persons. Libertarianism is, in the end, not so much about liberty as it is about protecting and enforcing absolute property and contract rights. The liberties that libertarians provide are defined by reference to absolute property in persons and in things, and who has these rights in the end is not morally important, so long as their holdings come about by observing libertarian transfer procedures and side-constraints.

Libertarians will insist that the distribution of property rights in persons and things still must be generated by rights-owners' free consent. But this does not show that libertarians value each person's freedom and independence. Instead free consent is a feature of a procedure for distributing rights without any check on the distributions this procedure generates. For libertarians each person starts with ownership of his or her person and any possessions acquired by transfer. These property rights are all put on a par, and each person is at complete liberty to transfer whatever rights she has. So far as any right is given priority, it is absolute liberty of contract and transfer, which determines the procedural mechanism for distributing rights and powers. But no attention is given to maintaining an individual's basic rights, liberties, and powers that (according to liberals) are needed to institutionally define a person's freedom, independence, and status as an equal citizen. So, we arrive at the peculiar possibility: the world and all within it can be someone's (or more likely some class's) property, with all but one (group or person) devoid of freedom and independence, and yet all is right and just since libertarian procedures and side-constraints have been satisfied.

However unlikely, the example indicates libertarians' lack of concern with preserving basic rights and liberties, or individual self-governance and independence. This marks an essential difference with liberalism. No liberal regime would enforce or permit enforcement of an agreement against a person who has tried to alienate one or

more of her constitutionally protected basic rights. For these are the rights that define a person's status as a free agent, capable of rationally deciding her good and taking responsibility for her actions. Liberalism affirms this ideal of free agency, and seeks to secure it via the institutional recognition of basic rights and liberties that protect the integrity and freedom of the person. For rights to be basic means they are not susceptible to being overridden by *anyone's* desires or choices. Being fundamental, basic rights are secured against the State and the wants of others. Being inalienable, they are secured against the wants of persons who would dispossess themselves of their basic rights and abandon their freedom and independence.

Libertarians will object that liberals still show "less respect" for liberty, since they refuse to recognize all of a person's free decisions. But no view says all a person's free decisions are to be respected; libertarians, like everyone else, require that free decisions not violate others' rights. The issue between liberalism and libertarianism then becomes whether all permissible liberties are on a par and are equally important, or whether some liberties are more significant than others. Libertarians assign absolute priority to freedom of contract and rights of property. Liberals give priority to an entirely different set of basic rights and liberties: those crucial to maintaining a person's status as a free, responsible and independent agent. Given the priority of these rights and liberties, liberals do not recognize decisions to contract away all one's rights or respect the liberty to do so. If this is all libertarians mean when they say liberals give "less respect to liberty" it simply reasserts the main point: liberals deny complete alienability. Liberals can reply that recognition of rights to alienate freedom is not to respect freedom but to debase it; it makes freedom a fungible thing, tradable for something with a qualitatively different and lesser moral value.

(B) Absolute Property and Equal Opportunity: Consider next libertarian attitudes towards liberal institutions that guarantee equal opportunity. We saw in Part One that the

traditional laissez-faire position is one of legal equality and formal equality of opportunity—the requirement that governments shall not make or enforce racially or religiously discriminatory laws, etc. But, as Friedman argued, it is not government’s business to forbid racial, religious, or gender discrimination in the private interactions and cooperative relationships of persons. This includes economic contracts of all kinds, including employment and economic exchange. Just as religious groups have a right to prohibit the uninitiated from attending their religious services, restaurant and hotel owners should be able to exclude racial and religious groups. Thus classical liberals like Friedman initially were opposed to the Civil Rights Acts and other measures forbidding racial, religious, and gender discrimination in public accommodations, hiring, etc.,

