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CAPITALISM IN THE CLASSICAL AND HIGH LIBERAL TRADITIONS*

By Samuel Freeman

I. Essential Features of Liberalism

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

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

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classical liberals prior to the twentieth century). All citizens, then, should enjoy equal political rights and liberties, including the right to vote, hold office, and freely participate in political life.

Where liberals primarily disagree is on the nature and status of economic rights and liberties, including the extent of freedom of contract and rights to private property in land, raw materials, and other productive resources. Classical liberals generally hold that the economic liberties are to be regarded and guaranteed as among the basic liberties; or if they are not strictly basic liberties, then economic liberties resemble basic liberties in that they can only be restricted for special reasons.[1] Freedom of contract and rights of property are not absolute for classical liberals; for example, the inalienability of the basic liberties itself puts restrictions on freedom of contract and rights of property. Nor would classical liberals, or liberals generally, accept or see as legally enforceable individuals' attempts to permanently alienate their rights to equal opportunities to educate themselves and compete for open employment positions, or their right not to be discriminated against on grounds of race, religion, gender, or other classifications. One of the primary distinctions between classical liberalism and libertarianism is that libertarians regard freedom of coercively enforceable contracts as of such fundamental importance that it overrides the liberal restriction on the inalienability of basic liberties and also overrides equality of opportunity and equal rights to apply and compete for open positions.[2] For liberals, by contrast, one cannot alienate

[1] Following Joseph Schumpeter, I associate classical liberalism with the economic liberalism of the classical economists, starting with Adam Smith in the eighteenth century, and David Ricardo, Thomas Malthus, and other classical economists (including J. B. Say in France) in the nineteenth century (with the exclusion of John Stuart Mill, for reasons to be discussed). Classical liberalism in the nineteenth century was associated with the doctrine of laissez-faire, "the theory that the best way of promoting economic development and general welfare is to remove fetters from the private enterprise economy and to leave it alone." Joseph A. Schumpeter, *History of Economic Analysis* (Oxford: Oxford University Press, 1954), 395. Friedrich Hayek and Milton Friedman are major twentieth-century representatives of classical liberalism, along with James Buchanan and the "Virginia School" of public choice theory, Gary Becker and other members of the "Chicago School," Ludwig von Mises of the Austrian School of economics, David Gauthier among philosophers, and Richard Posner and Richard Epstein among legal scholars. While each of these thinkers may not strictly endorse each and every one of the features of liberalism I discuss that distinguish it from libertarianism, each does subscribe to a predominant majority of them. Some thinkers (Loren Lomasky perhaps) may not fit neatly into either category, and would reject my distinction between classical liberalism and libertarianism. For a more extensive discussion of the primary differences between liberalism and libertarianism, see my essay "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View," *Philosophy and Public Affairs* 30, no. 2 (Spring 2001): 105–51.

[2] By "libertarianism" I mean primarily the doctrine argued for by Robert Nozick, and also accounts by Jan Narveson, Murray Rothbard, John Hospers, Eric Mack, and others (including perhaps Ayn Rand). There is also a school of thought known as "left-libertarianism." This position resembles libertarianism primarily in recognizing self-ownership and absolute freedom of contract. Otherwise, it bears little resemblance to traditional libertarianism, since it envisions qualified property rights along with extensive government redistribution to enforce egalitarian measures that (for example) neutralize the consequences of luck. See

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the basic rights, liberties, and opportunities that define one's equal status as a person or citizen.

While classical liberals regard the economic liberties as having great importance, they do not really regard them as basic liberties in every respect. Classical liberals have generally recognized that freedom of economic contract and rights of property differ from basic liberties in that they can be restricted for reasons other than maintaining others' basic liberties and rights to equal opportunities. For example, classical liberals today accept that contracts for the purpose of fixing prices or putting restraints on trade and competition should not be enforceable; for in addition to foreclosing economic opportunities for others, such contracts are economically inefficient. Unregulated monopolies in certain resources are generally forbidden by classical liberals when they lead to economic inefficiencies. Also, contemporary classical liberals accept government's powers of eminent domain for public purposes (on the condition that compensation is provided for any government "taking"). And most can accept zoning restrictions of certain kinds, for example, noise restrictions or the exclusion of manufacturing and commercial development in residential neighborhoods.[3] Zoning restrictions do not protect any basic liberty or opportunity but are issued as a matter of convenience, or to maintain property values, or to keep out unwanted neighbors. And classical liberals recognize other restrictions on the economic liberties that they would not extend to the basic freedoms of expression, conscience, association, and other basic liberties.

This suggests that however much the economic liberties are revered by classical liberals, they are not really among the class of basic liberties that all liberals recognize. For while classical liberals reject restrictions on the basic liberties (except to protect the basic liberties), they generally allow for restrictions and regulations on economic liberties in order to procure and maintain the conditions necessary for free competitive markets and economic efficiency, as well as maintaining health and safety, and procuring other public goods.[4] The most enduring and (I believe) persuasive clas-

Peter Vallentyne and Hillel Steiner, eds., *Left-Libertarianism and Its Critics* (New York: Palgrave, 2000).

[3] Michael Munger suggests that many classical liberals incline toward relying on restrictive covenants and the law of nuisances rather than municipal zoning laws. Still, unlike libertarians, classical liberals are willing to use zoning and eminent domain powers when restrictive covenants are ineffective or not available.

[4] For example, Friedrich Hayek, in *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), discusses, among other legitimate government measures affecting economic liberty: the legitimacy of prohibitions on contracts in restraint of trade (ibid., 230); regulation or prohibition of certain monopolies (265); regulations governing techniques in production (224–25); safety regulations in building codes (225); and certain restrictions on land use (229). Regarding property, he writes: "[T]he recognition of the right of private property does not determine what exactly should be the content of this right *in order that the market mechanism will work as effectively and beneficially as possible*" (ibid., 229; emphasis added). Moreover, on freedom of economic contract, he writes: "The old formulae of laissez-

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

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

Capitalism (as Marx and the classical economists recognized) is not simply an economic system but also a social and political system. For essential to capitalism is the political specification and legal enforcement of a complicated system of extensive property and contract rights and duties that are all conditions of economic production, transfer, and consumption, as well as the political specification and enforcement of laws and regulations needed to maintain the fluidity of markets and competitive enterprise (laws restricting monopolies, price fixing, and other restraints on trade).

Rather than accepting Marx's class-based definition, I regard capitalism as an economic and social/political system which enforces a scheme of extensive private economic rights and liberties within a system of free markets, wherein these economic rights and liberties are specified and markets are designed to achieve conditions of maximal productive output and economic efficiency in both the allocation and distribution of income and wealth. Essential to this understanding of capitalism, then, is (1) a political system of extensive private property and contract rights, and

faire or non-intervention do not provide us with an adequate criterion for distinguishing between what is and what is not admissible in a free system. There is ample room for experimentation and improvement within that permanent *legal framework which makes it possible for a free society to operate most efficiently*" (ibid., 231; emphasis added).

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other legal background conditions, (2) that are specified and adjusted to achieve efficient markets and the resulting maximization of productive output and, therewith, (3) maximal opportunities for consumption among those willing and able to pay for goods and services thereby produced. Finally, (4) the capitalist standard for the just distribution of income and wealth is fundamentally tied to market outcomes.

So defined, capitalism is not the only economic system that relies upon markets and private property in the means of production. Other alternatives will be discussed later (namely, property-owning democracy). But capitalism in this pure sense is the economic system that is defended by classical liberals, particularly the classical economists and their modern heirs. Thus, it should come as no surprise that capitalism, like the liberalism of the classical economists, has been closely associated with utilitarianism and attuned to utilitarian arguments, especially within the Anglo-American tradition.[5]

On this understanding, a system of robust private property rights and wide-ranging freedom of contract is not sufficient for capitalism. Capitalism also requires a system of free and efficient markets for the allocation of productive resources and the distribution of income and wealth. Liberals generally, including classical liberals, maintain that, when markets break down due to monopolistic concentration of market power, or when markets are incapable of adequately supplying goods or services that are important to individuals' independence and well-being, it is government's role to intervene and address such "externalities" or "neighborhood effects" by restoring competition and providing for these "public goods."[6] Thus, Adam Smith writes:

[5] Even major proponents of classical liberalism within the tradition of Austrian economics, such as Hayek or von Mises—while they may not put as much direct emphasis on economic efficiency and may emphasize instead the informational virtues of free markets (but why is this important if not for reasons of efficiency?)—should not find my characterization of capitalism at odds with their understanding. When Hayek rejects "utilitarianism," he in effect rejects rational planning and direct appeals to the principle of utility in regulating markets or assessing the distribution of income and wealth. Friedrich Hayek, *Law, Legislation, and Liberty, Volume II: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 22. Still, like David Hume, Hayek's arguments for the rules of justice and of capitalism are generally based in consequentialist considerations regarding their beneficial effects. As John Gray contends, Hayek ultimately relied upon indirect utilitarian arguments as the justification of his account of the rules of justice and capitalism. John Gray, *Hayek on Liberty* (Oxford: Basil Blackwell, 1984), 59–60.

