

Individual Freedom and Laissez-Faire Rights and Liberties

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"Law, Liberty, and Property are an inseparable trinity."---Friedrich Hayek

"Capitalism is a cultic religion." ---Walter Benjamin¹

The traditional philosophical justification for full or laissez-faire economic rights and liberties is an indirect utilitarian argument that invokes Adam Smith's "Invisible Hand": Individuals' self-interested pursuit of income and wealth against a background of free competitive markets, with free contract and exchange and full property rights, maximizes aggregate income and wealth, therewith overall (economic) utility. The only limits allowed on economic liberties are those needed to maintain market fluidity and mitigate negative externalities. The traditional doctrine of laissez-faire also allows for taxation and provision for public goods not otherwise adequately provided by private market transactions, and perhaps even a social "safety net" (e.g. the English Poor Laws) for people incapable of supporting themselves. These arguments have a long and respectable history going back to David Hume and Adam Smith; they were refined by the classical economists, including J.S. Mill, were further developed by Friedrich Hayek, Milton Friedman and

¹ Hayek, *Rules and Order*, vol. I of *Law, Liberty and Legislation*, p.107. Walter Benjamin, 'Capitalism as Religion,' Fragment 74, *Gesammelte Schriften*, vol.VI. This is a chapter from a manuscript on Liberalism and Economic Justice I am

¹ Hayek, *Rules and Order*, vol. I of *Law, Liberty and Legislation*, p.107. Walter Benjamin, 'Capitalism as Religion,' Fragment 74, *Gesammelte Schriften*, vol.VI. This is a chapter from a manuscript on Liberalism and Economic Justice I am currently working on.

others, and are widely accepted by contemporary economists influenced by the “Chicago School.”

Much of the force of indirect utilitarian arguments for full property rights and laissez-faire stems from their combining the values of social utility/welfare with liberal values of freedom and equality under law. These arguments make good sense of the classical liberal position and possess a great deal of argumentative force, so long as it is accepted that maximizing aggregate utility is the ultimate good, and that, as a matter of justice, individuals have all and only those economic rights and liberties that are conducive to maximum utility. It is a separate question whether these arguments are empirically sound. Left-utilitarians argue they are not and that a substantial social minimum that exceeds the weak classical liberal safety net is justified, even on classical utilitarian grounds.²

My focus here is not on the utilitarian “invisible hand” argument for classical liberal economic rights and liberties, but rather arguments that appeal directly to liberty or freedom as self-justifying intrinsic moral and political values. Assuming that such values as freedom from interference, non-coercion, non-aggression, freedom of choice and action, autonomy, individuality, self-determination, individual independence, and non-domination are morally fundamental: it is argued

² The left utilitarian position is empirically verified in social democratic welfare states such as Denmark, Norway, Finland, Sweden. A *NY Times* article, ‘Denmark Ranks as Happiest Country’, (March 16, 2016) reports that Denmark has the highest level of happiness per capita according to the ‘World Happiness Report,’ followed by Switzerland, Iceland, Norway, Finland, Canada, the Netherlands, New Zealand, Australia and Sweden. In 2017 Norway replaced Denmark. The report also found that vast inequality is strongly associated with unhappiness. Nonetheless the United States ranked 13th in 2016 and 14th in 2017.

by contemporary “neo-classical liberals” that on these grounds full property rights, laissez-faire economic liberties, and market distributions of income and wealth are required as a matter of justice. Their arguments are more Kantian than welfarist or even Lockean, for instead of natural property rights, they appeal to moral rights of individual freedom, non-coercion, or individual autonomy or “self-authorship.” It’s these sorts of arguments that I examine in this chapter. In Part One I focus on arguments, primarily by Hayek, for laissez-faire economic liberties based in freedom from interference and non-coercion. In Part Two I address arguments by Gerald Gaus and then John Tomasi that appeal to a Kantian/Rawlsian ideal of free and equal persons, to argue for full capitalist economic rights and liberties.

The general theme of this chapter is that arguments from an abstract ideal of individual freedom, non-coercion, independence, or autonomy do not justify laissez faire economic liberties. I doubt that this or any other conception of property rights and distributive justice can be justified simply by appealing to individual freedom or its cognates. Freedom may be sufficient to support claims to have one’s basic needs met, or rights to a social minimum, as means necessary to guarantee the worth and effective exercise of one’s freedoms; but this argument does not provide a full account of economic or distributive justice, being at most only a piece of that argument. In any case, rights to a social minimum are not what classical liberals or libertarians argue for; they reject such rights as a requirement of justice, even if conceded on grounds of public charity or as a public good.³

³ I do not address here libertarian arguments for absolute property and contract rights rooted in self-ownership. Freedom or autonomy is not the guiding idea used to justify these rights. Instead the appeal is to absolute property rights in one’s own

Part One: Maximizing Liberty and Minimizing Coercion: Hayek and Friedman

I. The Argument from Maximizing Liberty:

Classical liberal and libertarian politicians (and some philosophers) sometimes say that society should seek to “maximize liberty” or “maximize freedom”⁴—as if liberty or freedom were a measurable good to be maximized in the aggregate. But this cannot be what they really mean. For a society that seeks to maximize aggregate liberty might have to impose grossly unequal restrictions on some individuals’ freedoms to promote the sum total of free actions of others. This is contrary to the liberal value of the moral equality of persons.

A more guarded claim is that society should maximize the freedom of each person compatible with the individual freedom of others. Milton Friedman says that a liberal’s “objective is to preserve the maximum degree of freedom for each individual separately that is compatible with one man’s freedom not interfering with other men’s freedom.”⁵ This is a distributive claim: justice requires the greatest equal freedom of each person.⁶

person, which allegedly carry over to pervade appropriated things. I discuss shortcomings of this position elsewhere in my manuscript.

⁴ “The idea of libertarianism is to maximize individual freedom.” Jan Narveson, *The Libertarian Idea*, (Philadelphia: Temple University Press, 1987), p. 175)

⁵ Friedman, *Capitalism and Freedom*, p. 39

⁶ Kant says: “A constitution allowing *the greatest possible human freedom* in accordance with laws by which *the freedom of each is made to be consistent with that of all others*. . . must be taken as fundamental.” *Critique of Pure Reason*, A316 /B373. See also *Metaphysical Elements of Justice*, Introduction §C and Appendix, Ladd trans, p.35, and 43-44 where he refers to freedom so construed as the only “original right.” This superficially resembles Friedman’s objective but is more complex since it is a right to “Freedom. . . in accordance with a universal law.” Kant is often assumed to be a classical liberal, but given his time and place it is highly

If the idea of “greatest freedom for each without interfering with the freedom of others” is taken literally, as a claim about freedom of movement and action, then it would seem to render private property in many things difficult if not impossible, especially in land and many material objects. For the extensive rights of exclusive possession and use implicit in private property are designed to impose restraints on “all the world.” Depending on property’s distribution, especially if grossly unequal, property constraints are likely to reduce considerably, perhaps even minimize rather than maximize freedom of movement and of action for many people.

For example, classical liberals and libertarians ardently support large accumulations and unconstrained holdings of real estate by individual landowners-- 50,000 acre ranches, exclusive gated neighborhoods, private beaches and city parks, and the like. A society could increase each individual’s freedom of movement and action with public ownership or by permitting regulated public access on private land by easements to traverse landed property; whereas in fact, except for sidewalks and similar public easements, owners alone normally have exclusive rights to freedom of use and extraction on their land, and can legally prevent others’ free movement across it. So landowners normally have rights to prevent, therewith *minimizing* others’ freedom of movement and access, and this is thought (by Friedman and others) to be wholly consistent with if not required by “the maximum degree of freedom for each individual”

doubtful he intended to endorse the laissez-faire rule that economic contracts and rights of property should go largely unregulated.

that is compatible with the freedom of others.⁷ But as Henry Sidgwick argued, “if Freedom be understood strictly” it does not seem to imply anything more than non-interference while a person is actually occupying a space or using a thing that can only be used by one person at once.⁸ The right to prevent others from occupying or using the same unoccupied space or thing now and in the future that is implicit in private property is an interference with their freedom of action, occupancy, and use *beyond* what is needed to secure the freedom to occupy or use a thing while in one’s possession. Of course property preserves the freedom of *the owner* to use material things however he/she chooses to the exclusion of others, but it is not clear what a person’s exclusive possession and use of land and resources has to do with maintaining the “greatest possible freedom” of each compatible with that of others. Private property in most material things just is, by its nature, a right to interfere with everyone else’s freedom to occupy space or to use the same material or intangible thing.

Similar circumstances attend the right of freedom of contract, especially as conceive by the classical liberal laissez-faire view. This freedom, since it is legally enforceable, involves the power to limit one’s future options in order to attain desired ends, and in doing so restrict one’s freedom to act without interference. Even though a person’s options may be expanded by contractual agreements, how does giving others the power to coercively enforce agreements necessarily realize *greater* or (in Friedman’s

⁷ Of course, even if real property were publicly owned, there would have to be restrictions on occupancy and use if it is to be put to productively efficient use, though there could be far more public usage than in a fully private regime.

⁸ Sidgwick, *Methods of Ethics*, 276. See also Jeremy Waldron, ‘Homelessness and Freedom,’ in his *Liberal Rights*, who makes many of the same points regarding property that I argue here.

words) “maximum freedom” from interference? By its nature (the threat of) coercive enforcement of contractual obligations interferes with individual freedom of action. It may of course be true that a person has freely consented to such interference at some point in the past in order to satisfy his purposes then, but this does not mean that *greater freedom* is realized in society by the coercive enforcement of contracts. Instead what might well be achieved is *greater interference* with freedom for the sake of expanding individuals’ options and accomplishing other purposes. An obvious example here would be the indentured servitude contracts of a former era, or contracts for which specific performance is required and agreed upon actions are legally enforced. Except for indentured servitude, such infringements upon individuals’ freedom may not normally bother most people, but that is because an individual has freely agreed or otherwise promised to give someone the power to limit his freedom, and we think people normally ought to be required to satisfy their contractual agreements, or at least pay the costs of not doing so. Contractual obligations nonetheless potentially involve many restrictions and interferences with individual freedoms that otherwise would not exist.

Here one might object that “greater freedom” indeed has been achieved by freely limiting one’s future actions by contract, for by entering into contracts one creates future options and opens up a range of choices otherwise not available. Freedom of contract thus allows for “greater freedom of choice” by altering and increasing one’s options. But here it is not necessarily greater freedom to act without interference that has been achieved; it depends on the nature of one’s agreement and what one has agreed to. Moreover freely choosing to alter or expand one’s options for choice by contractual agreement is a different liberal value than simply freedom from interference. It is a

precondition of the related liberal value of having control over the course of one's life and not being subject to others' will or control. This value goes by several names: individual independence, autonomy, self-mastery, or non-domination.