Many contemporary classical liberals have adjusted, and now accept government restrictions on discrimination by employers and businesses. A classical liberal argument can be made for this adjustment, in terms of economic efficiency and perhaps other political values classical liberals endorse. Libertarianism by contrast have no principles that would allow for legal prohibition of invidious discrimination.⁶² This is a consequence of the strict priority they assign to absolute property and contract rights. The libertarian conception of property says that people may transfer their holdings to whomever they please, and may contract with and allow their property to be used only by others they choose. Other than prohibitions against fraud and duress, no legal restrictions can be placed on contractual agreements. Moreover, libertarians go further than Friedman-like classical liberals, for there is ultimately nothing in libertarian doctrine that institutionalizes or accommodates the classical liberal principle of "careers open to talents," or formal equality of opportunity. As discussed below, there is no public political power recognized by libertarians with the legitimate authority of legislation, to

⁶² Narveson says: “But if a business is really private, that means it is the property of its owners. They can do as they wish with it.” *The Libertarian Idea*, p. 315.

make and revise laws, and therewith enact the kinds of public policies and programs favored by classical liberals. Libertarians may say that, being without legislative authority, the minimal state is in no position to deny disfavored racial and ethnic groups their equal rights to libertarian opportunities. But the minimal state is hardly in a position to protect, guarantee, or much less provide rights to equal opportunities either. Whatever opportunities people have depend entirely upon others' willingness to interact and enter into contractual relations with them. Not only is there no public authority to prevent widespread private discrimination in education, hiring, public accommodations, and all other contractual relations. In the absence of public goods and positions--such as publicly funded education, a civil service, or government contracts for services--there is no formal equality of opportunity to apply and compete for open positions of the kind that classical liberals endorse either. Accordingly, libertarians, such as Nozick, reject any liberal interpretation of equality of opportunity. There is, he says, no general right to equality of opportunity or "to be in a certain material condition," only "particular rights to reach agreements with others, *if* you and they together can acquire the means to reach an agreement." (ASU 238)

(C) Markets and Monopolies: Under competitive conditions, markets normally result in efficient allocations of productive resources and increased output of goods to meet (effective) demand. But if market activities are left unregulated, freely associating individuals can just as well enter agreements designed to restrict others' options, frustrating instead of promoting productive output and consumer demand. The right of unrestricted freedom of contract so central to libertarianism implies that markets are to be wholly self-regulating; government has no role to play in securing market fluidity. This is not because of the naïve faith that unregulated markets will always outperform government regulators in efficiently allocating productive resources (though many libertarians and classical liberals believe this). It follows rather from absolute property

and contract rights. Consequently, there is no political authority to enact laws and institutions designed to promote competition and deter anti-competitive agreements.

Absolute contract rights conjoined with libertarian rights of unlimited accumulation of particular resources readily lead to cartels or monopolies. That someone may have acquired complete control over some necessary resource, such as oil, electricity, or water supplies, and charge others whatever he pleases (or simply refuse to sell out of spite) is wholly consistent with libertarian property rights. Such arrangements are not allocatively efficient. But because libertarians reject any interference with free economic transactions and complete private control over resources, they place subordinate value on efficient allocations of productive resources. It is more important to maintain individuals' absolute property and contract rights.⁶³ In the absence of institutional arrangements enforced by government to prevent excessive accumulation of market power, the likely outcome of libertarian entitlements is a series of contracts establishing cartels' control in each industry. Once this stage is reached nothing but good will can prevent libertarianism's progression into veritable economic serfdom for many.