Moreover, as Alan Kors points out in his essay in this volume, Ludwig von Mises's argument for economic freedom also relies upon instrumental appeals to utility and economic efficiency. Von Mises writes: "We liberals do not assert that God or Nature meant all men to be free . . . What we maintain is that only a system based on freedom for all workers warrants the greatest productivity of human labor and is therefore in the interest of all the inhabitants of the earth. . . . 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, IN: Liberty Fund, 2005), chapter I, sec. 2.

[6] John Locke is generally regarded as the first great liberal. While Locke endorses each of the other features of liberalism I discuss, missing from his writings is a developed idea of

> According to the system of natural liberty, the sovereign has only three duties to attend to . . . first [national defense]; secondly, the duty of protecting . . . every member of society from the injustice or oppression of every other member, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence to any individual, or small number of individuals, though it may frequently do much more than repay it to a great society.[7]

Moreover, Smith writes, "The expence of defending the society . . . of the administration of justice . . . of maintaining good roads and communications," as well as "institutions for education and religious instruction, [are] likewise, no doubt, beneficial to the whole society, and may, therefore, without injustice, be defrayed by the general contribution of the whole society."[8]

Adam Smith's regard for "the administration of justice," "protecting . . . every member of society," and measures that are "beneficial to the whole society" underlines another significant feature of liberalism, namely, the *public nature of political power.* Political power is not conceived of as a private power to be exercised for the benefit of those who can afford it, or to benefit only members of certain religious, ethnic, or otherwise privileged groups. Rather, it is a public power that is held in trust by governments, to be impartially exercised, and, as John Locke says, "only for the public good."[9] The public nature of political power as impartially exercisable only for the public good is integral to the liberal idea of the rule of law, and is another feature of liberalism that distinguishes it from libertarianism. Libertarianism rejects the idea of the public good and regards political power as a private power, to be provided to people on the basis of private contracts and in proportion to their willingness and ability to pay for it.

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the role of free markets in achieving economic efficiency. The idea was not sufficiently developed at the time he lived in the seventeenth century. Libertarians rely upon a Lockean account of natural property, but their account of absolute property rights is not Locke's view since, like liberals generally, he had no reservations about taxation and governmental regulation of property for important public purposes.

[7] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis, IN: Liberty Fund, 1981), Book IV, chap. 9, pp. 687–88; see generally Book V, chap. 1, part III, pp. 723–816, "Of the Expence of Publick Works and Publick Institutions." Milton Friedman quotes approvingly and discusses the passage in the text, in Milton and Rose Friedman, *Free to Choose* (New York: Harcourt, Brace and Janovich, 1979), 19–25, adding a fourth duty of government, "to protect members of the community who cannot be regarded as 'responsible' individuals" (ibid., 24).

[8] Smith, *Wealth of Nations,* Book V, chap. 1, pp. 814–15.

[9] John Locke, *Second Treatise on Government,* sec. 3, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), p. 268.

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I suggested that classical liberalism, like capitalism itself, has been closely associated with utilitarianism.[10] Utilitarianism provides an argument for each of the main features of classical liberalism, including its support for robust property and contract rights, conjoined with its emphasis on market efficiency and market distributions.[11] It should come as no surprise that nearly all the great classical liberal economists, including Adam Smith, David Ricardo, Thomas Malthus, John Stuart Mill, F. Y. Edgeworth, and Alfred Marshall, were utilitarians. Capitalism's association with utilitarianism also helps in understanding the evolution of laissez-faire capitalism into contemporary welfare-state capitalism. Utilitarians since David Hume have noted that a fixed sum of money causes greater utility for a poor person than for a rich person.[12] Most utilitarians conclude that we have good reason (other things being equal) to guarantee the most disadvantaged, or at least the disabled, a minimum income in order to raise them at least to the threshold of a minimally decent life. Though contemporary classical liberals often contest the extent of the welfare state and its limitations of economic freedoms, still they generally accept that it is the role of government to provide a "safety net" for persons who are incapable of providing for their own welfare. The disincentive to work that so-called "welfare" (or a negative income tax) can create must be taken into account, classical liberals insist, but they still generally have accepted government's duty to provide some kind of social minimum, at least in the form of "poor relief" to meet basic subsistence needs for those unable to provide for such needs themselves.[13]

[10] I do not claim that all classical liberals are utilitarians, but only that in the eighteenth and nineteenth centuries the two schemes of thought developed in tandem and mutually influenced one another. Of course, the idea of natural rights associated with John Locke played a significant role in the development of liberalism, and Adam Smith appealed to natural rights, in spite of his utilitarianism and Hume's rejection of natural rights. Still Smith, like Locke, endorsed a robust idea of the public or common good, and saw property rights as subject to requirements of the public good. The idea endorsed by contemporary libertarians, that property rights and economic liberties are absolute and are not to be regulated according to the public good, seems to be a nineteenth-century development. On my interpretation, libertarians' rejection of the idea of the public or common good, like their rejection of the public nature of political power, marks a significant departure from classical liberalism.

[11] Some contemporary welfarists (or "philosophical utilitarians" in T. M. Scanlon's sense) such as David Gauthier argue for capitalism and classical liberalism on Hobbesian contractarian grounds, but the argument is still driven mainly by considerations of economic efficiency. See David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986).

[12] See David Hume, *An Enquiry Concerning the Principles of Morals,* 2d ed. (Oxford: Clarendon Press, 1970), sec. 3, "On Justice," pp. 193–94.

[13] On classical liberal support for "poor relief," see Hayek, *The Constitution of Liberty,* 285–86. He provides historical background in *Law, Legislation, and Liberty, Volume II,* 190 n. 8, quoting such classical liberals as N. W. Senior and Moritz Mohl (writing in 1848). It is noteworthy that Adam Smith accepted the English Poor Laws, which, as he says, date back at least to the Elizabethan era (i.e., to the Parliamentary Acts of 1597–98 and 1601). Smith objected to the requirement that each local government is responsible for raising funds to pay for the support of their own poor, since this requirement discouraged the free movement of labor—therewith providing an argument for the centralization of governments'

Classical liberals generally contend that redressing destitution is not a claim-right that individuals have, but a matter of charity,[14] grounded in the fact that provision of everyone's subsistence needs is a public good. Thus, Milton Friedman writes, it is because of the insufficiency of private charity due to "a neighborhood effect" that he endorses "governmental action to alleviate poverty; to set, as it were, a floor under the standard of life of every person in the community."[15] Friedrich Hayek writes that, in order to avoid "great discontent and violent reaction" among those whose capacity to earn a living ceases,

> The assurance of a certain minimum income for everyone, or a sort of floor below which no one need fall even when he is unable to provide for himself, appears not only to be a wholly legitimate protection against a risk common to all, but a necessary part of the Great Society.[16]

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

duty to maintain disabled, incompetent, and destitute people. See Smith, *Wealth of Nations,* 152–57. The Poor Law Reforms of 1834 finally centralized poor relief, but—in part due to the influence of Bentham, Malthus, and Ricardo—made poor relief normally available only in the now infamous work houses. Mill approves of "public charity" on classical liberal grounds, namely, that private charity is not adequate, and that leaving the poor to private charity encourages them to commit crimes. See John Stuart Mill, *Principles of Political Economy* (Indianapolis, IN: Liberty Fund, 2006), Book V, chap. 11, sec. 13, pp. 960–62. Mill's departures from classical liberalism rest not in his views regarding poor relief, but in his conception of taxation (of estates especially), qualified property rights, remuneration of labor, and the organization of industry into workers' associations. See discussions in the text below.

On the continent, there is adequate philosophical precedent in central European liberalism for governmental provisions for the poor. Immanuel Kant in the eighteenth century saw it to be the duty of governments to "require the wealthy to provide the means of sustenance to those who are unable to provide the most necessary needs of nature for themselves." See Kant, *The Metaphysical Elements of Justice,* trans. John Ladd (Indianapolis, IN: Bobbs-Merrill, 1965), 93.

[14] See Hayek, *The Constitution of Liberty,* 292.

[15] Milton Friedman, *Capitalism and Freedom,* (Chicago: University of Chicago Press, 1962), 191. Friedman's proposal for a negative income tax to replace in-kind welfare benefits follows on pp. 191–95.

[16] Friedrich Hayek, *Law, Legislation, and Liberty, Volume III: The Political Order of a Free People* (Chicago: University of Chicago Press, 1979), 55. See also Hayek, *The Constitution of Liberty,* chapter 19, "Social Security." The problem with the modern welfare state, Hayek contends, is that "the doctrine of the safety net, to catch those who fall, has been made meaningless by the doctrine of fair shares for those of us who are quite able to stand" (ibid., 285, quoting *The Economist*).