Furthermore, expanding everyone's options for choice or giving individuals greater freedom to choose and control their options, though often celebrated as a benefit of free markets, is not a fundamental objective for classical liberals who aim to "maximize freedom." For we could readily expand many individuals' freedom to choose among available options by, for example, guaranteeing everyone a generous basic income, or by reallocating market distributions to reduce vast inequalities, thereby considerably increasing the range of options available to the less advantaged and hence to everyone in the aggregate. But this is not classical liberals mean by "the greatest possible freedom for all." For they clearly intend to support extensive private property rights, reduced taxation, and minimal restrictions on ownership and unregulated freedom of economic contract (consistent with economic efficiency). It is not clear yet what any of this has to do with "maximizing freedom compatible with the freedom of all."

II. Rights-Regulated Freedoms, or "Freedom under Law"

An easy reply to the foregoing remarks is that they miss the point. For clearly when it is said that liberal society should seek the "greatest possible freedom for all," it should go without saying that a background of individual rights, liberties, and private property holdings is presupposed. Thus, assuming that individuals each have exclusive rights to their own person and possessions, *then* they should be free to act as they choose, being restrained only by prohibitions on actions that violate others' rights (or are otherwise harmful in specified ways, e.g. public bads such as water and air pollution).

The aim of a liberal society is not then strictly speaking, “the greatest possible freedom of each,” but instead the greatest possible freedom that is compatible with respect for each others’ pre-existing rights, including private property, where the distribution of property rights is itself (largely) the product of free transfers and exchanges.

Hayek expresses this idea of rights-regulated freedom with the familiar phrase “freedom under law.” It is taken for granted that restrictions on individuals’ freedom by legally protected rights in one’s person and possessions are necessary for peaceful social interaction and cooperation. Given the necessity of legal constraints to make social life possible and productive, the aim should be to allow individuals, not as much unqualified freedom as possible, but as much freedom to exercise their rights and powers over their person and rightful possessions, compatible with others having the same freedom to exercise the rights and powers they have. Thus, given that we all have rights to our person, we should be able to exercise them as we choose without violating others’ rights; and so too given that all have property in things (tangible and intangible) external to our persons, we also should have the freedom to do with these rights as we choose, so long as we do not violate others’ rights or harm them in specifically defined ways. The same is true of our freedom to enter into contractual relations, both economic and non-economic, with others: we should be free to legally restrict our freedom of action in order to alter and expand our options now and in the future and acquire rights to do or possess other things. The freedom to make such tradeoffs of one’s freedom of action for purposes of achieving new options and other benefits is part of being a free person.

Of course conflicts between individuals’ rights and liberties often arise. Here classical liberals such as Friedman, Hayek, and von Mises often appealed to economic

efficiency (if not aggregate utility in some cases) to resolve these conflicts and to further specify the rights individuals have.⁹ Hayek especially was keen to leave the resolution of these conflicts up to judges and the common law rather than legislative determinations, in order to respect established conventions. He thought legislation is too blunt an instrument that endangers liberty, since it is far-reaching in its unintended consequences and is subject to the designs of politicians and caprices of popular will.

On this account of rights-regulated “freedom under law,” the idea of *maximum compatible freedoms* (Friedman, p.39) is specified by reference to individuals’ personal and property rights. So depending on existing property distributions, some may have far greater freedoms of choice, movement, and action due to their substantially unequal rights in wealth and possessions protected by conventional property claims. “Equal freedom under law” does not then by any means imply that individuals have equal property rights, whether to resources or even to a basic minimum, or for that matter rights to any resources and possessions at all. So far as property is concerned, “equal freedom under law” only means that all have a formal civil right to hold property, with no substantive right to anything guaranteed. Many individuals may only have rights to control their own persons and labor, owning nothing, and yet they are still to be regarded

⁹ On their appeals to efficiency and utility: Friedman says, “the essential function of payment in accordance with product in a market society is to enable resources to be allocated efficiently without compulsion.” Friedman p. 167. Hayek says, “[E]xtreme utilitarianism leads to absurdity; and only what has been called ‘restricted’ utilitarianism therefore has any relevance to our problem.” Hayek, *The Constitution of Liberty*, (UChicago Press, 1960) ch. 10, sect. 6, p.159. Von Mises says: “What we maintain is that only a system based on freedom for all workers warrants *the greatest productivity of human labor*. . . . This is the fruit of free labor. It is able to create *more wealth for everyone*...” Ludwig von Mises, *Liberalism in the Classical Tradition*, (Indianapolis: Liberty Fund, 2005) Chapter I, §2.

as “equally free.” As Hayek says: “Freedom may be enjoyed by a person with practically no property of his own.” (CL 141) So such stirring phrases as “maximizing equal freedom” and “greatest equal freedom for all” are really about the *formally equal rights to freedom of choice* and action with respect to the rights one already possesses in one’s person and in external things. We all have the same basic rights in our person, but since property rights in things may be grossly unequal, there is no guarantee that the formal freedoms all have will result in *substantively effective freedoms* of action for those who have few if any property rights in things.

Accordingly, Hayek says

“we must recognize that we may be free and yet miserable. . . . It is true that to be free may mean freedom to starve [but] the penniless vagabond who lives precariously by constant improvisation is indeed freer than the conscripted soldier with all his security and relative comfort.” (CL 18)

Now it may be true that the penniless vagabond is not anyone’s slave or unwilling servant, but beyond that obvious desideratum for any moral conception, liberal or non-liberal, what does his purely formal freedom amount to if he cannot freely move about or sleep in a safe, secure place because of property restrictions? He has no effective freedom to pursue worthwhile (or even non-worthwhile) plans of action. Hayek says that freedom does not mean all good things and is not always preferable to other goods—such as avoiding starvation—but he says it is nonetheless important and “deserves a distinctive name.” Granted that formal freedom is important, even necessary, but why should it be the *only* political value the liberal state aims to protect? If, as Hayek admits, avoiding starvation is even more preferable than purely formal freedom, then why should there not be a human right to basic means of subsistence, and not simply the charitable and precarious “safety net”? More generally, why shouldn’t each person being able to

effectively exercise his or her freedoms—as guaranteed by a substantial social minimum—also be guaranteed by the liberal state? The classical liberal/libertarian response is that property rights take precedence over a guaranteed social minimum. But where does this come from? It is not a requirement of *freedom* in any sense we’ve encountered yet (or are likely to encounter, I argue). That classical liberal (and libertarian) property rights trump effective freedom and even a right to means of subsistence must have some other justification than claims of “freedom compatible with the freedom of each.” Historically the classical liberal appeal has been to the invisible hand and economic efficiency. But this is just to say that individual or *aggregate welfare* trumps the effective exercise of *each person’s freedom*—which is a utilitarian or otherwise consequentialist argument for *limiting* the effective freedom of some, not an appeal to “Liberty” or individual freedom.

Rather than distinguishing between formal vs. substantive or effective freedoms, classical liberals like Hayek distinguish between having freedoms to act vs. having *powers, abilities, or capacities* to exercise one’s freedoms.¹⁰ Bill Gates and the lowliest street urchin then might be said to be “equally free” even though they have extremely unequal powers and capacities to exercise their freedoms because of vastly unequal distributions of income, wealth, and fair opportunities. Liberalism on this account is said to guarantee only formally equal freedoms, and formally equal opportunities to compete for and occupy positions with access to powers and positions; it does not guarantee the powers, opportunities, and economic resources needed to *effectively exercise formal freedoms*.

¹⁰ See Hayek, *The Constitution of Liberty*, ch. 1 sect. 4, p.17 on the “confusion of liberty as power with liberty in its original meaning.”

On this way of thinking, the *extent* of individuals' freedom of action will depend upon both the rights of others, as well as the rights individuals themselves have. Bill Gates and the homeless person have the same formal freedoms: to express their opinions, practice their religions, move about and travel anywhere, associate with others, own property, enter contracts, etc. But the effective freedom of the street urchin to express his views to others is limited to those in his immediate surroundings who will listen to him; he has no effective freedom to publicize his views, or travel or move about except on public streets, and even then he is limited by vagrancy laws and the good will of the local police. Classical liberalism, though it guarantees equal formal freedoms, does not guarantee *effective equal freedoms*; indeed, it hardly guarantees any effective freedoms at all as a matter of right and justice.¹¹

Here one might sensibly respond that the problem with the idiom of "effective equal freedoms" is that there is no possible way to realize a realm in which individuals' freedoms are equally effective, since the degree to which a person can effectively exercise a freedom depends on much more than simply one's level of income and wealth. It also depends on peoples' education and interests, their upbringing, degree of intelligence, physical strength and skills, occupation, and other factors. Lawyers and professors of the humanities exercise their formal freedom of thought and expression far more effectively than equally prosperous but isolated farmers in Wyoming, but there is

¹¹ Waldron, *op.cit.*, challenges the claim that the homeless have even formal (or negative) freedom, since they are legally liable to be interfered with at any moment and in any place they occupy. For reasons integral to making sense of the liberal idea of the rule of law, I think it is important to maintain the distinction between formal and effective freedom.

no injustice here. Whatever is meant by ‘effective freedom,’ it does not raise problems of justice in the way that formal inequalities of liberties do.

But if there is not a problem of justice with inequality of most effective freedoms (except perhaps political liberties) there is a serious problem in not being able to effectively exercise to only a barely minimal degree one’s formally equal rights and liberties, especially when this is a matter clearly within a society’s control. “Effective equal freedom” does not require that formal freedoms be *equally* effective or have the same worth for all; rather all citizens should be guaranteed adequate resources and opportunities so they can effectively exercise their basic liberties and take advantage of society’s opportunities to a sufficient degree that they are independent, not simply of others’ “arbitrary will” (Hayek) but also free from the effects of morally arbitrary contingencies and misfortunes (of birth, social class, and bad market luck.)

Classical liberals might contend that individuals should indeed be able to effectively exercise their liberties to a minimally adequate degree. This may be part of their argument for capitalist distributions, which many will say is the best way to realize the aim of minimally adequate effective liberties for all. The odd classical liberal might even see this as an issue of justice that calls for welfare rights to meet individuals’ basic needs when they are unable to do so.¹² But more commonly classical liberals regard gross poverty, not as an injustice to be addressed by guaranteed basic rights, but as a kind

¹² See Loren Lomasky, *Persons, Rights, and the Moral Community*: “In that strictly limited but crucial respect, basic rights extend beyond liberty to welfare rights” p. 126. Lomasky says this basic welfare right is not required by distributive justice.

of “public bad” to be addressed by public charity when private charity is inadequate.¹³

This is a consequence of the great weight classical liberals assign to extensive economic freedoms and rights of private property.