(D) The Libertarian Rejection of Public Goods and a Social Minimum: There is no place in libertarianism for government to enforce the provision of public goods, those goods not adequately and effectively provided for by markets. The role of the libertarian state exclusively is to protect and maintain rights and entitlements against infringement, to enforce contractual agreements, and to resolve disputes. For governments to tax people to provide public goods is unjustly coercive. It is also unjust for government to tax some and redistribute it to others (for purposes of health care, unemployment or emergency relief, and so on). The state has no role to play in distributing income and

⁶³ Narveson says the idea of monopoly is indefinable in a rigorous way, and besides, "the use of one's resources for whatever purposes one will is the hallmark of liberal freedom." *The Libertarian Idea*, p.203.

wealth (other than enforcing existing rights); distributions are to be decided entirely by people's free decisions. These matters require little discussion here, since libertarians emphasize them as central to their position. (e.g. Nozick, ASU, p. ix)

(E) Political Power as a Private Power: Since Locke liberals have conceived of political power mainly in terms of three primary functions of governments: political power is the authority (1) to legislate public rules and revise them to meet changing circumstances; (2) to adjudicate disputes arising under these rules, and (3) to enforce these rules against those who violate them. For Locke these three powers are needed to remedy the "defects" and "inconveniences" of a state of nature. These shortcomings warrant the creation of political society (via a social contract, on Locke's account). This political society (the "Body Politic," "the People") has the authority to legislate a constitution and place limited political power in a government, which is appointed as the People's fiduciary agent to fulfill these functions on their behalf.

One peculiar feature of libertarianism is the absence of legislative authority, a public institution with power to introduce and amend rules and revise social conventions. The need for new or revised rules is to be satisfied through private transactions and the invisible hand, by the eventual convergence of many private choices. Libertarians generally accept that adjudicative and executive powers are necessary to maintain personal and property rights. But these functions are to be carried out by private protection agencies and arbitration services (in Nozick's account, a "dominant protective agency," which is the minimal state). No public body, commonly recognized and accepted as possessing legitimate authority, is required to fairly and effectively fulfill these functions. Political power is a privately exercise power.

Nozick draws upon Locke's account of natural property, but is selective; for example, he disregards Locke's justification for natural property, including our duties to

preserve ourselves and others as God's property, and assist others in need and distress.⁶⁴ Nozick's moral parsimony enables him to contend that it would be irrational for the inhabitants of a Lockean state of nature to overcome the inconveniences of their situation by a social contract.⁶⁵ Instead, they enter into separate private contracts with competing protection agencies to enforce their personal and property rights. Eventually, one protection agency achieves a natural monopoly in providing "protection services" for those willing and able to pay for them. This "dominant protective agency" is the "ultra-minimal state." Different "packages" of protection services are offered, depending on customer's wants, circumstances and ability to pay. The dominant protective agency evolves into the "minimal state" when it provides a minimum level of protection services (the "least expensive protection policy") without charge to those unable to afford them. These services selectively protect non-members: They are guarded against aggression by paying members, but are not shielded from aggressive non-members.⁶⁶

So conceived, the libertarian "state" originates in and is sustained by a network of private contracts. This network of agreements must be constantly renewed, and is needed to maintain the minimal state; there is no enduring constitution that survives the demise of individuals or the expiration of their individual contracts. Clients of the minimal state must purchase their protection "policies" for specific periods, just as they purchase auto or medical insurance. They contract for different services depending on their willingness

⁶⁴. See sec. 159 of Locke's Second Treatise, on "the Fundamental Law of Nature and Government, viz. That...*all* the Members of the Society are to be *preserved*." (Referred to also in sects. 6, 16, 18, 134, 135, 183). Because of the fundamental law, all have a duty "to preserve himself" as well as "to preserve the rest of Mankind." (sec.6).

⁶⁵. "Anything an individual can gain through such an unanimous agreement he can gain through separate bilateral agreements." Anarchy, State and Utopia, p. 90.

⁶⁶. Protection services against members are provided to non-members without charge in compensation for requiring them to resolve disputes with the agency's paying clients within the agency's arbitration procedures, thereby losing their rights of private enforcement of their rights. See *ASU* chs. 2 and 5, especially pp. 101-119.

and ability to pay; and if they cannot pay, then they receive minimal protection against the minimal state's clients. They do not receive protection from the aggression of its non-clients (others equally unable to afford or unwilling to pay for protection services.)