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Nozick and others rejects each of these essential features of liberalism; libertarianism's apparent resemblance with classical liberalism is misleading. What leads many to conflate libertarianism and classical liberalism is that both endorse similar (though not the same) robust conceptions of economic rights and liberties, and therewith endorse market capitalism as the appropriate mechanism for determining the just distribution of income, wealth, and economic powers and responsibilities.[17] It is this robust conception of property rights and economic liberties that distinguishes classical liberalism from the high liberal tradition and gives rise to their different conceptions of distributive justice. Classical liberalism's conception of property rights and economic liberties also explains the theory's more conservative estimate of what is required to guarantee equal opportunities and satisfy the social minimum; the more limited extent it assigns to government's role in regulating markets; its more restricted range of public goods; and its formal or legalistic conception of equality of opportunity. I discuss these differences within liberalism in the following sections.

II. The High Liberal Tradition

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

By the "high liberal tradition" I mean the school of liberal thought that originates in the nineteenth century with the political and economic writings of John Stuart Mill; it includes T. H. Green and John Dewey in the late nineteenth and early twentieth centuries,[18] and its major representative in the second half of the twentieth century is John Rawls. Though Mill professes to be a utilitarian and Rawls a contractarian, there are close similarities in their conceptions of liberalism, democracy, and distributive justice. Rawls and Mill both affirm a principle of liberty that protects largely the same set of basic liberties, the primary exception being equal political liberties for all citizens.[19] Mill was an ardent defender of repre-

[17] Libertarians differ from classical liberals in that they do not recognize (among other things) government's authority to regulate contracts to maintain the fluidity of markets, or to restrict property rights for the public good, or to tax people to pay for public goods or poor relief.

[18] See T. H. Green, *Lectures on the Principles of Political Obligation* (Cambridge: Cambridge University Press, 1986). For a discussion of Green's "new liberalism," see David Brink, *Perfectionism and the Common Good: Themes in the Philosophy of T. H. Green* (Oxford: Oxford University Press, 2003), esp. pp. 77–88. For references to Dewey's works, see notes 24 and 72 below.

[19] Rawls's first principle of justice, the principle of equal basic liberties, states: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." John Rawls, *A Theory of Justice,* rev. ed. (Cambridge, MA: Harvard University Press, 1999), 266. In later work, Rawls substituted the

sentative democracy and a universal franchise for all citizens, female as well as male; still he was prepared to allow for unequal voting rights, with plural voting rights for those with greater education.[20] Rawls, by contrast, argues that being respected by others as an equal person and enjoying the status of an equal citizen is essential to a person's good and sense of self-respect. Primarily for these reasons, he argues, citizens in a democratic society ought to have equal rights to vote, hold office, and freely express themselves in the political and public domains.[21]

While classical liberals rejected a universal franchise until well into the early twentieth century, few classical liberals today would deny citizens formal equality of political rights to vote and hold office. The category of "passive citizens," which once included women, many free blacks, and other citizens who did not meet property qualifications, is now limited to children and others requiring legal guardians. Nonetheless, classical liberals generally do not accept efforts to neutralize the effects of wealth on political campaigns and procedures in order to mitigate inequality of political influence and promote political impartiality. High liberals, by contrast, contend that the liberal principle of maintaining the equal status of citizens requires that governments preserve the "fair value" (as Rawls says) of the political liberties regardless of people's economic position in society.[22] This is to be achieved primarily by the regulation of campaign spending and political contributions and by public financing of campaigns, so that private wealth does not distort or unfairly influence the democratic process. High liberals regard the dependence of legislators and other political officials upon private contributions for their political campaigns as a distortion of "public reason," since it tends to undermine impartial judgment and gives to the economically more advantaged an unfair influence in the political life of a democratic society. Classical liberals, including those who currently are a majority on the United States Supreme Court, disagree; they generally see restrictions on political contributions and campaign spending, not as a requirement of political equal-

phrase "a fully adequate scheme" for "the most extensive total system." See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 291. The basic liberties that Mill and Rawls jointly recognize include liberty of conscience, freedom of thought and expression, freedom of the person and of occupation (or as Mill says, "freedom of tastes and pursuits"), and freedom of association. Rawls also includes among the equal basic liberties political rights of participation, and the rights and liberties covered by the rule of law.

[20] As opposed to classical liberals and the political practice of the time which denied voting rights to those who did not meet property qualifications (as well as to women), Mill argued that those with more education, not with more property, are in a better position to deliberate impartially and decide what measures best promote the public good (which Mill understood in quasi-utilitarian terms). See John Stuart Mill, *On Representative Government,* chap. VIII, "Of the Extension of the Suffrage," in Mill, *On Liberty and Other Essays,* ed. John Gray (Oxford: Oxford University Press, 1991), 334–41. The only exception to a universal franchise that he endorsed is the exclusion of recipients of poor relief. Ibid., 333.

[21] Rawls, *A Theory of Justice,* sec. 82.

[22] See Rawls, *A Theory of Justice,* 194–97; see also Ronald Dworkin, *Is Democracy Possible Here?* (Princeton, NJ: Princeton University Press, 2009), 128–29.

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ity, but as an unjustified restriction on freedom of political expression.[23] Money talks in classical liberal jurisprudence.

Again, the contrast here of classical liberalism with libertarianism is instructive. Notably, classical liberals do not regard campaign spending limitations as an unjust limitation on one's economic rights to spend one's money to buy whatever one pleases (within the limits set by basic rights and liberties). The classical liberal justification for not limiting private campaign contributions does not stem from their conception of the economic rights that attend capitalism. The liberal idea that political power is a public power to be impartially exercised for the good of all citizens implies a rejection of the idea that government or its officials have the power to auction off political decisions or that citizens should have a right to buy political protection or decisions, as though they were a private economic good. The right to make campaign contributions is regarded, not as an economic right to purchase political services, but as a political right of free speech and expression.

While classical and high liberals differ in their interpretations of political equality, their main differences stem from their positions on the nature and scope of economic rights and liberties. This will be the primary focus of the remainder of this essay. I will regard Mill and Rawls as the paradigmatic representatives of the high liberal tradition. John Dewey is an important representative during the first half of the twentieth century, but since he had less to say about institutional arrangements than Rawls and Mill, I will not focus on his "new liberalism" here.[24]

There are four significant common features of Mill's and Rawls's views regarding economic justice. I focus on these in the following discussion since they are primarily the features that distinguish the classical and high liberal traditions. First, both Mill and Rawls deny that property rights and economic liberties are among the rights and liberties that are protected by their principles of liberty. They both reject what Mill calls "absolute property" in favor of a more "qualified property" system, with greater regulation of economic contracts than laissez-faire traditionally allows.[25] Second, with respect to free markets, both distinguish between

[23] For example, recently the U.S. Supreme Court in a 5-4 decision struck down a long-standing prohibition on corporate and union payment for broadcasts of campaign-related materials supporting or opposing specific candidates, on the grounds that it restricted corporations' rights to free expression and political influence. See *Citizens United v. Federal Elections Committee,* 558 U.S. 50 (2010).

[24] Dewey's main works on liberalism and political philosophy are *Individualism: Old and New* (1930); *Liberalism and Social Action* (1935); and *Freedom and Culture* (1939). For an instructive account of Dewey's liberalism, see Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: W. W. Norton, 1995), esp. chaps. 3 and 8.

[25] Mill, *Principles of Political Economy,* Book II, chap. i, sec. 3, p. 209. Jerry Gaus and Ellen Paul remind me that Mill's attitudes toward laissez-faire evolved through the several editions of *Principles.* Mill writes: "*Laisser-faire,* in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil" (ibid., Book V, chap. xi, sec. 7, p. 945. But the next nine sections discuss "Large exceptions to laisser-faire,"

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and emphasize the dual functions that markets play in allocating productive forces (on the one hand), and distributing income and wealth (on the other). They argue that markets play their most crucial role in protecting freedom of occupation and choice of careers and in securing the efficient allocation of productive resources, and they do not fundamentally tie the final distribution of income and wealth to markets and the price system. Third, Mill and Rawls both endorse a conception of equality of (social and economic) opportunity that goes well beyond the classical liberal view of legal equality and careers open to talents. Finally, with respect to control over the capital and productive resources and the distribution of income and wealth, both criticize capitalism for its tendency to concentrate wealth and control over the means of production in the hands of a relatively small class, and they advocate private property market systems which, unlike capitalism, do not have this tendency. I discuss each of the four ways that high liberalism differs from classical liberalism and capitalism in the next several sections.