III. Liberty as the Absence of Coercion:

1. The flip side the idea of maximizing freedom is that of minimizing coercion.

Hayek says that a “state of liberty or freedom” is “that condition of men in which the coercion of some by others is reduced as much as possible in society.” (*CL*, p. 11)¹⁴ The idea of minimizing coercion seems reasonable on its face, especially if we take personal and property rights to be justified and widely accepted. But taken by itself and independent of any specification of individuals’ rights, the idea of minimizing or reducing coercion “as much as possible” has some of the same problems as maximizing freedom from interference. It can require excessive coercion of the few to minimize coercion of a large majority. For example, attempts to protect or integrate into society a reviled racial or religious minority might require increasing acts of coercive enforcement, the sum of which could be reduced by segregation or apartheid, removing the reviled minority from interaction with the prejudiced majority. Moreover it is hard to make sense of the idea of minimizing coercion for its own sake.¹⁵ Does it mean that anyone who occupies an unoccupied space or who takes control of an unused tool or other object

¹³ See Hayek, *CL* 257-259, on the “assurance of a given minimum of sustenance for all,” which he distinguishes from the welfare state’s illusion of “social justice.”

¹⁴ See also Friedman, *Capitalism and Freedom*, p. 113, who suggests that a liberal society should seek to maximize voluntary cooperation and minimize coercive interaction.

¹⁵ While coercing the few who violate laws may have the effect of reducing or even minimizing coercion for the many in any reasonably just criminal justice system, the purpose of coercive enforcement is not to minimize aggregate coercion, but to enforce the laws and protect each individual’s legal rights.

cannot be coercively interfered with, threatened or removed? Again, how is property possible under such conditions?

To be convincing the idea of minimizing coercion, like that of maximizing freedom, must presuppose a background of individual rights and liberties that others have a duty to respect, as well as a system of property that permits individuals and groups rights of exclusive possession, use and control of things. Since rights and liberties normally require enforcement, there must then be a distinction between the legitimate acts or threats of coercion necessary to enforce individuals' rights and liberties, vs. the illicit coercive acts that violate them. But if the value of non-coercion must presuppose an account of individuals' rights and liberties, then what is *their* justification? Are they, for example, conceived as natural or otherwise fundamental moral rights, or are they justified by some other principle such as utility, economic efficiency, the difference principle, or luck egalitarianism? In any of these cases, it would appear again that non-coercion is a secondary notion, dependent on the specification and justification of these antecedent rights. The more basic argument must be one that addresses the moral rights and liberties individuals have, or some other fundamental moral principle or requirement. But in that event, the bulk of the work is being done by an account of individual rights and liberties; so to put the primary emphasis on minimizing coercion seems misdirected or at best a distraction from the real issues at stake. But if that's the case, then the idea of "reducing coercion as much as possible" may well have little substantive content of its own. Like "maximizing liberty" it has polemical value for popular political purposes, but is of little philosophical significance in justifying classical liberal economic liberties.

Still worse, to put emphasis on claims of minimizing coercion can be simply misleading, depending on how the rights and liberties attending property are specified and distributed. For example, suppose a libertarian system, where most property rights in economic resources have come to be monopolized by a few billionaires and multi-millionaires (the notorious .01%) through a gradual process of free contracts, transfers, and exchanges. A majority of people live in poverty, some of it dire, and they are constantly attempting acts of petty theft and trespass, where many are unsuccessful and are promptly detained and imprisoned in an ever-increasing prison population. To say that in this society “coercion has been reduced as much as possible” is disingenuous if not literally false, since acts and threats of coercion are widespread and could be vastly reduced if the distribution of personal property rights were not so wildly unequal. But since the coercive enforcement of vastly unequal property rights is legitimate according to libertarian principles, the most that a libertarian could say here is that “illegitimate coercion has been reduced as much as possible.” This is misleading and distorts what is really going on in libertarian society.

2. I'll assume then that the idea of minimizing coercion presupposes a background of individual rights with respect to persons and things that are to be enforced by coercive threats and acts of coercion when called for. One difference between maximizing freedom and minimizing coercion is that, while private property, by virtue of its exclusivity, interferes with others' freedom, property is not necessarily coercive so long as everyone regards existing distributions as just and voluntarily accepts existing property claims. It is an empirical fact whether or not coercive enforcement, or even the threat thereof, is needed to sustain existing property rights and claims. We can imagine

ideal conditions of a “well-ordered society” (in Rawls’s sense) whose members all regard their society as just and want to comply with its laws, and who generally respect all property claims and willingly pay their taxes, with only minor exceptions. Coercive enforcement would only occasionally be needed, to address drunken revelry, mental illness, and crimes originating in weakness of will. But since everyone already wants to respect others’ rights and claims, they are primarily motivated by their sense of justice, and not by the threat of coercive enforcement of laws.

By contrast if the only motive for our acceptance of others’ property claims is self interest prompted by coercive legal enforcement—(even billionaires are dissatisfied with their shares and object to high taxation—a familiar scenario)-- then coercive enforcement is the primary reason individuals comply with existing property and taxation laws. More normally most people are motivated to some degree by their sense of justice and willingness to abide by law, but in the absence of shared acceptance of social norms as minimally just, grossly unequal distributions accompanied by dire poverty result in the multiplication of coercive acts of enforcement against those who trespass to steal or forage to meet their basic needs and desires. These are not unfamiliar circumstances: there are far more coercive threats and acts of enforcement in impoverished inner cities than in comfortable suburbs, and in societies where individuals have an adequate guaranteed social minimum. When taken seriously, “reducing coercion as much as possible” requires reducing gross inequalities and providing the less advantaged sufficient resources to pursue their primary purposes and achieve independence.

But again this is not what Hayek and other advocates of “minimizing coercion” have in mind. Their primary aim is to endorse robust economic freedoms, including full

or even laissez-faire property and contract rights. What they really seem to mean by “minimizing coercion” is that, assuming a background system of robust or laissez-faire property rights is *already* in place, individuals should be free to use, transfer and dispose of their possessions and enter contractual and other agreements as they please with very few restrictions or regulations, so long as they do not violate others’ rights. The amount of “legitimate” coercive force needed to enforce this system of robust laissez-faire property and contract rights, and the legal obligations and burdens that such a system imposes upon everyone (the poorest especially) expected to comply with its demands, generally is quite substantial. But this fact does not (seem to) factor into estimations of how much net or individual coercion exists in classical liberal society.

For these and other reasons, efforts to justify laissez-faire and classical liberal capitalist rights and liberties by appealing to the idea of “reducing coercion as much as possible” are misguided. However inspiring the idea might be, the primary aim or outcome of a liberal society cannot be to minimize *de facto* coercion. Moreover, the idea of minimizing *illicit coercion* has little content apart from an independently justified system of rights and liberties that warrant the use of legitimate coercive force. I am skeptical that the popular ideas of liberty as non-interference or liberty as absence of coercion are capable of justifying any particular system of economic rights and powers.

3. Hayek, Friedman, and others also contend that only extensive freedom of contract and related economic liberties and rights to productively use property as one chooses guarantees the fullest degree of free, voluntary cooperation and “coordination without coercion” of individuals economic activities.¹⁶ Laissez faire purportedly

¹⁶ Friedman appeals to this idea in *Capitalism and Freedom*, pp. 13, 113.

involves less interference with individuals' voluntary interactions and with their free choices than do more qualified property systems weighed down by economic regulations and restrictions on contracts, economic exchange, and property rights.

Grant that laissez-faire involves *greater freedom between the parties to economic exchange*, and Pareto improvements (normally) to each of their positions. This says little about the good or bad effects on the freedom and well-being of everyone who is not party to their free exchange, especially those who may be disadvantaged by it. Simply because contracting agents mutually benefit from economic exchanges does not mean that everyone else does or even that most people do.¹⁷ Likewise, there is no clear correlation between greater economic freedom between economic agents and less overall coercion or coercive interference with other individuals' lives. Impoverished people, who own little more than their labor power have *greater formal freedom of contract* in a laissez-faire system than do people who are marginally better off in a society where contracts are more regulated; but this does not imply that there is less coercive interference or greater freedom from interference overall in the laissez faire society. It only implies that there is greater formal freedom of contract. Finally, it is noteworthy that Friedman's arguments for maximizing voluntary cooperation through greater freedom of contract come in the context of arguing *against* the involuntary cooperation mandated by 1960's civil rights acts, which prohibit public accommodations, merchants, and employers from refusing to serve or employ racial, ethnic, and religious minorities. Friedman fails to mention the

¹⁷ This is true, even if we assume that *most* people benefit from living in an economic system of free economic contract and exchange, and that they are better off than they would be in any other economic system.

effects of a white majorities' contractual freedom of racial, ethnic and religious discrimination on the fair opportunities and prospects of these minorities, or on their equal social status and sense of civic self-respect.

So the question remains: Why is greater formal freedom of economic contract of such great importance, *regardless* of its effects on individuals' effective exercise of all other freedoms, their opportunities and welfare, and their sense of self-respect? Is there a reasonable answer here that can be grounded in individual freedom, independence, autonomy, non-domination, or related liberal values?

4. I've claimed that the idea of minimizing coercion seems to be a secondary notion, and is not really what is at issue in philosophical disputes over the scope and extent of property rights and economic justice. Perhaps there is a way to avoid assigning secondary if not inconsequential status to the value of non-coercion, by developing an interpretation of coercion that justifies a system of robust personal and property rights and liberties which in turn are normally appealed to in order to justify the use of legitimate coercive threats and force necessary to repel illicit coercion. I will discuss this "bootstrapping" argument in the next section.¹⁸

But first, though Hayek says that coercion should be "reduced as much as possible," it should be clear by now that he is not really concerned with minimizing de facto acts or threats of coercion per se. Instead, Hayek says what is called "individual" or "personal freedom" is "the state in which a man is not subject to coercion *by the arbitrary*

¹⁸ The argument is bootstrapping since, in order to justify the claim that, "a system of laissez-faire or libertarian rights reduces coercion as much as possible"--even in the face of widespread opposition by individuals and stringent coercive enforcement of such rights-- appeal is made to the idea of minimizing coercion to justify these same laissez-faire rights and liberties.

will of another or others.” (CL p.11) Being subject to other’s “arbitrary will” means that one is subject to coercive threats or acts that require one to serve others’ purposes, and not one’s own. So understood, freedom is not (Hayek says) dependent on the range of choices or options a person has, so long as another has not manipulated the circumstances to make her act according to the other’s will rather than her own will. (CL p.13)

This feature of Hayek’s position suggests that an essential aspect of freedom as non- coercion for Hayek is *individual independence*, in the sense of “independence from the arbitrary will of another.” (CL p. 12) In this regard, Hayek’s account bears *some* resemblance to the liberal value of individual independence found in Mill, Rawls, and other high liberals, and also to the republican ideal of “freedom as non-domination” in Philip Pettit, Quentin Skinner, and others. But Hayek’s account of freedom, understood as not being subject to others’ arbitrary will, is nowhere near as extensive as the high liberal account of personal independence or republican non-domination. For Hayek freedom as independence of another’s will is not dependent on the range of choices or options a person has. A person may have no alternative choices; nonetheless, so long as another (such as his employer) has not manipulated him or his circumstances so as to make him act according to the other’s will, he is free and independent.