How are we to assess this conception of political power? How does it compare with liberalism? Begin with the minimal state's lack of legislative authority. H.L.A. Hart argued that any society is bound to be a static and primitive if it only relies on custom and people's uncoordinated responses to new situations, and is without commonly recognized procedures that identify rights and duties and enact public rules to promptly respond to changing conditions.⁶⁷ One challenge to libertarianism is to show that this is not its inevitable fate. No matter how knowledgeable the Invisible Hand, libertarian agents are invariably going to be unsure of and will disagree about the application of their abstract rights and duties. The absence of a public institution that refines libertarian rights and principles and authoritatively issues public rules to apply to specific circumstances will result in great "inconvenience." Without institutions to publicly identify the principles of libertarian natural law, and further specify them into concrete rules, it is difficult to see how the countless sophisticated rules that make up the modern institutions of property, contract, securities, negotiable instruments, patents and copyrights, and so on, could effectively evolve simply by the Invisible Hand. Even if these institutions could evolve without legislative power, once in place there is no legal person with the authority to eliminate ineffective rules and revise them to meet changing conditions.

Political power is then truncated under libertarianism since there is no commonly recognized legislative authority. Moreover, the judicial and enforcement powers that do exist remain in private hands. A primary feature of libertarianism is that the protection and enforcement of people's rights is treated as an economic good, to be provided for by

⁶⁷. H.L.A. Hart, The Concept of Law (Oxford University Press, 1961), pp.89-96.

private market interactions.⁶⁸ Initially held by each individual, these private political powers are transferred by each through separate contractual agreements to other private persons who compete on the market to provide protection, arbitration, and enforcement services. Different arrangements are made depending on the political services people want and can afford. In Nozick's version a single dominant protection agency eventually acquires a de facto monopoly in political power; its competitors go out of business. (Oddly Nozick does not discuss the hazards of monopolies, including excessive pricing, neglect of service, etc.) For Rothbard and anarchical libertarians competing protection agencies can peaceably coexist, just as competing insurance companies do under contemporary conditions. (Even so there is nothing to prevent price collusion among competitors in the absence of state regulation.) In both accounts political power is privately exercised for the benefit of those who can afford it and according to whatever favorable terms each person can bargain for. The distribution of political "services" depends then on a person's wealth and relative bargaining position.

Libertarians then place in private hands the role of identifying, interpreting, and coercively enforcing the fundamental conditions of society, including the most basic claims for restraint, protection, and mutual assistance that are conditions of social life. Is this a just and legitimate arrangement? Contrast it with liberals' conception of legitimate political power.

Liberals regard political power as legitimate only when: (1) it is held by an enduring public institution that specifies offices and positions of authority, the conditions for occupying them, and settled public political procedures officers must comply with. (2) Political power is not "owned" by anyone, but is regarded as a fiduciary power, held in trust, and applied for the benefit of the governed, not the benefit of those holding

⁶⁸. See Nozick, ASU, p. 24: "Protection and enforcement of people's rights is treated as an economic good to be provided by the market, as are...food and clothing."

political power. Moreover (3) political power is to be impartially exercised, only for the public good and the good of each citizen.

It is doubtful whether libertarianism can meet any of these conditions on public political authority. (1) *The public institution of political power*: It is hard to regard the libertarian minimal state as an enduring corporate body with settled public procedures and rules of succession that enable it to survive the demise of the individuals who govern it. (For example, even private business corporations are the product of publicly enacted statutory law, which libertarians do not recognize). At most the libertarian minimal state resembles a business partnership among individuals (perhaps family members). Still, let's suppose the libertarian minimal state can be organized as an enduring non-political institution with published procedures and rules for selecting and replacing officers and enacting and applying rules, and which survives officials' (or individual owners') retirement or demise. Does this private enterprise meet the remaining conditions for public political power?