III. Private Property and Economic Liberties

Mill says that the economic liberties are not protected by the principle of liberty. His reasons are not compelling. He says that trade is a "social act" that is not "self-regarding" in the way that the basic liberties protected by his principle of liberty are supposed to be. Mill's distinction between individuals' "self-regarding" conduct and their social or "other-regarding" conduct with the potential for harm is, standing alone, hard to sustain. Many kinds of speech and association protected by the purportedly self-regarding freedoms of thought, expression, association are "social" and "other-regarding" insofar as their main purpose is to influence political and cultural opinion and conduct (e.g., political speech, political parties, the Chamber of Commerce). The real basis for Mill's distinction between the "self-regarding" liberties that are protected by his principle of liberty, and the economic liberties that are not, must lie elsewhere. Though he says the principle of liberty is justified ultimately by the principle of utility, his list of basic liberties and his exclusion of economic

including "Cases in which the consumer is an incompetent judge of the commodity." Here Mill argues, among other things, for public support for elementary schools, making schooling free to children of the poor (ibid., 950). Moreover, in his discussion of "socialism," Mill says that impoverished workers have no choice of whom to work for or on what terms, and that freedom of contract is an absurdity, given the disparity of bargaining power that exists between owners and wage workers. If all that Mill means above by "laisser-faire" is a presumption in favor of markets in production, then Rawls accepts it in this limited sense. Historically, however, the term implies much more than this, including minimizing government economic regulation and the endorsement of near-absolute freedom of contract and nearly unqualified property rights in land and means of production, which Mill and Rawls clearly reject.

liberties originates in considerations of "individuality" and an ideal of persons as "progressive beings" (discussed below in Section VII.)[26]

Rawls relies upon similar considerations to argue that the economic liberties are not among the basic liberties protected by his first principle of justice. He says that "the right to hold personal property" is among the basic liberties. But "the right to own certain kinds of property (e.g., the means of production) and freedom of contract as understood by the doctrine of laissez-faire, are not basic [liberties]; and so they are not protected by the priority of the first principle."[27] Instead, for Rawls the specification, scope, and extent of economic rights and liberties is decided by his second principle of justice (including the difference principle), which states:

> Social and economic inequalities are to satisfy two conditions: first, they are to attach to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle).[28]

Rawls's distinction between personal property and nonpersonal property, including means of production, might seem hard to maintain for economists. (For example, many people buy houses in which to reside for a limited time, always intending to sell them for a profit.) But Rawls's distinction is not made within economics or the social sciences, nor does it track the legal distinction between personal and real property. Rather, it is a distinction made within a theory of social and economic justice, and is defined relative to Rawls's principles of justice. "Personal property" for Rawls thus consists of institutional rights and responsibilities regarding possessions that enable persons to effectively exercise their basic liberties (freedom of conscience, expression, association, etc.), take advantage of fair equal opportunities, and achieve individual independence as they

[26] Thus, Mill says in *Principles of Political Economy,* Book V, chap. 11, sec. 3, p. 940, that in a democratic age, "There never was more necessity for surrounding individual independence of thought, speech and conduct, with the most powerful defenses, in order to maintain that originality of mind and individuality of character, which are the only source of any real progress."

[27] Rawls, *A Theory of Justice,* 53, 54. This inclusion of a right to hold personal property among the basic liberties in the first (1971) edition of *A Theory of Justice* (p. 61) led some critics to contend that a capitalist conception of robust property rights is protected by Rawls's first principle. They argued (on the assumption that a right to personal property must include nearly unqualified laissez-faire rights of use and transfer) that there is little space left for redistribution under Rawls's difference principle once Rawls assumes that a right to hold property is a basic liberty. In the 1999 revised edition of *A Theory of Justice* (p. 54), Rawls added the sentence quoted above in the text, which makes clear that this interpretation is a misunderstanding. Later, on the basis of his second principle of justice (discussed here), Rawls explicitly rejects laissez-faire conceptions of property, and contends that rights and other incidents of property are to be determined by the difference principle.

[28] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 42–43.

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pursue a plan of life that is chosen from the wide range of permissible ways of living. Rawls implies that, while ownership of one's residence and personal belongings is necessary for individual independence and privacy, laissez-faire rights of ownership of means of production and near-absolute freedom of economic contract are not necessary for these general purposes—however much certain individuals might want to enjoy these rights given their specific life-plans (to be wealthy, for example). If laissez-faire rights of property and contract are to be justified at all on Rawls's terms, it must be shown that a laissez-faire economic system satisfies the difference principle and is, compared with other alternatives, to the greatest benefit of the least advantaged. That is an empirical question, which Rawls, like Mill, does not think can be decided in laissez-faire's favor.

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

Mill famously distinguishes between absolute and qualified property:

> The laws of property have never yet conformed to the principles on which the justification of private property rests. They have made property of things which never ought to be property and absolute property where only a qualified property ought to exist. They have not held the balance fairly between human beings, but have heaped impediments upon some, to give advantage to others; they have purposely fostered inequalities, and prevented all from starting fair in the race.[29]

For Mill, the justification of private property in productive resources lies, in the first instance, in its "expediency" in facilitating production. He condemns absolute property rights in land for their inefficiency. "In the case of land, no exclusive right should be permitted . . . which cannot be shown to be productive of positive good."[30] Thus, ownership of land that is cultivated "does not imply an exclusive right to it for purposes of access." And if land is not intended to be cultivated, "no good reason can be given for its being private property at all"; anyone permitted to own it "holds it by sufferance of the community":[31]

[29] Mill, *Principles of Political Economy*, Book II, chap. i, sec. 3, p. 207.
[30] Ibid., 231–32.
[31] Ibid., 232.

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> No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.[32]

With respect to bequests, Mill says that they are one of the attributes of property. An owner, for reasons of "expediency" and to encourage savings, should have the right to bequeath by will "his or her whole property, but not to lavish it enriching some one individual, beyond a certain maximum, which should be fixed sufficiently high to afford the means of comfortable independence:"

> I see nothing objectionable in fixing a limit to what anyone may acquire by the mere favour of others, without any exercise of his faculties, and in requiring that if he desires any further accession of fortune, he shall work for it.[33]

Rawls too would regulate bequests and limit rights of inheritance. Even if it were assumed that certain rights of gift and bequest are implicit in property, these rights do not include the absolute right to transfer all and everything owned to whomever the owner chooses.[34] It is true that rights of gift and bequest encourage individuals not to squander their economic resources, but to save and reinvest them. For this reason, instead of taxing estates, both Rawls and Mill favor a tax on inheritances, thereby limiting rights of individuals on the receiving end of gifts and bequests to a specified amount. Inheritance taxes have the socially desirable effects of encouraging owners to spread their wealth around to more people and to charitable and other beneficial institutions, as well as limiting the adverse consequences of large individual accumulations of wealth on the equitable distribution of social and political power.

Both Mill and Rawls reject "natural property" and "natural rights" to property in possessions. They endorse versions of a conventional "bundle of rights and interests" view, and contend that property is a social/legal institutional convention that can be designed in different ways, depending upon the specification of the "incidents of property" (including the many rights, powers, duties, and liabilities, to possess, use,

[32] Ibid., 230.

[33] Ibid., 223, 225.

[34] Rawls explicitly excludes rights of acquisition and bequest from the basic right to hold personal property (*Justice as Fairness,* 114). The nature and extent of these rights instead are to be settled by the difference principle. Regarding rights of bequest, he says: "An estate need not be subject to tax, nor need the total given by bequest be limited. Rather the principle of progressive taxation is applied at the receiver's end. . . . The aim is to encourage a wide and far more equal dispersion of real property and productive assets." Rawls adds that the aim is also "to prevent accumulations of wealth that are judged to be inimical to background justice, for example, to the fair value of the political liberties and to fair equality of opportunity." Rawls, *Justice as Fairness,* 160–61.

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transfer, and dispose of things, both tangible and intangible). Rawls and Mill are both influenced by Hume's account of property as a social convention. Hume says that property is not a quality of objects or a natural relation of persons to things, but an "internal" or "moral" relation among members of a society that exists by "convention."[35] Rawls too regards property as a conventional institution, the incidents of which can be specified and designed in multiple ways. One of the primary tasks for an account of distributive justice is to set forth and justify a principle for the specification and regulation of the rights and duties of possession, use, transfer, and disposal of the tangible and intangible things we ordinarily call "property." For Mill, this role was ultimately to be served by the principle of utility—for Rawls, by his second principle of justice, primarily the difference principle. On either account—and this is perhaps a central feature of the high liberal tradition—the rights and other incidents of property (what might be called its "ontology") are relativized or adjusted to meet the requirements of antecedent principles of justice, as these principles are applied to different social and historical circumstances.

The "ontological relativity" that Mill and Rawls bestow on property is not peculiar to the high liberal tradition. Hume was, after all, a (nascent) classical liberal. Similarly, Friedrich Hayek and Milton Friedman both endorse the Humean institutional conception of property. Friedman writes:

> The notion of property . . . has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions.[36]

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

> The ethical principle that would directly justify the distribution of income in a free market society is "to each according to what he and the instruments he owns produces." The operation of even this principle implicitly depends on state action. *Property rights are matters of law and social conventions.* . . . [Hence] *The final distribution of income*

[35] David Hume, *Treatise on Human Nature* (Oxford: Oxford University Press, 1960), 527, 491.

[36] Friedman, *Capitalism and Freedom*, 26.

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and wealth under the full operation of this principle may well depend markedly on the rules of property adopted.[37]

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

Like other classical liberals within the Anglo-American tradition since Hume and Adam Smith, for Friedman the ultimate grounds for robust property rights, economic freedoms, and market distributions depend, not on claims of natural property rights regarded as "self-evident propositions,"[38] but on considerations of economic efficiency and, ultimately, social utility. Insofar as claims of natural property rights are made, as in the work of Adam Smith, they too ultimately are conceived instrumentally, as the incidents of property that achieve efficiency and the public benefit.