For high liberals by contrast independence from others’ arbitrary will requires not simply the absence of manipulation by others, but also the mitigation of arbitrary *contingencies* (of nature, social class, and brute bad luck) so that one is not liable to being taken *unfair advantage of* by (the will) of others. The problem with Hayek’s idea of economic freedom is that it fosters exploitation, if not in Marx’s sense (extraction of surplus labor value), then surely in the sense of others’ taking unfair advantage of

arbitrary contingencies and one's misfortune in employment and other circumstances. Not being subject to others' arbitrary will should require the absence or at least mitigation of the arbitrary contingencies of nature, social class, and misfortune. This in turn requires *economic independence* and self-sufficiency. Independence from others' arbitrary will then requires not simply formal rights to hold property and freedom of contract, but also that individuals have sufficient economic resources and educational opportunities to pursue a wide range of activities and ends that they have freely chosen or endorsed. Otherwise, not only can they not effectively exercise their liberties, but also they are subject to being taken unfair advantage of by the (arbitrary) will of others, including their employers. Avoiding this, again, requires rights to a guaranteed social minimum and other social benefits (education, health care, worker safety rights, etc).

IV. Hayek's Bootstrapping Argument:

For Hayek, private property in personal possessions and productive resources is ultimately justified since it is necessary to prevent the coercion of individuals by one another. Without the guarantee of exclusive possession and use of material things, individuals cannot be independent of others' arbitrary coercive interference. Each person then must be able to secure a protected "private sphere" for himself where he/she is not interfered with; private property is a necessary condition for this coercion-free private sphere. But property itself requires coercion. This is legitimate however when necessary to protect property and therewith prevent coercion according to others' arbitrary will.

The idea that coercion is justified so long as needed to offset coercion that violates individuals' (fundamental right of) freedom is found in Kant, and is his primary justification for the State. Hayek's argument parallels Kant, though he changes the

storyline. For Kant, the State has the necessary role of legislatively specifying as well as enforcing the rights of property needed to maintain individuals' freedom. This seems to leave wide latitude for the State to specify the institution of property so that a basic right to a social minimum is guaranteed, perhaps even according to egalitarian principles such as Rawls's difference principle. For Hayek, by contrast, private property is prior to and independent of the State's legislative specification of it. Though not a natural right in Locke's sense, it is the product of social customs and conventions that gradually evolve through individuals' free interactions that take place prior to, or at least independent of the State. The State is only needed to clarify and enforce pre-existing and evolving property conventions. Hayek, unlike Kant and the Civil Law tradition, has little confidence in relying upon the exercise of legislative power to specify rights of property or regulate its use and exchange. Instead Hayek regards judicial refinement of property norms via common law precedent to be the condition of a "free society."¹⁹

There are of course different ways to specify the institution of property, or for it to conventionally evolve, which could serve the role of reducing arbitrary coercion by others. Why should private property as traditionally conceived in 19th century common law, with "full" if not laissez-faire rights of use, transfer, and income, serve this role better than more qualified rights, or for that matter better than publicly owned property with rights of use for definite terms? Hayek sometimes just seems to take full capitalist rights of use and transfer as a given, as if the institution of property and contract could not be designed in any other reasonable or efficient way compatible with individual freedom. Building on Hume and Smith, he regards full property and contract rights as

¹⁹ This is the main argument of volume I of *Law, Legislation, and Liberty*, entitled *Rules and Order*.

the product of the gradual evolution of conventional social (including legal) norms of justice that are implicit in the cooperative interaction of people, and which come to be affirmed and refined by judicial resolution of disputes that set precedents in common law. But unlike Hume, Smith, and other classical liberals he does not ostensibly appeal to public utility or even primarily economic efficiency (with a few occasional exceptions) to justify a capitalist property and market system. Instead he appeals to individual freedom, understood as *the absence of coercion*, and assumes that the evolution and maintenance of a system of full property and contract rights involves *greater freedom* in this regard -- less coercive enforcement and less arbitrary interference by the State --than do other more qualified systems of property. He seems to rely also upon the fact that full and laissez-faire property rights give *owners* greater freedom to use and transfer their rights in things without government interference, and *assumes* that this is a net increase in individual freedom for all.

There seem to be three lines of argument here. First, there's the claim that private property is necessary to minimize (de facto) coercion of individuals by one another, and by the State. Second, a system of private property which is unplanned and gradually evolves over time—which he calls a “spontaneous order” that mimics the “invisible hand” of the market--and that is reinforced and refined by the common law, is not only better able to incorporate effectively the “tacit knowledge” of many individuals than a planned or legislated system could; but also *because* it incorporates longstanding customs and social practices that are ingrained in individuals' habitual interactions, it involves *less coercive enforcement and interference* with individuals' lives, than do property measures involving legislative imposition of a property system, or even new

property rules. Third, laissez-faire rights of property, contract and other economic liberties involve less interference with individuals' lives and relationships than do qualified property systems weighed down by regulation and restrictions on the uses of propertied possessions.

The first claim, that private property minimizes coercive interaction, is again Kant's primary justification for the State, as necessary for a stable property system. Even if we accept Kant's and Hayek's claim-- that a private property system guaranteeing exclusive possession mitigates coercive interference—this does not itself favor any particular private property system, whether full or qualified, and surely not the system of laissez faire. For as we've seen the amount of coercion needed to enforce norms of property largely depends upon individuals' acceptance of these norms and the system of distributions it engenders. Hence whether the system of laissez faire or full private property rights reduces coercion more than a more qualified system depends upon culture and whether members of society are more likely to accept laissez-faire property vs. some more qualified system. Hayek himself says that so long as the laws of property and other laws are publicly known, impartially applied, and conform to other requirements of the rule of law, people then can predict the consequences of their actions if they observe the laws; we then “never need to be coerced,” and indeed seem to have no reason to contend that our conduct is coerced by the laws. Of course taxation is “in some respects” coercive, but since it is predictable it is deprived of “the evil nature of coercion.” For we can still follow our life plans independent of the will of others and the State.²⁰ Unless Hayek is just taking a background of full or laissez-faire property rights

²⁰ The Constitution of Liberty, chap. 9, sects. 7-8, pp. 142-143.

for granted when he makes these statements, the implication is that no particular property system, whether full or qualified (within a certain range), follows from the liberal mandate that the State should minimize coercion.

So why does Hayek think that full or laissez-faire property rights and economic freedoms minimize coercion? What is the implicit argument he assumes to justify full or laissez-faire property? Here's a reconstruction of what seems to be his argument:

Assume that some form of private property in personal possessions and productive resources minimizes coercion by the "arbitrary will of others." Grant that there are different ways to specify private property systems with rights of use, transfer, income, etc. more or less qualified, and all of these systems require coercive enforcement, which varies according to the degree of acceptance by members of society. Also, assume that once a conventional private property system has evolved and is in place and secured by (common) law and legal enforcement, then each individual is protected from the interference by the arbitrary will of others. The coercive authority that is needed to enforce such rights against others, including taxation, is legitimate since it is coercion according to law and not according to anyone's private will. In that event arbitrary coercion by others is substantially reduced, if not minimized.

Now, let's also assume that once any property system is in place and its rules are generally accepted, freedom can be expanded and coercion can be reduced even further. For the aim of a free society is not only to minimize coercion of individuals by one another, but also to minimize interference and coercion *by the State* itself. Hence, everyone should be able to do with his/her propertied possessions and enter into

economic contracts as they choose, since this affords to all who enjoy such rights *greater freedom from interference by the State* to live according to their freely devised plans. The aim of minimizing coercion applies then to otherwise legitimate coercion by the State in so far as that can be any further reduced than it already is. *Therefore*, minimal coercion requires that the State also minimize its regulation of and interference with the exercise of recognized property rights and rights to transfer property rights to others, as well as minimize (coercive) taxation of income and wealth, except when needed to maintain the rule of law. But this should yield classical liberal economic liberties and property rights.

If this is a correct reconstruction of Hayek's assumptions, then the argument has the redolence of a "bait and switch." For the argument rests on the premise that the primary reason for the institution of private property and its coercive enforcement is to help each individual avoid arbitrary coercion *by other persons* so they can enjoy their "private sphere" and effectively control their possessions and pursue their life plans. Several different arrangements of property rights satisfy this condition, even a liberal socialist system so long as personal property rights are guaranteed. But once the institution of property is established then secured by the State, Hayek is no longer primarily concerned with *each individual* living his or her life free from the arbitrary coercion by other persons. That problem assumedly has been solved by the State, and Hayek's primary concern now switches to what is otherwise *legitimate coercion by the State itself* and with minimizing *State regulation and coercive interference* with respect to individuals' exercise of their *existing* property and contract rights. Minimizing *non-arbitrary State interference* (according to otherwise legitimate rules) with what individuals *themselves* can do with the things they have property in now becomes the

primary aim to be realized, *regardless* of the amount of purportedly “legitimate” coercive state interference that might need to be exercised *against others* in order to maintain *their* compliance with and sustain newly introduced laissez-faire property rules.

An example: prior to the 17th century, much land in England was “Common land,” open fields that were collectively used for grazing and crop rotation by peasants under the supervision of a “lord.” Because of longstanding custom, everyone accepted this practice and the free movement of one’s person and livestock across pathways over Common land. Starting in 1604, and continuing until 1914, Parliament enacted over 5200 Enclosure Acts enclosing 6.8 million acres of land--laws which prohibited such free use and movement, much to the detriment of peasantry and freemen whose livelihoods were seriously affected. Many (including Hayek) would argue that enclosures allow for more efficient use of the land, and increased total welfare in society. Perhaps this was true in the long term. But Hayek (also) would claim that enclosure *increased the freedom of the landed classes* to do as they please with “*their*” landed estates, giving them fee simple absolute control over “their own” landed estates. But, as is so often the case with landed possessions, increasing one person’s (or one social class’s) freedom and options comes at the expense of restricting the freedoms and options of a far greater number of persons. In what sense then has coercive interference with individuals’ lives by others or by the State expected to enforce these provisions been reduced in this case? It appears that just the opposite has taken place in this and similar cases.