(2) *The fiduciary nature of political power*: Libertarian political power is exercised pursuant to the terms of economic contract: it is individually bargained for, sold for a profit at the going market (or monopoly) rate, and is normally distributed only to those willing and able to pay for it. Economic bargains are driven by private interest; parties normally are indifferent to each other and negotiations are conducted "at arms length." Economic contractual relations are not fiduciary relations, which by their nature require acting for another parties' interests, even if at the expense of one's own. Moreover, a peculiar feature of the minimal state, and of competing protection agencies under anarchical libertarianism, is that political power becomes a sort of private commercial power. As a for-profit enterprise, the protection agency's primary duties extend to its owners. While the manager-owner relationship among those owning and controlling the minimal state may be conceived as fiduciary, this is very different from

the fiduciary character of liberal governments, where the governed are the beneficiaries of political authority. Within libertarianism there is no structure of publicly recognized principles and institutions that impose general duties on “government-protection agencies” to act in a fiduciary capacity for their members' interests or for the public interest. In so far as it is exercised for benefit of another, libertarian political power is guided only by the contractual obligations fixed by many bilateral bargains.

(3) *The impartial exercise of political power for the public good*: This liberal requirement highlights the way that libertarian political power is most conspicuously non-public: (a) Libertarian political services are not uniformly supplied but are provided in proportion to a person's willingness and ability to pay. People receive only those protection, arbitration, and procedural benefits they can afford. Political power is not then impartially administered. This holds true even for Nozick, who (unlike other libertarians) provides minimal protection benefits to non-members without charge: The level of protection provided is not equal to others (e.g. no arbitration services are provided); moreover, minimal protection is not provided against the people most likely to attack non-members, namely, other non-members. (b) Furthermore, in acting from private economic motives and for the private benefit of its paying customers (and of course its owners), there is no aim or understanding that the minimal state acts for public benefit--for the good of society and all of its members. As it eschews public goods in the economic sense, libertarianism eschews the public good in the moral sense. Political power is not exercised for the sake of justice (even as libertarians define it), but for private ends. The selective enforcement of individuals' rights clearly suggests that the motivating purpose of the minimal state is not the enforcement of justice.

What is striking about libertarians' conception of political power is its resemblance to feudalism. By ‘feudalism’ I mean a particular conception of *political* power. I do not mean the manorial system, or the economic system that was grounded in

serfdom.⁶⁹ Feudalism rather is a system of personal political dependence that is based in a network of private bargains or contractual agreements. Under feudalism the elements of political authority are powers that are held personally by individuals, not by enduring political offices and institutions. These powers are held as a matter of private contractual right. Individuals gradually acquire the power to make, apply, and enforce rules by forging a series of private contracts with particular individuals or families. Oaths of fealty or service are sworn in exchange for protection and other benefits. Those who exercise political power wield it on behalf of others pursuant to their private contractual relation, and only for the term the contract endures. Since different services are provided to different people, there is no notion of a *uniform public law that is to be impartially applied to all individuals*, an essential feature of liberal political power. Instead, "custom and verbal agreement take the place of written law." (Coulton, 47) Moreover, subjects' political obligations and allegiances are voluntary and personal: they arise out of private contractual obligations and are owed to particular persons. Political obligation and allegiance are not seen as moral imperatives that are based in a duty of justice, or in duties to humanity or even to members of any national, ethnic, or religious group.