IV. The Allocative Function Versus the Distributive Function of Markets

The second important similarity between Mill and Rawls is their conception of the proper role of markets. This clarifies their attitudes toward capitalism and helps to explain why both reject capitalism as understood by classical liberals. Mill distinguishes between laws of economic production and laws of distribution. He contends that laws of production are of universal applicability, whereas laws of distribution are not and are guided by institutional arrangements that differ among societies. The laws of production, Mill writes, "partake of the character of physical truths," whereas "the Distribution of Wealth . . . is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like."[39]

Similarly, Rawls distinguishes between the role of market prices in allocating productive resources and their role in the distribution of income and wealth. "The former [allocative function] is connected with their use to achieve economic efficiency, the latter [distributive function] with their determining the income to be received by individuals in return for what

[37] Ibid., 162 (emphasis added).

[38] Ibid., 26.

[39] Mill, *Principles of Political Economy,* Book II, chap. i, sec. 1, p. 199. See Alan Kors's discussion (elsewhere in this volume) of this aspect of Mill's position. Lionel Robbins, in his 1979–81 lectures *A History of Economic Thought,* ed. Stephen Medema and Warren Samuels (Princeton, NJ: Princeton University Press, 1998), 224, says: "I ran into my friend Friedrich Hayek in the summer, and he was saying that he thought that Mill had done great harm by his distinction between the laws of production and distribution."

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they contribute." In using the market to allocate productive factors, "prices are indicators for drawing up an efficient schedule of economic activities":

> It does not follow however that there need be private persons who as owners of these assets receive the monetary equivalents of these evaluations.[40]

The general implication is the same point made by Mill, namely, that a society's use of markets to determine the distribution of wealth is separate and apart from its use of markets to allocate productive resources.[41] In general, the efficient allocation of productive resources does not require that the distribution of wealth that results be determined by market distributions that result from efficient production.

Liberals generally endorse free markets and the price system for at least two reasons. First, unlike planned economies, a market system is crucial to realizing the basic liberty of persons to freely choose their own careers and workplaces. Markets are, in this way, essential to realizing both freedom of the person and equality of opportunity to compete for open positions. Planned economies and traditional societies constrained by class customs restrict individuals' choices in these matters or give them none at all; a person's occupation and workplace are assigned either by someone in authority or by social class and custom—in the latter case, your profession and path in life is the same as your father's or mother's. The second reason liberals generally endorse markets is that the market allocations of productive resources and labor are believed to be more likely to result in an efficient allocation of these factors of production than is a nonmarket system. Markets thereby normally minimize economic waste.[42] There are other justifications which may be emphasized by classical liberals but are not endorsed by high liberals (for example, free markets are required by the basic liberty of freedom of economic contract, which is not recognized as a basic liberty by high liberals); but on these two grounds at least, liberals of both varieties can agree.

Significantly, both of these arguments—from freedom of occupation/equality of opportunity and from allocative efficiency—relate to production and the allocation of labor and resources for purposes of productive economic activity. In the absence of a particular conception of property, the arguments do not by themselves imply anything in particular about

[40] Rawls, *A Theory of Justice*, 273 (p. 241 of the 1999 revised edition). Rawls indicates that he draws on the work of J. E. Meade for this distinction.

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

[42] This is normally, but not always, the case, since markets often generate "irrational exuberance" causing speculative "bubbles" which eventually burst (e.g., the recent overbidding and oversupply in the housing market).

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who has rights to the economic product that is the efficient outcome of the activities of freely associated producers and entrepreneurs. Assuming that the three traditional "factors of production"—land, labor, and capital—all contribute their share to the final product, the question is left open as to how the resulting income, profits, interest, and rent are to be distributed among those cooperating to produce them, or among members of society as a whole.[43] The answer to this question is determined largely by a society's specification of property rights in productive resources and the rights of workers and owners of capital to income from the product created by their respective contributions. As Friedman says, "Property rights are matters of law and social convention. . . . The final distribution of income and wealth . . . depend[s] markedly on the rules of property adopted."[44]

Here classical liberals have argued that economic agents—workers and those who own and control capital alike—should each receive the marginal value of the contribution that each makes to productive output. Drawing on marginal productivity theory, many classical liberals contend that each participant in a joint economic enterprise contributes his or her share of factors of production (labor, land and raw materials, or capital, both real and liquid) toward the final product. According to standard microeconomic theory, we can measure the economic value of each of the inputs to production by determining its marginal contribution to the final product. The *marginal product* of each factor that each participant owns and controls is then (it is said) what he or she can be said to "contribute" toward the final output. Since each participant is responsible for what he or she contributes, it follows that in accordance with the precept of justice "To each according to his or her contribution," economic agents *morally ought* to share in the distribution of income and wealth in a manner proportionate to the value of their marginal product.[45]

[43] Mill says of wealth and productive output: "The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomever they please, and on whatever terms. Further, in the social state . . . any disposal whatever of those can only take place by the consent of society, or rather of those who dispose of its active force." Mill, *Principles of Political Economy,* Book II, chap. I, sec. 1, p. 199–200.

[44] Friedman, *Capitalism and Freedom,* 162. The following argument in the text relies on an argument in my essay "Equality of Resources, Market Luck, and the Justification of Market Distributions," *Boston University Law Review* 90, no. 2 (April 2010): 921–48.

[45] Robert Nozick relies on marginal productivity theory for a similar argument: "People transfer their holdings or labor in free markets. . . . If marginal productivity theory is reasonably adequate, people will be receiving, in these voluntary transfers of holdings, roughly *their* marginal products. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 187–88 (emphasis added); see also ibid., 301–2, 304–5. In Nozick's utopia, "[E]ach person receives his marginal contribution to the world" (ibid., 302). Similarly, David Gauthier maintains: "In the free exchanges of the market each may expect a return equal in value to her contribution. Thus the income each receives . . . is equal to the contribution she makes, or the marginal difference she adds to the value of the total product. See David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986), 92–93. "The equation of income with marginal contribution ensures just this impartiality. . . . [E]ach benefits from, and only from, the contribution she makes." Ibid., 97.

This is a popular way of thinking among classical liberals and libertarians, and it appeals to a notion of fairness in the distribution of the products of economic cooperation. Classical liberals and libertarians argue that owners of capital should have a right to the entire profits, interest, and rent that result from their investment of capital—exclusive of others, whether they also contribute or not—because profits, interest, and rent measure the marginal product of their contribution.

What are we to make of this argument from fairness, that economic agents' share in the final product should be proportionate to their (marginal) contribution? There is a genuine naturalistic sense in which workers can be said to contribute their labor toward productive output, as well as a naturalistic sense in which land, raw materials, and real capital make a contribution. It is a natural fact, regardless of the form taken by social conventions and institutions, that nothing could be produced in the absence of labor (which includes knowledge), land, natural resources, and the instruments of production created by their combination. Under capitalism and other private property systems, owners of capital and other resources are also causal agents in the production process due to their ownership and control of means of production. But the sense in which owners of factors of production other than labor themselves make a "contribution" to productive output is different from the kind of contribution made by labor, land, and capital itself. The contribution of owners is notional when compared to the contribution made by the factors of production they own; it is a manner of speaking that is dependent upon the rights of ownership and control that owners enjoy by virtue of legal and other conventional arrangements.

By way of example to clarify the point, consider a slave economy. While it is clear that the slaves on a sugar plantation make a substantial contribution toward agricultural production, to say that the *owners* of the slaves also make their "contribution" of labor ("after all, they own it") is to use that word in a very different sense from the one we use when we say "workers contribute their labor." Owners of slaves "contribute" the labor of those persons they own in this notional sense; it is (to use Jeremy Bentham's term) a "legal fiction." This much seems obvious.

Generalizing, the same notional sense of "contribution" is at work when it is said that owners of land, real capital, liquid capital, and any other resources "contribute" to economic output. Their "contribution" may be causally necessary within the social context; production could not, under the circumstances, take place without it, due to conventional norms of property. But this contribution is not on a par with the natural contribution that labor itself makes, just as it is not on a par with the physical contribution that natural and artificial resources make to productive output. The contribution made by the owners of productive resources is not a natural fact of either kind. Unlike workers, owners, regarded purely in their capacity as owners, do not themselves actually

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produce anything.[46] Often they are not even aware of doing anything (for example, owners of shares of mutual funds). Theirs is a legal contribution effected by virtue of the legal rights and powers that owners of capital resources are recognized as having by other members of a society. Legal rights and powers are institutional facts made possible by peoples' beliefs and other attitudes, and by their social activities. Property exists by virtue of a background of social rules which are collectively accepted and generally recognized as authoritative by (most) members of society, and by virtue of people interacting according to these rules. It is by virtue of the institutional facts of private property that owners of capital are deemed to make a "contribution" to production. Their contribution is not a "brute fact"; it is, rather, a matter of peoples' attitudes and linguistic descriptions formed against a background of institutional facts (property, money, government, and the legal system) which themselves exist only by virtue of collective agreement, intentions, and activities.[47]

Here economists have said that the capitalist makes a substantial or natural contribution after all, for she contributes her "abstinence" or "waiting to consume." That is to say, owners of wealth and capital *could* consume what they possess, but do not, and instead invest their resources and undertake risks that most others are unwilling to take. By undergoing this sacrifice, owners benefit society by capital formation. Had someone not abstained from consumption and saved wealth and resources, there would be no capital for workers to labor on.