So the question for Classical liberals and libertarians is: *Why is coercion by the state to enforce the laissez-faire system a legitimate exercise of political power, no matter the amount of popular opposition or coercive force required, whereas state coercion that*

qualifies, regulates and restricts the exercise of laissez-faire rights is illegitimate and arbitrary? How does laissez-faire “minimize coercion,” whether de facto or morally legitimate coercion? What does minimizing coercion have to do with laissez-faire rights and liberties to use and control land and possessions and enter contracts without regulation or restriction, especially if for productive purposes? The argument cannot be that laissez-faire reduces *overall coercion by the State* more than does qualified systems, since that may well be empirically false. The fact that it minimizes *coercive interference of owners* of property, to do with their possessions as they choose, is beside the point when others’ rights, freedoms, and well-being are adversely affected. Under laissez-faire owners are given property rights they otherwise would not have often at the expense of others’ rights and welfare (as in Enclosure laws). To give owners greater freedoms under laissez-faire says nothing about whether overall coercion of members of society by the State is decreased, or whether it is increased. If the argument is that putting laissez-faire property rights into place and coercively enforcing them against an unwilling population reduces *illegitimate* coercion by the State, then this begs the question--by assuming that only laissez faire property rights are legitimate. This is what Hayek’s bootstrapping argument is supposed to prove. .

This clarifies the peculiar sense in which laissez-faire property and contract rights seem to come out of nowhere in Hayek’s and many other classical liberal and libertarian arguments which claim laissez-faire rights are necessary to “minimize coercion” or “maximize freedom.” There is a crucial shift of emphasis and direction in the course of the argument, which goes (1) from preventing arbitrary coercion by other individuals through the State’s legitimate coercive enforcement of property rights, to (2) preventing

the coercive authority of the State itself to interfere with or regulate the exercise of alleged property or contract rights. The argument begs the question by assuming that it is illicit or illegitimately coercive for the State to interfere or regulate what individuals do with the possessions they have property rights in, rather than State regulation being instead a legitimately coercive restriction on conduct that these same individuals do not have a right to perform in the first place. It comes down a specification of the rights, powers and liabilities that attend property and ownership. Imposing laissez-faire rules in order to minimize coercion against owners is often nothing more than awarding them property rights that they did not have initially, and involves taking away from others or from members of the public rights and claims they have long enjoyed. If individuals have qualified rather than laissez-faire rights and liberties in things to begin with (such as environmental restrictions on land use, or public easements) then it cannot be that the State's coercive interference with owners' freedom is arbitrary or illegitimate. Rather, it is often owners' attempts to use or control or transfer possessions in ways they are not entitled to that proves illicit. They do not have full property rights to use or transfer possessions in just any way they choose, just as a trustee, or lessee, or bank teller do not have such rights with respect to the assets they possess and are in control of. But if not, then it cannot be argued that government regulation and restriction on use and control of things amounts to illegitimate coercive interference with individuals' freedom.

I've raised the question: How do laissez-faire measures minimize coercion or provide each with a sphere of personal independence, given the alternative of more qualified market systems with property rights in a social minimum? Of course the taxation that is needed to sustain rights to a social minimum may need to be coercively

enforced if people do not regard it as justified; but so too is coercion needed to sustain property rights within the system of laissez-faire. It cannot be said that that the coercion needed to sustain either system is arbitrary or illegitimate without further argument. It's the claim that one form of coercion (regulations by the State directed at land and factory owners, for example) is "arbitrary" whereas the other (coercion by the State against newly minted "trespassers" and "vagrants") is "legitimate" that is at issue here. What is behind these distinctions between arbitrary and legitimate coercion, if not the unjustified assumption that *only* laissez faire or full property rights are legitimate? The argument here cannot be that de facto coercion is greater in a system of qualified property rights with a guaranteed minimum than it is in a laissez-faire system; indeed the empirical facts seem to support the opposite conclusion, since with a guaranteed minimum there should not be the magnitude of poverty that breeds disrespect for laws and the pressing need for laws' constant coercive enforcement.

Finally, in what sense would a guarantee of substantial basic minimal income increase "arbitrary" coercion rather than lessen it? Of course there is coercive taxation needed to pay for it--if people object to paying taxes for a social minimum--but then there is also taxation needed to coercively enforce laissez-faire property rights against those with few resources. If reducing overall coercion is the aim, then one must look at the coercive force needed to protect laissez faire property against theft, etc., including imprisonment, the consequences of poverty on the crime rate, and other factors, before concluding that laissez-faire systems involve less de facto coercion than liberal systems with a guaranteed minimum. Reducing the sum of coercion here seems to be in favor of a qualified system with a social minimum.

V. The Argument for Economic Liberalism from Social Convention

1. Now to turn to another range of considerations Hayek relies upon to support economic liberalism and the laissez-faire property system.²¹ Kant contends that the State plays an essential role in exercising legislative authority to institute and specify the complex rights, powers, and other incidents of property. Hayek departs from Kant here and, following Hume and Adam Smith instead, argues for the gradual development of the “conventions of justice,” of property, contract, and markets and other transfers by consent. These conventions originate in social practices largely independent of government, he claims, and are “discovered” and articulated by common law judges who resolve disputes among individuals as they arise.²² The rules of property, contract, and consensual transfers that emerge from the judicial process become incorporated into the common law, as judges clarify and refine the rights and duties implicit in existing customs and social conventions. This “spontaneous process of growth”(88) of rules and precedents in common law is not governed by design or external purpose. Nonetheless, as in free markets, values of freedom, efficiency, welfare, and equality before law are combined and evolve into a “spontaneous order” that arises “as if by an invisible hand.”

Legislative power, by contrast, involves consciously adopted general purposes, social planning, and often the indiscriminate disruption of conventions. Legislation is needed sometimes to adjust judge-made law or reverse long lines of precedent so that law can adapt to changed circumstances. (LLL, I: p. 88f) But more ambitious legislation assumes knowledge of an enormous amount of information that legislators do not and

²¹ This is largely developed in Hayek’s *Law, Legislation, and Liberty: Volume I, Rules and Order*, U. Chicago, 1973.

²² (LLL, vol.1, p. 83, 85)

cannot possess, about facts regarding individuals' motives, preferences, circumstances, habits, etc., and has unintended consequences normally worse than the problems legislation was designed to address. Hayek argues for the greater effectiveness of non-legislative intervention and the gradual evolution of customs and the common law of property and other conventions of justice.

Hayek also claims that legislative change of existing customs often involves the threat of widespread coercive enforcement by the State because of disruption of habitual conduct that complies with conventional norms. (The question whether legislative change might involve less coercive enforcement of new property rules and economic regulations than does enforcement of the status quo is not addressed.) Assuming the inefficiencies and greater potential coercion of legislative change, Hayek's thought is that the gradual evolution of property conventions--refined by the judiciary on a case by case basis that sets precedents in common law--preserves the accumulation of "tacit knowledge" already implicit in complex conventional practices, and minimizes state coercion. Rather than legislative specification of property, Hayek would leave the specification of the incidents of property largely up to existing conventions, where individuals freely interact and transfer property rights via market relations according to their own contractual terms, with judges settling disputes when necessary and setting precedents regarding rights and responsibilities. Liberty flourishes, he contends, only where judge-made law predominates over legislation, whether democratic or otherwise.

The "Invisible Hand" thus does double duty for Hayek: it guides the allocation of productive resources and distribution of goods and services within the market system, as Adam Smith averred; and it also determines the evolution of property rules and other

legal conventions that provide background for the market economy and determine the distribution of income and wealth. Since existing conventions of property and free exchange are generally acceptable to members of society, coercive interference with their cooperative endeavors purportedly are minimized in both instances, with the added benefit that the implicit social knowledge of the members of society is efficiently integrated into the economic outcomes as well as the structure of social conventions.

Conservatives are normally critical of ideal theory because it ignores and misrepresents the social world as it exists and requires changes that interfere with longstanding customs and ways of life. But Hayek's account of the "spontaneous" origins of the "conventions of justice" is itself (like Hume's) an exercise in ideal theory: It is romanticized Whig history of how property, contracts, markets and other conventions essential to economic liberalism could come about within a "free society" of people who are willing and able to cooperate without coercion, and are conveniently left undisturbed by rampaging tribes, armies, famines, plagues, and by the State itself. In this way, Hayek's account resembles Nozick's and other *ideal historical process views*.²³ But unlike Nozick, Hayek allegedly does not presuppose that property is pre-social or originates fully formed independent of social cooperation and society. Still on his account social recognition and acceptance of others' rights of possession, use, transfer, and disposal of things arises pre-politically and spontaneously in the absence of interference by government, as a result of social interaction and economic cooperation, and without need of legislative institutions to specify or even certify property and other

²³ Rawls contrasts Locke's and Nozick's "ideal historical process view" of entitlements with his own "ideal social process position," which focuses on the basic structure and seeks to maintain "background justice" via the difference principle. *Justice as Fairness: A Restatement*, p. 54.

economic conventions. The role of government is then mainly to resolve disputes and conflicting claims, setting forth rules as precedents that clarify and refine conventional rules of property and transfers by consent, and coercively enforce these when necessary. This is what constitutes “justice” on Hayek’s account, which he contrasts it with “the mirage of social justice” endorsed by left-liberals and socialists.

Hayek’s appeals to Adam Smith’s “invisible hand” and the accumulated social knowledge that is implicit within social conventions, is more credible when applied to the problem of the efficient allocation of economic resources and distribution of goods and services. It becomes suspect when appealed to in order to justify the “spontaneous order” that is the purported outcome of evolving conventions of property, contract, and markets and other consensual transfers, and market distributions of income and wealth. The common law is not necessarily more compatible with individual freedom than is legislative change. There was a common law of slavery developed in Britain from early Medieval times, without Parliamentary action or interference, which was adopted by the American Colonies and incorporated by states after the American Revolution.²⁴ It was not common law judges that finally outlawed slavery in Britain and its colonies; judges upheld the common law system of servitude and several acts of Parliament were required

²⁴ For example, in *Butts v. Penny* (1677) 2 Lev 201, 3 Keb 785, an action was brought to recover possession of 100 slaves. The court held that slavery was legal in England in relation to infidels and that an action for “trover” or recovery “would lie” or be legally valid. See, 'English Common Law, Slavery and,' [Encyclopedia of Blacks in European History and Culture \(2008\)](#), Vol. I, pp.200-203. [<http://www.mirandakaufmann.com/common-law.html>] Also, ‘African Slaves and English Law,’ <https://archive.lib.msu.edu/DMC/.../pdfs/PULA/.../pula003002007.pdf> and ‘Slavery at Common Law,’ https://en.wikipedia.org/wiki/Slavery_at_common_law

to abolish it, including the 1807 abolition of the African slave trade, and the Slavery Abolition Act of 1833.