Under feudalism proper in Europe, personal loyalty between liege and vassal was

⁶⁹ "Feudalism" is here understood to be a conception of political power exercised as a private prerogative that is grounded in a network of private agreements. Feudalism "involved the parceling out of public authority into private hands" (Francis Oakley, *The Medieval Experience* (Scribner, 1974) p. 30). Historically feudalism arose out of the breakup of the monarchical system in both Japan and in Europe (after Charlemagne). Under feudalism "in its most developed form...the national system has become obliterated." (G.G. Coulton, *Medieval Panorama*, (Meridian, 1954) p. 49) "Political authority and private property were merged together into the new feudal relation." (Christopher Dawson, *The Making of Europe*, [1932] p. 227) I emphasize that feudalism is a *political* and not an economic doctrine; it does not imply serfdom. Feudalism in Japan had nothing resembling serfdom in Europe during its feudal period. Moreover serfdom existed in non-feudal systems with strong monarchs (e.g. Russia). See Peter Duus, *Feudalism in Japan*, (Knopf, 1969), pp.9, 15-16, 77. The tradition that identifies feudalism with serfdom and the manorial economy stems from Marx's use of the term 'feudalism,' and receives its classic expression in Marc Bloch's *Feudal Society* (1939).

seen as a moral duty arising out of contract. Loyalty was an important political motivation, and a complicated system of loyalty-norms cemented personal allegiances. Loyalty motives and norms are absent from libertarianism; it relies on self-interest and the obligation to keep one's contracts as sufficient incentives to comply with political obligations (to provide protection services, etc.). But in all other respects mentioned, libertarianism resembles feudalism. Their similarity stems from both doctrines' conception of *political power as a system of personal political dependence grounded in a network of private contractual relations*. Like the provision of any other individual service, contracting for protection and arbitration services is the way people must protect themselves and secure their interests from others' aggression.⁷⁰

Liberalism originated with the rejection of the idea of private political power, whether it stemmed from a network of private contracts under feudalism, or was seen as owned and exercised by divine right under royal absolutism. Libertarianism resembles feudalism in that it establishes political power in a web of bilateral individual contracts. Consequently it has no conception of legitimate public political authority, nor any place for political society, a "body politic" or "people" that political authority represents in a fiduciary capacity. Having no conception of public political authority, libertarians have no place for *the rule of law* or *the impartial administration of justice*. People's rights are protected selectively and disproportionately, if at all, to the degree that they can afford protection and depending on which services they pay for. Having no conception of a political society, libertarians have no conception of the *common good*, those fundamental interests of each person that, according to liberals, are to be maintained for the sake of justice by the impartial exercise of political power and the rule of law.

Concluding Remarks

⁷⁰. See Norbert Elias, *Power and Civility*, (Pantheon 1982) pp.57-65. Also J.P. Poly & E. Bournazel, *The Feudal Transformation: 900-1200*, chapter 2, on the feudal contract.

My purpose in Part Two has been to show how libertarianism is incompatible with the primary institutions endorsed within the liberal tradition. Libertarianism is increasingly advocated by many in our liberal society and of course is tolerated, though its advocates do not endorse basic liberal institutions. Whether libertarianism will gain sufficient adherents to undermine our liberal society is a question of the stability of liberal institutions. Classical liberal institutions, because of the priority they assign to property rights and economic liberties, seem prone to disintegrate into libertarianism. If people are led to believe in the inherent justice of market distributions and the "sanctity" of prevailing legal norms of private property, then many citizens eventually will come to believe in their fundamental moral right to whatever they acquire by market exchange, gift and bequest. Liberal institutions will then be jeopardized, as they are currently by the Tea Party movement. Those better off will resent taxation to pay for public goods, social security and health care for the elderly and handicapped, and minimum income supports and other assistance for the poor. Democratic government's very legitimacy may be questioned. These are familiar events in the United States, currently and historically.

Among nations the United States is distinctive in that it celebrates, as part of its national self-awareness, the Lockean ideal of creation of political society by an original social contract among free and freeholding persons, equally endowed with natural rights. Modify this national story somewhat, by substituting a web of bilateral contracts for the social contract and eliminating any duties it entails, and we have the makings of libertarianism. This helps explain why libertarianism is such a peculiarly American view. However slight these modifications may seem, their effects are far-reaching. For what we have in libertarianism is no longer liberalism, but its disintegration.