Mill himself relied on this so-called abstinence theory of interest when, in response to the socialist claim that labor is the source of all value, he argued that owners of capital have a right to a return on their investment too.[48] But even if we concede that owners may serve a valuable function and have a right to *some* return on investment, abstinence from consumption does not by itself imply that owners of capital should have complete rights to the monetary value of the *entire* marginal product of the resources they legally own. The mere fact that the capitalist *could* consume his capital instead cannot establish a right to the entire marginal product. After all, a professional thief could consume it too, but this fact surely does not entitle the thief to any return, either for refraining from theft of productive resources, or for abstaining from consuming resources already stolen and investing them instead. The reason the capitalist (as opposed to the thief) can be said to contribute her "abstinence" is precisely that the capitalist is legally entitled and normally has a *right* to consume what she

[46] Of course, owners often manage or otherwise work in their own firms (particularly in smaller businesses); but then they no longer act purely in their capacity as owners, but are contributing their labor to production.

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

[48] Mill, *Principles of Political Economy,* Book II, chap. ii, sec. 1, pp. 215–16.

owns, but decides to invest instead. From this it does not follow, without further argument, that the capitalist should have a right to the entire marginal product that is created by the resources she owns.

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

The general point here is that the argument from marginal productivity theory for market distributions depends upon an ambiguity involved when we speak of someone's "contribution to" productive output. It is this ambiguity between the de facto and de jure sense of "contribution to" (or "worker's versus owner's responsibility for") the final product that is played upon by the argument for market distributions according to the marginal product of each party's "contribution."[49]

None of this is meant to deny that private property in productive resources often serves an important *function.* Economists will argue that without private ownership of productive resources, much of the productive surplus that is created by labor likely would be consumed if it were distributed to workers themselves, and would not then be saved and reinvested. By allowing for private property in productive resources, a society creates the strategic position of *owners,* which provides an effective way to both shepherd resources and save and reinvest the productive surplus. Allowing private ownership and control of productive resources creates a group of people who are willing to save their surplus income (profits, interest, and rent) and take risks on investments that lead to the development of new products and services. If we did not allow people some kind of market return on the risks they undertake with their wealth,

[49] Marx, in effect, remarks on this conflation of different senses of "contribution" in a well-known passage on the "Trinity Formula," in *Capital,* Book III. See *Karl Marx: Selected Writings,* ed. David McClellan (Oxford: Oxford University Press, 1977), 500.

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they would not undertake these risks, and new innovations and other benefits of undertaking market risks would not be realized within a society.

If this argument is sound, then it supports some kind of market economy with private ownership of productive resources and some degree of market returns for their use (as opposed to a socialist system where the public owns the means of production and receives the return on their use). Still, the functional argument for private ownership just stated does not justify rewarding owners with the *entire* marginal product of the capital they contribute to production. Rather, the functional argument simply establishes the beneficial effects of private over public ownership, and implies nothing in particular about individuals' rights to income, the rate of taxation, or what the returns to ownership should be. Nor does the beneficial function served by private ownership even justify capitalism in the traditional sense argued for by classical liberals, for not all private-property market economies are capitalist.[50] I conclude, then, that whatever role marginal productivity theory plays in microeconomic explanations of the market price of labor and productive resources, that theory cannot be used to justify full market distributions of income and wealth going to the private persons who legally own productive resources. For once we go beyond the natural contribution made by workers' labor and productive resources, the idea of a particular person's "contribution" toward or "responsibility for" productive output cannot be specified independently of the legal institution of property. When it comes to productive resources other than labor, individuals' "contribution to" and "responsibility for" the social product are institutionally dependent, indefinable outside an institutional (and normally legal) context. Again, as Milton Friedman said (in endorsing the classical liberal precept of justice "To each according to his contribution"): "The final distribution of income and wealth under the full operation of this principle may well depend markedly on the rules of property adopted."[51]

There remains then the problem of justice that appeals to marginal productivity theory were supposed to resolve—namely, the problem of justifying market distributions of income and wealth that result from productive activity. Assuming that for any legal system that is in place we can specify the legal or de jure contribution that owners are convention-

[50] For example, a property-owning democracy, which Rawls contrasts with welfare-state capitalism, structures institutions to encourage workers' private ownership and control of their industries. See Rawls, *Justice as Fairness,* 135–40. Martin Weitzman advocates replacing the wage relationship with a system that ties workers' compensation to an index of a firm's performance, such as a share of revenue and profits. See Martin Weitzman, *The Share Economy* (Cambridge, MA: Harvard University Press, 1984). John Roemer advocates a model of profit-maximizing firms that distribute profits across society; all members of society are given an equal or fair share of corporate stock upon reaching maturity, with a right to dividends depending upon how their firms or mutual funds perform. See John Roemer, *A Future for Socialism* (Cambridge, MA: Harvard University Press, 1994).

[51] Friedman, *Capitalism and Freedom,* 162.

ally regarded as making toward production, this cannot morally justify market distributions according to each party's legally recognized contributions. Since the contribution of capitalists is not a natural contribution (in the way that the contribution of workers and productive resources clearly is) but is instead an institutional artifact, the question arises, "Why should owners receive the entire income or marginal product of the resources they legally own in the form of profits, interest, and rent?" It begs the question to say "They own it," since the very problem to be addressed is the justice of existing property relations and what the rights of return on ownership should be. Thus, the argument for market distributions of marginal product must depend upon something other than marginal productivity theory. Ultimately, it depends upon some version of a laissez-faire theory of property rights, such as a theory of natural property, which contends that people legally should be entitled to complete rights to income generated by the use of economic resources they own and control.[52] Some such argument is presupposed by the contention that individuals are due the full marginal product of resources they own.

If this is correct, then it suggests that the question whether individuals should be rewarded according to their contributions cannot be settled independently of questions regarding the justice of the economic system and system of property relations that is in place. The adage "To each according to his or her contribution" is at best a secondary precept which presupposes some more fundamental account of economic justice.

V. Equal Opportunity and Economic Liberty

The argument for equality within the liberal tradition is more an argument for social equality rather than political equality. When Alexis de Tocqueville published *Democracy in America* in 1835, the majority of American citizens were regarded as "passive" and without the right to vote; males who did not meet property qualifications were excluded from the franchise, as were, of course, women and African Americans. What made the United States democratic in de Tocqueville's sense was not so much democratic government as it was the absence of an inherited class structure and legal barriers to positions and occupations. The idea of careers open to talents, or "the natural liberty of exercising what industry they please" (Adam Smith) regardless of birth or lineage or (most) religious affiliations, was affirmed by classical liberals in the eighteenth century.[53] Only much later was the idea to be extended to race and gender. One

[52] Thus, Robert Nozick devotes a substantial amount of space to discussing the state of nature and a right of initial appropriation of "unowned" things, subject to a "Lockean Proviso." See Nozick, *Anarchy, State, and Utopia,* 67–182.

[53] Smith, *Wealth of Nations,* 470.

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argument for the equal opportunity to compete for open positions lies in the classical liberal view of economic liberties. Workers should be free to market their services, employers should be allowed to employ whomever they choose, and merchants and other businesses should be free to engage in the exchange of goods and services with whomever they please, without being burdened by the legal enactment of others' religious, social, or racial biases. Moreover, opening positions purely to talents and skills increases economic efficiency. The classical liberal ideal of equal opportunity played a major role in democratizing society by breaking down the barriers of inherited class privilege and legal discrimination according to social position, religion, wealth, and (eventually) race and gender.

Still, the classical liberal view of economic liberties did little directly to mitigate social (as opposed to legal) discrimination. Owners and employees still had the right in theory and in practice to refuse goods, services, and employment by virtue of their robust property and contract rights. Racial discrimination in hotels, restaurants, real estate sales, and many other areas of life was common in the United States, even in the absence of Jim Crow laws in the South and elsewhere which legally mandated it.[54] Segregation and racial discrimination by businesses were legally protected in most of the United States until the 1960s, even when not legally required. Of course, classical liberals do not endorse racial or other forms of discrimination. The vast majority reject it in theory as much as other liberals do. Classical liberals often contend that, because of freedom of contract, these sorts of problems will eventually sort themselves out. Businesses or entrepreneurs that discriminate on grounds not related to economic efficiency are at a disadvantage, since they are imposing higher costs on themselves. Free markets will tend to drive out of business those who discriminate on grounds other than economic efficiency.[55]

This is one of many examples where what is true in the economic theory of perfectly competitive markets is not true in fact of our social world of the "second best." Where there is widespread racial or ethnic bias, discrimination on these grounds is a precondition to economic success. Even where enlightened businesses might want to serve disfavored minorities, their trade would soon suffer due to ingrained social customs and prejudices. Until relatively recently in most parts of the South and in

[54] So-called Jim Crow laws arose in the South and elsewhere in the United States after the end of Reconstruction in the 1870s, and continued until the 1950s and 1960s. They mandated, among other restrictions, de jure segregation of most public facilities and accommodations, including schools, public restrooms, buses and trains, and restaurants and hotels. In 1954, the U.S. Supreme Court, in *Brown v. Board of Education,* declared segregation of public schools unconstitutional. This case was a milestone in the eventual elimination of Jim Crow laws by the Civil Rights Acts of 1957 and 1964 and the Voting Rights Act of 1965. See C. Vann Woodward's classic history, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1955); and Michael J. Klarman; *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004).