Judicial decisions at common law are no more prone to preserve individual liberty, or economic justice, than are the customs that the common law (allegedly) incorporates and refines into law. Common law adjudication preserves the status quo, which is why conservatives regard it as preferable to legislation as a source of law. But the justice and liberty purportedly guaranteed by adherence to the common law can be no greater than the justice of the customs, rules and conventions that the common law embodies. The fact that existing legal institutions express established ways of doing things does not make these customs just or liberty-preserving. The problem with the conservative idea of justice Hayek endorses is that it applies only to assess individuals' actions and their conformity to existing law and social conventions. It cannot be applied to critically evaluate the justice of states of affairs or laws and conventions themselves, except in so far as these states and laws are incompatible with existing legal institutions. This limitation cripples Hayek's and other conservatives' ability to critically assess injustices inherent in the status quo or to recognize the unjust consequences laws can create.

Hayek is not a traditional conservative concerned with preserving longstanding traditions, social hierarchy, and religion, maintained through the power and authority of the state. He is rather primarily concerned with justifying a system of robust economic liberties, whether it comes about through the ideal historical process of evolution of conventions that he, Gerald Gaus, Roger Scruton and others imagine, or is the product of wholesale legislation after the collapse of a former socialist or other non-capitalist

system. The point of preferring judge-made common law to legislation is primarily to preserve or reinstate economic liberties that were in place prior to the Great Depression and to defang democratic legislative interference with and redistribution of market outcomes that began with the institution of the welfare state.

If this is a correct assessment, then the conservative appeal to the evolution of social conventions and norms is largely a distraction. It is not just any set of conventional norms that Hume, Hayek, Gaus and others seek to justify with their idealized reconstruction, but rather the background conditions of full capitalist society. Whether that system is arrived at by mimicking the ideal historical process of an evolving “spontaneous order,” or by the collapse of a planned economy and radical capitalist revolution imposed from above ultimately is beside the point for them. But this leads one to question whether appeals to preserving “tacit knowledge” implicit in custom, and respecting the evolution of social conventions of a “spontaneous order” of full property rights within a laissez-faire economic system, is really doing much work in the end.

Part Two: Neo-classical Liberalisms of Freedom: Gaus and Tomasi

VI. Gaus on Coercion and Classical Liberalism

Gerald Gaus argues that a liberal requirement of public justification of coercive laws tends to support, or “tilts” towards classical liberalism.²⁵ Briefly, his argument is that among free persons, there is a presumption of liberty and a presumption against coercion: the state may coercively enforce laws only if they are justifiable to all (not

²⁵ ‘Coercion, Ownership, and the Redistributive State: Justificatory Liberalism’s Classical Tilt,’ *Social Philosophy and Policy*, 2010: 233-275. The arguments here are repeated in Gaus’s 2011 book, *The Order of Public Reason*.

unreasonable) persons in a liberal society. A law is justifiable *to* a person, for Gaus, only if he/she could accept it on grounds of reasons that stem from his/her *own moral beliefs about justice*. This is a very stringent requirement, since Gaus assumes that in a liberal society even under rather idealized conditions, there will inevitably be, not only disagreement about religion and values that constitute a good life, but also disagreements about morality and justice. This means that people will have different conceptions of political and economic justice and that *any one person* can defeat or veto a law that she believes unduly restricts his/her liberty, if the law is incompatible with moral reasons of justice he/she does not accept. For example, a person who believes, even falsely, that economic distribution is based in desert and that markets reward people according to what they deserve, can defeat any redistributive program that guarantees a right to public assistance. As Gaus says of Betty, a “Member of the Public” who believes in “a strong principle of desert”:

her concept of desert is a sufficient reason to reject the right of assistance. If the concept of desert is a defeater in any Member of the Public’s evaluative system for the right, then the right is not publicly justified.”²⁶

The account of public justification that informs Gaus’s argument, though ostensibly based on Rawls, is very different from Rawls’s position. Briefly, what Gaus calls “public justification” is not justification in terms of public reasons in Rawls’s sense, which are reasons responsive to the fundamental interests of free and equal democratic citizens. Instead “public justification” for Gaus is the authorization for individuals to

²⁶ Gaus, *The Order of Public Reason*, p. 363. Gaus assumes that in a liberal society, there will be a diversity of moral conceptions of justice; he then rejects Rawls’s ideal of a well-ordered society in which all reasonable persons agree on the same liberal conception of justice, or at least on a narrow range of conceptions, all of which guarantee fair equality of opportunity and a substantial social minimum.

appeal to their own *personal reasons about justice* to defeat a public conception of justice that everyone else otherwise may reasonably endorse--with classical liberalism winning out by default, as discussed shortly. These are the consequences Gaus draws from his requirement on public justification, that the presumption of liberty can be overcome only if everyone whose liberty is constrained by a law accepts the coercive constraint on grounds of the personal reasons they endorse regarding justice.

Gaus contends that public justification so conceived “tilts” in favor of classical liberalism and its conception of strong property rights and economic liberties, since classical liberal property rights are allegedly less coercive than more “redistributive” conceptions, such as Rawls’s difference principle or more egalitarian views. Everyone in a liberal society who is not irrational or unreasonable presumably can accept *some* conception of private property rights and a free market economy, as opposed to none at all. But we rank the acceptable conceptions of property and economic liberties differently, according to our own particular views regarding justice and the importance of individual liberty compared with social and individual welfare and other values. But because liberty can be coercively restricted only if everyone accepts the restriction for their *own particular moral reasons*, advocates of non-redistributive classical liberal property rights will object to more redistributive schemes, on grounds that they are more coercive the higher the rate of taxation that is needed to realize them. Of course, advocates of more redistributive schemes (including the less advantaged) will prefer redistributive property systems sanctioned by the difference principle, luck egalitarianism, restricted utility, prioritarianism, or some other redistributive principle. But their opposition (in the form of the low ranking they assign) to the classical liberal

property system can only “defeat” it if their preferred qualified property system involves less coercion than does the classical liberal scheme. And how can this be? After all qualified redistributive property systems must be sustained by a higher rate of taxation, and according to Gaus, the *higher* the rate of taxation, the *more coercive* the system—presumably because the more taxpayers are forced to transfer the more they object to the forced transfer. For this reason, classical liberal property involves less coercion than more redistributive schemes, and hence better satisfies Gaus’s presumption of liberty.

There are several problems with this argument.

First, Gaus contends that higher tax rates, of 80% for example, increase the costs of a wide range of market activities and therewith close off more options for those who pay the tax; for this reason, they are more coercive than are lower tax rates (of 20%). He says, “Of course, one still *can* engage in these [market] activities if one is willing to pay the 80 percent, but it is equally true that one still *can* engage in criminal activities if one is willing to pay the penalties.” (p.265)²⁷ Now on one reading of this argument, Gaus might be assuming that individuals either have, or at least believe they have, complete rights to the income that they receive, and that to tax their income is therefore unjustly coercive, or at least is experienced as such. But if we assume that individuals do not have complete property rights to the income they receive, then what can be unjustly coercive about a fair rate of taxation, even if experienced as such? Assume that a 50% tax rate on income over \$250,000 is just. If so, there’s nothing unjustly coercive about requiring a person to pay that amount, not any more than it is unjustly coercive to require the bank teller or debt collector to turn in the cash in his

²⁷ ‘Coercion, Ownership, and the Redistributive State,’ p. 265.

possession that he collects each day. The fact that either party *experiences* the just tax as unjust and feels coerced is irrelevant. To assume otherwise is to beg the question about the extent of individuals' property rights in income they receive by market transactions and gifts and bequests.

Here Gaus might reply that he is not begging the question or making any assumptions about a just rate of taxation, but that instead he only makes the empirical assumption that in any market system, economic agents are prone to have the belief—regardless whether it is true or false—that they indeed do have complete or substantial rights to the income they come to possess by market transactions and gift and bequest. This is say that “common sense libertarianism” (as Liam Murphy and Thomas Nagel call it) is a fact deeply engrained in human nature. Given these empirical facts about human nature and the beliefs fostered by market economies, the presumption of the correlation of increased taxation with increased (sense of) coercion holds true.

No doubt if economic agents *believe* they have complete or very substantial rights to income --just as if they believe they own stolen money bequeathed to them-- they will experience as coercive the legal deprivation of any part of that income, for they believe the transfer is unjust. But many people do not believe, even in our capitalist economy, that they have a full rights to all the income they obtain by market transaction or by gift and bequest. What feature of human nature would incline people to believe that they have a legitimate claim on *all* income generated by their contributing their labor or propertied possessions to market activity, with no duty to pay their fair share of taxes to maintain the economy or system of property itself? Surely even if people did generally believe that, then it would be at most a peculiar social fact that results from living in a classical liberal

or libertarian capitalist society and frequently being reminded that everyone has such extensive rights. Moreover, even if it *were* true that people were naturally inclined to this belief in market systems and as a result they experienced all taxation as illicitly coercive, why should that empirical fact decide the issue of how much indeed people have a *moral right* to as a result of contributing their labor or propertied possessions to economic activity? People also may experience having to respect others' property rights as coercive, but that's not a reason not to require them to respect others' legitimate property interests. So it is not clear why the fact that the more advantaged experience taxation as coercive is an argument against a redistributive property system, unless it is assumed beforehand that any such system is unjust (the question begging approach). Otherwise, perhaps they should just accept redistribution for what it is—the transferring of what they do not have a right to—just as everyone else accommodates themselves to others' claims in any property system.