[55] See Friedman, *Capitalism and Freedom,* 109–10.

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

In response to such antidiscrimination measures and policies enacted by the Fair Employment Practices Commission (FEPC), Milton Friedman objected that measures such as the Civil Rights Act are serious violations of individuals' freedom. He wrote:

> There is a strong case for using government to prevent one person from imposing positive harm, which is to say, to prevent coercion. There is no case whatsoever for using government to avoid the negative kind of "harm." On the contrary, *such government intervention reduces freedom and limits voluntary cooperation.*
>
> FEPC legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state . . . to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws of the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle to FEPC.[56]

The laws are said to be similar in principle, and both are condemned, on the grounds that in both cases government's coercive powers are used in a way that "reduces freedom and limits voluntary cooperation." The political injustice done to the entrepreneur, restauranteur, or hotel owner who is legally required under the Civil Rights Act to fairly consider black job applicants or to serve Jews and Hispanics is then put on the same plane with the injustice done, not only to businesses and employers, but also blacks and Jews who are legally prohibited from entering employment positions or frequenting public places or businesses in the Jim Crow South and in Nazi Germany. In both cases, their freedom is limited and cooperative relations are no longer voluntary.

[56] Ibid., 113 (emphasis added).

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

One important difference between the liberal freedoms of association and contract is that contractual relations—unlike associative relations between friends, lovers, and members of private clubs, fraternities, or religious groups—are legally sanctioned and enforceable. We can enter into and break off friendships, intimate relationships, club memberships, and religious and other affiliations, and it is none of government's business. Government's lack of enforcement primarily distinguishes freedom of association from freedom of contract. Unlike freely associative relations, there is no right of exit from contractual relations without legal consequences; one either has to pay damages or restitution, or has to execute one's contractual obligations in cases of specific performance. Freely entered contracts thus have the imprimatur of government and are specifically designed to invoke the exercise of public political power.[57] There is no parallel to this in the case of freedom of association; instead, there is a presumption of a right of exit without legal consequences (unless, of course, one has made a contract explicitly invoking government's involvement, as in the case of civil marriages). For high liberals, it is in large part the exercise of public political power, to define and enforce legally recognizable contracts, that gives liberal governments the legitimate authority to specify certain terms and conditions that contractual relations must satisfy.

Of course, given liberals' endorsement of free-market relations, there has to be good reason for government to limit freedom of contract by

[57] This accords with the ruling by the U.S. Supreme Court in *Shelley v. Kraemer,* 334 U.S. 1 (1948), which held that private restrictive covenants barring blacks from ownership of real estate are unenforceable since they violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. The Court said it is illegal for the government, including the judiciary, to enforce such covenants since the state then plays an integral role in a policy of racial discrimination in violation of the Fourteenth Amendment.

requiring (as in the case of FEPC legislation and the Civil Rights Act) that merchants do business with certain customers they would rather avoid. Friedman contends that there is not good reason. Continuing the argument above, he says that since both laws coercively restrict voluntary cooperation, "Opponents of [the Hitler Nuremburg] laws who are in favor of FEPC cannot argue that there is anything wrong with them in principle"[58]—thus suggesting that there is no principled basis for limiting voluntary cooperation in one case but not the other. But for high liberals, the basic reasons that the Nuremburg laws are unjust are not that they limit voluntary cooperation. (As Friedman and other classical liberals recognize, there are often legitimate reasons for limiting voluntary cooperation—for example, in cases of conspiracies to commit crimes, conspiracies in restraint of trade, bribery, and so on.) The main reasons why Nuremburg, Jim Crow, and other racist laws are fundamentally unjust are that (1) they publicly deny the equal moral and civic status of racial and ethnic groups, and (2) they legally restrict group members' basic freedoms of occupation and choice of careers as well as (3) their rights to equal opportunities to compete and take part in social and economic life. These are the selfsame reasons and principles for which high liberals also restrict freedom of economic contract (in the Civil Rights Act and elsewhere) in ways that many classical liberals will not countenance. Friedman is then mistaken; the principles that expose the obvious injustice of the Nuremburg and Jim Crow laws are the selfsame principles that justify compelling those who do business with the public not to engage in invidious discrimination in their economic transactions.

A more robust conception of social and civic equality and equality of opportunity is, then, the primary reason that high liberals restrict freedom of economic contract in ways that most classical liberals will not countenance. John Stuart Mill's argument for the equality of women in economic, political, and social life gives early expression to the high liberal position that civic equality and equality of opportunity are not simply to be regarded as formal requirements that forbid the legal exclusion of women and other classes of individuals from taking advantage of social, political, and economic opportunities.[59] Equality of opportunity is a social requirement that is regarded as necessary to secure and maintain the equal social and civic status of all citizens in the public domain and in one another's eyes.

The public funding of educational opportunities is also explicable within the high liberal tradition on similar grounds. Already, early classical liberals such as Adam Smith saw the benefits of publicly funded education to a nation's efficient productive capacities.[60] Moreover, as Friedman notes,

[58] Friedman, *Capitalism and Freedom,* 113.

[59] See Mill, *The Subjection of Women,* in Mill, *On Liberty and Other Essays.*

[60] See Smith, *Wealth of Nations,* Book V, chap. 1, art. ii, on compulsory education: "For a very small expence the public can facilitate, can encourage, and can even impose upon

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education involves "neighborhood effects," the costs of which cannot be charged to those who benefit, and should thus be publicly assumed.[61] Thus, many classical liberals see general education of all children as among the public goods to be provided by government. Here again, for high liberals, classical liberals' primarily economic justification of equality of opportunity does not suffice or pinpoint the real reasons for a right to publicly funded education. As I will discuss in my concluding section, there is an ideal of persons and their relations as equals that underpins the high liberal view of the substantive requirements of equality of opportunity.

VI. Distributive Justice: Income, Wealth, and Economic Powers

The idea of distributive justice does not find much favor among classical liberals or libertarians since (as Nozick said) it suggests that there is some pattern or end-state that must be met if the distribution of income and wealth is to be justified.[62] Here I use the term "distributive justice" more broadly than this, to refer to the standards that should be relied upon in society for assessing whether people have just entitlements to the income, wealth, and economic powers that they legally own, control, or exercise. So understood, capitalist market distributions against a background of robust private property rights specify the fundamental standard of distributive justice for classical liberals—on the assumption that economic agents have paid their proportionate share to maintain the institutions of justice and provide for public goods. Thus, the marginal productivity theory of just distributions discussed earlier says that the share of income that is owed to workers and owners of resources is to be determined by the market value of their respective contributions, which are construed as the (marginal) product created by their labor or property. This market distribution is a fundamental feature of capitalism as a social and economic system. For classical liberals, it stands as *the* fundamental principle of distributive justice. It may not be the only principle—people acquire rights to gifts and bequests, gambling winnings, abandoned property, and so on—but markets still provide the fundamental determining

almost the whole body of the people, the necessity of acquiring these most essential parts of education" (p. 785). Smith says that among the benefits to the state of educating "the inferior ranks of people" is that they are more disposed to work and be orderly and respectful of themselves, others, and their superiors, and less prone to disorder, superstition, and sedition (p. 788).

[61] "The education of my child contributes to your welfare by promoting a stable and democratic society." Friedman, *Capitalism and Freedom,* 86. Friedman argues for publicly issued vouchers to be used at privately run, for-profit or nonprofit schools (ibid., 89).

[62] Nozick, *Anarchy, State, and Utopia,* 149–50. Hayek more generally condemns the idea of "social justice." The title of the second volume of his *Law, Legislation, and Liberty* is *The Mirage of Social Justice.*

principle of distribution of the income resulting from productive economic activity itself.