Gaus contends that it is coercive to close off the options of the more advantaged by taxing their income.²⁸ He quotes Feinberg, who says: “The interest in liberty *as such* . . . is an interest in having as many open options as possible with respect to various kinds of actions, omission, and possession.” (Gaus, p. 262) But closing off the options of the more advantaged is only part of the story. It is true that, assuming they have a complete right to all their income, having to pay more in taxes limits options for those who have to pay the tax; but then if they do not have a right to all their income, taxation of the amount they do not have a right to cannot be said to limit their options. In any case, however we

²⁸ “Coercive laws restrict freedom by rendering options considerably less eligible as choices; as the law renders a larger set of options less eligible this way, it is more coercive and its costs to liberty increases.” Gaus, *ibid.*, 262.

conceive individuals' rights to market income, if taxes on income are spent by the government for public goods such as infrastructure or increased educational benefits, or for public assistance, then the effect of taxation can easily be a net *increase in the options* of those who are the beneficiaries of taxation, and especially for the poor who have very limited options to begin with. This fits with Feinberg's claim, that "the interest in liberty *as such* . . . is an interest in having as many open options as possible." But as we've seen, for a classical liberal like Gaus to define increases or decreases in liberty in terms of having greater or fewer options is a precarious move--(a fact Hayek is aware of when he insists that the poor beggar who has virtually no options is just as free as the wealthy man). For by redistribution and raising the social minimum we can rather easily increase the net gain to options for the less advantaged, while only moderately limiting the far greater number of options already available to the more advantaged.

Gaus argues that, "As a rule, we should expect that increases in taxation (and generally the redistributive activities of the state) will be strongly positively correlated with increases in coercion." (p.265) The problem with this is that it only focuses on the purportedly coercive effects on the more advantaged who pay the tax, while simply ignoring the coercive effects of enforcing a classical liberal property system (or any property system) on the less advantaged, and especially the poorest who do not have adequate means to effectively exercise their freedoms or even live a decent life. Why is Gaus only concerned with coercion of the more advantaged? If we can assume as Gaus does that increasing taxation corresponds with increasing coercion, then we can also assume that any property system imposes greater coercive costs on people the poorer they are, and imposes the greatest coercive costs on the poorest who must scrounge for means

of survival. The fact that so many people who commit theft, trespass, and other crimes of property are poor is not an anomaly. An extensive private property system that excludes the poor from private spaces and possessions, minimizes the provision of public parks and other public spaces, arrests the homeless for vagrancy in all but the poorest neighborhoods, and provides only a minimal safety net, if any, surely coerces the poorest more than does any qualified liberal system of property that provides a greater social minimum and a wider array of public goods and services for everyone to enjoy.

Finally, whether a property system is more or less coercive depends upon whether members of society endorse its rules and the specification of rights, powers, duties, liabilities and the like that constitute it. In a qualified property system with a robust social minimum and a wide range of public goods, whose members accept as just or at least legitimate the property rules and resulting distributions, there is nothing intrinsically more coercive about redistributive taxation than there is in a classical liberal system with minimal taxation. For members of this society do not believe that they have a property interest in all the market income—or the marginal product-- that their activities generate. They believe they have property rights only to that income that is authorized by the principle of distributive justice relied upon to specify what people's property rights are. Assuming that citizens of all income types widely accept the property rules in the qualified property system that corresponds to the difference or some other principle, then they would not even regard it as “redistributive”— any more than we regard it as redistributive when a salesman, bank teller, or debt collector has to turn in the money she's collected for the day to her employer.

VII: Can Economic Liberties Be Basic Liberties?

I said earlier that since Adam Smith and the Classical Economists classical liberalism has been associated primarily with utilitarianism. As such classical liberalism is one of the primary forms of what Rawls called a “liberalism of happiness.” But Kant, Humboldt, Constant, and other continental thinkers argued for a kind of classical liberal position too, grounded in the claims that private property is a condition of individual freedom. They did not celebrate unregulated markets and laissez-faire, but still there is a strand of Romantic Idealist thinking that regards property as an extension of the self, and free economic activity as an important form of self-expression of one’s creative capacities.

John Tomasi’s *Free Market Fairness* (2012) aims to revive a Kantian classical “liberalism of freedom.” He adapts John Rawls’s Kantian constructivism and argues that it supports a classical liberal or liberal libertarian form of capitalism, not property-owning democracy or liberal socialism as Rawls advocates. Tomasi says: “the central moral claim of market democracy [is] that thick economic liberties are among the basic rights of liberal citizens.” (p. 121) I address Tomasi’s argument that thick economic liberties are a condition of realizing the moral powers of free and equal persons and should have the same exceptional status as do the basic personal and political rights and liberties guaranteed by Rawls’s first principle of justice.

For Rawls the basic liberties include liberty of conscience and freedom of thought and expression; freedom of association and the rights and liberties that maintain freedom and integrity of the person; equal political liberties, and the rights

implicit in the rule of law. Among the basic liberties related to economic activity, Rawls recognizes freedom of occupation, choice of careers and employment, freedom of movement, and a right to hold personal property as necessary to freedom and independence of the person. Presumably adequate freedom of contract is among the rights of personal property, since it is needed to obtain and transfer property rights, and also enter binding commitment to effectively exercise basic liberties. But Rawls explicitly rejects basic economic rights of both private and public ownership and control of means of production as well as laissez faire freedom of contract.²⁹ The definition and scope of these and other economic rights are to be determined and regulated by the second principle of justice, including the difference principle. Rawls later contends that extensive capitalist rights of property and contract, with the vast inequalities of wealth and social and political power they generate, are not protected by, but are indeed detrimental to many citizens' effective exercise of their basic liberties and fair opportunities.

Tomasi is much more optimistic about the consequences of unfettered capitalism, which he contends make everyone, even the least advantaged better off than Rawls's alternatives. But regardless, he contends the robust economic rights of property, contract, and exchange are basic since these freedoms are needed to effectively exercise our "capacity for self-authorship." He regards this capacity for autonomous self- definition and governance as similar if not identical with the "moral powers" that Rawls relies upon to justify and specify the basic liberties—including the capacities to form, revise, and rationally pursue a conception of the

²⁹ *A Theory of Justice* (revised ed. 1999) p. 54

good, and to understand, apply and act from principles of justice. Tomasi also contends Rawls underestimates the importance of thick economic liberties in providing the necessary background for a wide range of life plans to choose from and enabling individuals to exercise their capacities for self-authorship.

Tomasi's position supports, he claims, both laissez faire and "restricted welfare state capitalism." (pp.116-117) Like most classical liberals, he recognizes that governments (may) have a duty to meet the basic needs of people who cannot care for themselves, and regards this as compatible with basic economic liberties. He calls this position "democratic limited government" and says it resembles the views of Hayek and Friedman. There's no indication Tomasi would endorse a more extensive social welfare system, such as Northern European capitalist social democracies. The magnitude of government benefits would violate the "thick" economic rights Tomasi advocates.

II. Others have argued that full capitalist rights and liberties are equally important as personal liberties. Milton Friedman for example says that economic freedom is "an end in itself," "an essential part" of individual freedom, as well as being a "necessary condition" of political and personal freedom.³⁰ But Friedman is a consequentialist and can accommodate a pliable account of rights and liberties, stretching and contracting them as needed to promote greater overall wealth and utility. Tomasi by contrast aspires to imitate Rawls's Kantian conception of moral persons and the first principle of justice, which give a lexical priority to specified liberties that conflicts with consequentialism. A distinctive feature of Rawls's first

³⁰ Friedman, *Capitalism and Freedom*, ch.1, pp. 8-10.

principle set forth initially in *A Theory of Justice* is that, “the basic liberties can be restricted only for the sake of liberty,” meaning that “a less extensive liberty must strengthen the total system of liberties shared by all.” (TJ 266 rev.) Hence, basic liberties cannot be restricted for the sake of economic efficiency or to promote the general welfare, nor to increase economic advantages for oneself or the least advantaged under the difference principle. (TJ 475) ³¹

The effect of Tomasi’s rendering thick economic liberties basic is that this nullifies Rawls’s difference principle. If robust economic rights and liberties are put on a par with basic personal rights and liberties, and economic agents acquire property rights in market distributions and other consensual transfers, then the substantial transfers that Rawls says are required by the difference principle to enable *all* to effectively exercise their basic liberties and take advantage of fair opportunities are rendered unjust violations of others basic property rights and economic liberties. This would rule out not just a substantial social minimum, which Tomasi rejects anyway, but also publicly funded education and health care, and the provision of many public goods and services, even those that are normally endorsed by classical liberals to maintain the efficiency of economic markets. For it is the nature of basic liberties, as Rawls defines them, that they cannot be restricted for these reasons. Once laissez-faire or similarly “thick” property rights are made basic, it would be a violation of them to tax everyone to pay for public goods such as

³¹ In *Political Liberalism*, Rawls says that a “lexically prior principle requiring that citizens’ basic needs be met” is presupposed by the principles of justice, especially the first principle, since having one’s basic needs met is necessary for citizens “to understand and be able to fruitfully exercise those basic liberties.” (PL. 7)

infrastructure projects or public services such as public education, public health measures and health care, unemployment insurance, old-age pensions and other benefits endorsed even by classical liberals such as Hayek and Friedman. The fact that these benefits might be needed to enable citizens to effectively exercise their basic liberties and take fair advantage of equal opportunities—benefits covered by Rawls’s second principle of justice—would be irrelevant since the transfers of income and wealth required to maintain this level of benefits violate the basic property rights and expansive economic liberties Tomasi argues for.

More than this, it would appear to be a violation of Tomasi’s thick basic economic liberties even to legally forbid price collusion, agreements in restraint of trade, monopolies of crucial economic resources, and other practices that undermine efficient markets. Most regulations to control monopolies and otherwise maintain market efficiency would seem violations of basic economic rights and liberties. Moreover, government’s power of eminent domain, necessary to establish transportation and communication infrastructure (highways, railways, airports, electricity and telephone easements, etc.) would not seem possible if economic liberties were basic in Rawls’s sense, since basic liberties may only be constrained to “strengthen the total system of basic liberties”, which (for Rawls) does not include increasing the value of liberties (except the fair value of political liberties).

The problem then is that, in arguing that robust economic liberties be regarded as basic and on a par with personal liberties, Tomasi runs the risk that many measures now taken for granted even in a modern capitalist society to establish and maintain the efficiency of markets would not be permissible. This

conflicts with his endorsement of classical liberalism. Economic liberties were not given such extraordinary priority--even during the laissez-faire era prior to the Great Depression --that they could not be limited to maintain economic efficiency and provide essential public goods, sometimes even a limited social safety net. But by making the economic liberties basic in Rawls's sense, Tomasi, wittingly or not, argues for a kind of libertarianism that allows public transfers only if necessary to protect the security of persons and property.

In view of this, it is especially puzzling how Tomasi can say that his account of "free market fairness" indirectly satisfies the difference principle, since the least advantaged allegedly fare better under unfettered capitalism than they would under Rawls's property owning democracy. (Tomasi, 226-237) This puzzle is heightened by Tomasi's support for open borders, allowing workers freedom to migrate wherever they choose within a global capitalist system. (p.262) This is Panglossian Capitalism. While the poorest immigrants might fare better in the short run with open borders, the likely outcome for unskilled workers who already reside in Western societies is that their wages will be bid down to subsistence levels. This hardly satisfies Rawls's difference principle, or even the Pareto principle.

III. *Political Liberalism and the Moral Powers*: Rawls revised his statement of the first principle after *A Theory of Justice*.³² He substituted "equal right to a *fully adequate scheme* of basic liberties" for "equal right to the most extensive total system of basic liberties," in order to remove any suggestion that the aim of the first

³² "The Basic Liberties and their Priority," published in *The Tanner Lectures on Human Value* (1982), and as Lecture VIII of *Political Liberalism*.

principle is to maximize liberty, basic liberties, or exercise of the moral powers.³³ Rawls also contends that, because the exercise of a basic liberty (such as freedom of speech) is more important in some cases than others, the priority of the basic liberties is to be confined to the “central range of application” of a basic liberty, in realizing the “adequate development and the full and informed exercise of both moral powers.” (PL 333) Thus, whereas political speech, and scientific, artistic, literary, and cultural expression should have priority--since they are necessary to the full and informed exercise of the moral powers--advertising is not conducive to the moral powers’ exercise, and can be regulated or restricted when there are legitimate “public reasons” to do so. (PL 363ff.)

Rawls’s multi-tiered approach to freedom of speech and other basic liberties accords with liberal Supreme Court jurisprudence since the Warren Court era, though it is increasingly questioned by classical liberal justices.³⁴ Many classical liberals object to the tiered approach to basic and constitutional liberties, such as

³³ “The scheme of basis liberties is not drawn up so as to maximize anything, and in particular, not the development and exercise of the moral powers.” PL 332. The problem with the maximizing idiom he says is that it is purely quantitative and does not distinguish some cases (e.g. freedom of political speech) as more significant than others (e.g. advertising, or hate speech). Also it is satisfactorily applied only in the simplest cases—suggesting that it is difficult to make sense of the idea of maximum basic liberties in more difficult cases. (PL 331-332)

³⁴ For many years commercial speech was not regarded by the Court as protected by the first Amendment. The Court reasoned that the broad powers of government to regulate commerce must reasonably include the power to regulate speech concerning articles of commerce. In *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1975) the Court held advertising price information was protected, but not to the degree that political and other forms of speech are. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) extended this rule to advertising tobacco products in spite of its harmful effects on children.

freedom of speech, because it permits the demotion of commercial speech to less protection than political, scientific, artistic, and cultural expression. If economic liberties are basic, as Tomasi argues, then the regulation and restriction of advertising would be doubly problematic since it would infringe both free expression and economic liberties.

In response to the objections raised in the preceding section, Tomasi replies that Rawls's qualification of his priority rule—that it applies only to the central range of application of a basic liberty in realizing the moral powers—helps him avoid problems of his not being able to regulate basic economic liberties to avoid gross economic inefficiencies.³⁵ Tomasi now says that inefficient economic practices such as price collusion are not conducive to exercise of the powers of self-authorship, whereas extensive rights of private ownership and control of productive assets are, as are rights to a “very significant portion of [one’s] pretax income, and to make very substantial bequests.” Presumably these basic rights include individuals’ rights to accumulate unlimited wealth and own and control large corporate entities (such as Koch Industries, the News Corporation, Amazon, Facebook, and so on).

Tomasi’s claim that inefficient measures are not conducive to the exercise and development of the capacity for self-authorship parallels arguments, he notes, by Adam Smith, von Mises, Hayek, and others, that only in an efficient laissez-faire market economy can individuals fully realize their freedom and independence, fully exercise their capacities, and maximize aggregate welfare. But this is an empirical

³⁵ John Tomasi, ‘Reply to Samuel Freeman: Thick Economic Liberty,’ in the 2012 Symposium on *Free Market Fairness* sponsored by the blog *Bleeding Heart Libertarianism*, <http://bleedingheartlibertarians.com/2012/06/reply-to-samuel-freeman/>

argument about the beneficial effects of laissez-faire, not an argument about the relationship of laissez-faire to the development of Kantian capacities for practical reasoning and self-authorship. It is rather the invisible hand argument generalized to include the unintended promotion of most liberal social values, which Tomasi avails himself of under the guise of Rawls's Kantianism. Smith, von Mises and Hayek, were indirect utilitarians: The reason that individual freedom allegedly could coincide with maximum welfare and self-realization is that rules of property and other economic liberties could be legally adjusted when they conflict with economic efficiency and providing public goods. But this is just to say that they did not recognize that economic or any other liberties are basic in Rawls's sense. And why should they? They are all in the end consequentialists, and do not accept that there are freedoms that cannot be trumped by efficiency and aggregate social welfare. But Tomasi claims the mantle of Kantianism and cannot appeal to economic efficiency and related consequences to specify and refine property rights and economic liberties. On Tomasi's account, the invisible hand guarantees that maximum freedom, self-realization, and economic well-being for all coincide with economic efficiency and maximum aggregate wealth. This is empirical speculation based in the same Panglossian confidence in laissez-faire capitalism that informs Tomasi's claim that market distributions of income and wealth maximize the position of the least advantaged. Comparisons of the position of the least advantaged in classical liberal economies with their position in social democratic and welfare state systems casts serious doubt on these claims.

Tomasi is left with the following trilemma. If he argues that thick economic liberties are all within the central range of application of freedom of contract and

rights to own and control means of production, then the initial problem remains; these basic liberties cannot be restricted for reasons of economic efficiency or the public good, and his position lapses into libertarianism, which he seeks to avoid. If Tomasi instead relies on the invisible hand to claim that only basic liberties that are economically efficient contribute to the full development of the moral powers, then he in effect adopts efficiency as the criterion for determining the central range of application of basic economic liberties; appeal to the moral powers then becomes redundant. The question then arises why the other basic liberties (of speech, association, freedom of the person, etc.) are not also subject to delineation or restriction by economic efficiency.

The third more credible alternative for Tomasi is to make a substantive argument that shows a direct connection between having thick economic rights and liberties and the full and informed exercise of the moral powers. There may be a credible argument that more qualified economic rights of private property and contract enable individuals to exercise their moral powers more effectively than public ownership and control. But why should rights of unlimited accumulation, or the laissez-faire contract doctrine of caveat emptor, or the absence of consumer protection constraints and implied warranties on contracts, be necessary, or even conducive to the development and exercise of the moral powers of practical reasoning and self-authorship for *all* citizens? The only suggestion Tomasi makes is that thick economic liberties are justifiable for the “same reasons” that Rawls says that a right to hold personal property is a basic right. Rawls’s idea is that exclusive control over personal belongings and a living space are a condition of personal

independence, of forming valuable relationships, of effectively exercise basic liberties, and executing a rational life plan. This resembles Hayek's claim that private property is justified so that all can have a "private sphere" within which to plan and control their lives. But neither Rawls's nor Hayek's reasons come close to justifying rights of unlimited accumulation and control of productive wealth and laissez-faire contract rights. Moreover, even if qualified ownership of means of production is necessary for individual independence or a private sphere, that fact at most opens the door to a generous welfare state or a property owning democracy with widespread private ownership of productive wealth by *all* citizens. But these alternatives allow for greater taxation, regulation, and redistribution of market income and wealth than classical liberalism can bear.

IV. I see no connection between laissez faire and background conditions necessary for the full and informed exercise of the moral powers of practical reason. My suspicion is that Tomasi's real reasons for arguing that thick capitalist economic liberties are basic in Rawls's sense has little to do with the moral powers but is his affirmation of the inherent desirability of an entrepreneurial lifestyle for many people, coupled with a recital of the good effects that unassailable protection for economic liberties has for liberal societies, including increased wealth, options, and political participation. He says, "the exercise of thick private economic liberty is *for many citizens* a condition of responsible self-authorship." (p. 183) This suggests that for many people in a capitalist economic system, essential to *their particular occupations and conceptions of the good* is that they *be* capitalist entrepreneurs and/or owners of productive resources and wealth with full economic rights of use,

control, and consumption. Of course this is true of many people. But the desirability of capitalist lifestyles for some and their effects cannot serve as a basis for including the economic liberties among the basic liberties. It is also true that many other people might rationally desire that social democratic economic rights and powers be made basic—guaranteed bargaining rights, a right to strike, employment security, co-determination rights, and worker prerogatives within the firm--since they are essential to pursue *their* very different occupations and life plans. But this does not mean that social democratic rights are necessary to exercise the moral powers and should be given the exceptional status of basic economic rights that can only be restricted to protect other basic rights and liberties.

Simply because certain rights and liberties are essential conditions for many people to pursue their particular choice of occupations and life plans is not a reason to make them basic rights and liberties. For rights and liberties to be basic in Rawls's sense, they must be necessary to the exercise and development of the moral powers of *all* citizens who are reasonable and rational and are deemed to have the fundamental interests of democratic citizens in the development and exercise of the moral powers necessary to social cooperation. Rawls's account of moral personality is based in a normalized ideal of persons as citizens and their fundamental interests, and is designed to serve as a basis for public reasoning and political justification in a liberal and democratic society in which citizens have different conceptions of their good and endorse different religious, philosophical, and ethical doctrines. It appeals to higher-order interests all citizens are presumed to have—in developing the moral powers of practical reasoning--since the exercise of these capacities is a

condition for anyone's gaining the benefits and carrying out the responsibilities of social cooperation. The argument for each of the basic liberties is that they are necessary institutional conditions for free and equal citizens being able to realize these fundamental interests and pursue a rationally desirable plan of life. The fact that some citizens have economic interests furthered by laissez-faire liberties, or democratic workplace interests furthered by worker-control or socialist ownership of the means of production, is not relevant.

In response to my objection, that basic liberties must be necessary to the exercise of the moral powers of *all* citizens and not just a few, Tomasi replies this cannot be a correct interpretation of Rawls's basic liberties. For equal political rights and liberties do not satisfy this universality condition, as evidenced by the failure of many people to vote or take an active interest in politics. But having equal political liberties is a precondition of the social equality and civic self-respect of free and equal citizens. Whether or not citizens choose to exercise these liberties is beside the point: Someone has to exercise political authority, and to be denied equal political rights of participation--to vote, hold office, politically assemble, and join and form political parties--demeans liberal citizens. It is public recognition that they are not equal citizens and full members of the political community, but are in the class of political subordinates unqualified to take part in public political life. It is being relegated to that permanently subordinate civic condition--not the mere failure to vote regularly--that undermines citizens' full development and exercise of their capacities for justice.