Advocates of the high liberal tradition generally reject predominantly market-driven theories of just distributions. While they regard market transfers as an efficient instrument for distributing a substantial portion of the distributive shares that members of society are due, they reject (free and efficient) market distribution itself as the fundamental principle of economic justice in the distribution of income and wealth. Thus, Rawls contends that the fair distribution of income and wealth is to be determined by the "pure procedural" outcome of a "social process" wherein economic institutions and property are designed and specified according to Rawls's second principle of justice, including the difference principle.[63] Markets play an instrumental role in achieving this distribution, but they are not themselves the standard for determining just entitlements. Nor is the market the only procedural mechanism for realizing the fair distribution of income and wealth for high liberals. Rawls envisions income supplements (such as earned-income tax credits in the United States) as among the instrumental means of distribution of income required by distributive justice.[64] The ultimate standard for determining just distributions is the difference principle set against a background of institutions satisfying fair equality of opportunity. Distributive shares are fully just when economic institutions work, over time, to make the class of least advantaged workers in society better off in terms of their share of relevant primary social goods (income, wealth, and economic powers) than they would be in any other economic system that is compatible with the basic liberties protected by Rawls's first principle. (As I shall explain momentarily, this does not mean that the least advantaged are to have more income and wealth than in any alternative economy.)

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

[63] Rawls's second principle of justice is set forth above in the second paragraph of Section III.

[64] Rawls, *A Theory of Justice,* sec. 43, see esp. pp. 242–45. On income supplements more generally, see Edmund Phelps, *Rewarding Work* (Cambridge, MA: Harvard University Press, 1997; 2d ed., 2007). Earned-income tax credits in the U.S. are means-tested income supplements paid primarily to low- and moderate-income workers with children (workers earning $48,278, or less if they have fewer than three children). In 2010, the EIC paid $3,050 for one child, $5,036 for two, and a maximum of $5,666. ($457 is paid to workers with no children earning less than $13,460, or $18,440 if married and filing jointly). See Publication 596 EIC at http://www.IRS.gov. Other countries, including Canada and the United Kingdom, have similar programs.

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a form of welfare-state capitalism.[65] It says that once the consequences of arbitrary natural and social inequalities have been neutralized, entitlements to income and wealth are determined by our choices and how well we fare in market activity. Dworkin seeks to equalize starting positions in life and neutralize the effects of "brute luck," which include differences in natural talents, social position, and misfortunes for which people are not responsible. (Mill expresses a similar luck-equalizing position regarding remuneration of labor.)[66] Each person then has a duty to pay his or her fair share in taxes toward maintaining an economic system that meets this and other conditions. But Dworkin does not try to neutralize market luck (a form of "option luck") or otherwise put restrictions on the inequalities that free and efficient market activities and distributions may cause. He believes that, once individuals have paid their share toward public goods, social insurance, and other conditions necessary for maintaining justice, they should be entitled to whatever they gain by market activity. Dworkin's example shows that high liberalism does not necessarily imply a rejection of capitalism. Rather, what it implies is a rejection of unqualified capitalist market distributions, and of the reliance on (free and efficient) markets as the fundamental standard for the distribution of income and wealth.

The rejection of markets as the fundamental standard for just distributions of income and wealth is the most obvious respect in which high liberalism differs from the classical tradition. I want to focus, however, on a different characteristic of some (if not all) high liberal positions that suggests a more thorough rejection of capitalism as traditionally understood. This feature is implicit in Mill's and Rawls's (and John Dewey's) advocacy of institutions which enable workers' control of their work environment and ownership of productive resources. I shall approach this topic by noting a peculiar feature in Rawls's view. Rawls rejects welfare-state capitalism in favor of "property-owning democracy," a private-property market system which involves widespread private ownership of means of production. How can he do this consistent with the difference principle? Assuming, as classical liberals argue, that free-market capitalism is capable of producing greater economic output than any alternative economic system, how can Rawls avoid endorsing some form of welfare-state capitalism under the difference principle? For given efficient markets, increasing economic output, more reinvestment, and greater overall income and wealth, it seems that there will always be greater income and wealth created to redistribute to the less advantaged

[65] Ronald Dworkin's position on economic justice is set forth in his *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), esp. chaps. 1, 2, and 7–9; and also in his *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011).

[66] Mill writes in *Principles of Political Economy,* Book II, chap. i, sec. 4, p. 210: "The proportioning of remuneration to work done, is really just, only in so far as the more or less of work is a matter of choice: when it depends on natural difference of strength or capacity, this principle of remuneration is itself an injustice: it is giving to those who have: assigning most to those who are already favored most by nature."

in a capitalist economy than in any alternative economic arrangement. Therefore, it would seem that the least advantaged should fare better under welfare-state capitalism than in any other economic system. How then can Rawls reject the capitalist welfare state?

The answer to this puzzle must be that Rawls's difference principle is the ultimate standard for distributing not only income and wealth, but also the primary social goods that Rawls calls "powers and positions of responsibility." By "powers" he means legal and other institutional powers of various kinds, primarily those powers required to make economic decisions, including powers of control over productive resources. What primarily distinguishes property-owning democracy from welfare-state capitalism, Rawls says, is that the former involves less inequality in primary social goods—income and wealth, and economic powers and positions—and greater worker ownership and control over productive resources and over their workplace conditions.[67]

Here again, Rawls's account resembles Mill's. In the third edition of his *Principles of Political Economy,* Mill revised his discussion "On the Probable Futurity of the Laboring Classes" (Book IV, chapter 7). In the revised version, he states that, as opposed to laissez-faire, his own position is based on "equality," and that the desirable form of production is "association without dependence." The wage relationship is undesirable, Mill says, since it makes workers "servants," dependent on capitalists for their subsistence and well-being. Moreover, it puts workers and owners of capital in conflict, and has a demoralizing effect on the working classes.[68] He optimistically predicts that eventually "the relations of masters and workpeople will be gradually superseded by partnership in one of two forms: in some cases, association of the labourers with the capitalists; in others, and perhaps finally in all, association of labourers among themselves."[69] Mill goes on to discuss these two arrangements in some detail: first, the share arrangement between owners and laborers where profits are divided among them; and second, "the association of the laborers themselves on terms of equality."[70] Either arrangement would give workers an interest in production and in the success of the firm, and would work to cure workers' indifference toward their work, and their hostility and conflict with owners. Mill's preferred arrangement is the second, which involves ownership and control of firms by workers themselves, where accumulations of capital "become in the end the joint property of all who participate in their productive employment. [This] would be the

[67] Rawls, *Justice as Fairness,* 135–40, 158–62, 176–78.

[68] Mill says that the wage relationship divides "the producers into two parties with hostile interests, the many who do the work being mere servants under the command of the one who supplies the funds, and having no interest of their own in the enterprise except to earn their wages with as little labour as possible." Mill, *Principles of Political Economy,* Book IV, chap. vii, sec. 4, p. 769.

[69] Ibid., 769.

[70] Ibid., 775.

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nearest approach to social justice and the most beneficial ordering of industrial affairs for the universal good."[71]

These workers' "Associations" or "Co-operations" (as Mill calls them) are to take place within a framework of competitive markets for labor and productive resources. To be successful, he says, they must allow for incentives within the firm as well as worker-approved individual managers rather than collective management by workers themselves. Thus, unlike Marx and other socialists of his era, Mill affirmed a need for markets and competition among firms; he opposed a central and planned economy with public ownership; he endorsed some degree of inequality of income and wealth as necessary for incentives; and he opposed organized revolutionary activity by the working classes. But Mill still regarded it as essential to individual independence and the free development of "individuality" that employees not be subservient to their employers; that the wage relationship and the division between workers and capitalists be moderated if not dissolved; and that workers be given economic powers and ownership interests in their workplaces.[72]

Rawls refers to Mill's "Associations of workers" as one among several possible economic arrangements within property-owning democracy.[73] Rawls shares with Mill a rejection of capitalism and the endorsement of a private-propertied competitive market system where ownership and control of productive resources and wealth is widely distributed among workers and citizens generally. What is revealing about Rawls's claim that distributive justice requires a property-owning democracy rather than a capitalist welfare state is that it shows that his primary concern with distributive justice is not simply, or even primarily, the distribution of income and wealth—if that were his concern, then the capitalist welfare state probably could do the job better than other alternatives. Equally if not more important for Rawls is that workers be able to own a share of productive wealth and have some control over their own productive activities:

> What men want is meaningful work in free association with others, these associations regulating their relations to one another within a

[71] Ibid., 793–94.

[72] John Dewey also advocated arrangements that democratize work without socializing the means of production. He wrote: "Democracy is not in reality what it is in name until it is industrial as well as civil and political." John Dewey, "The Ethics of Democracy," in *John Dewey, The Early Works,* vol. I (Carbondale: Southern Illinois University, 1969), 246. Later in the same work, Dewey writes: "That the economic and industrial life is *in itself* ethical, that it is to be made contributory to the realization of personality through the formation of a higher and more complete unity among men . . . such is the meaning of the statement that democracy must become industrial." Ibid., 248. For a discussion of what he calls Dewey's "guild socialism," see Ryan, *John Dewey and the High Tide of American Liberalism,* 111–17 and 309–27.

[73] Rawls, *Justice as Fairness,* 176, 178.

framework of just basic institutions. To achieve this state of things, great wealth is not necessary.[74]

Having a share of economic powers while engaging in "meaningful work" is instrumental if not essential to fostering "perhaps the most important primary [social] good," the self-respect of free and equal democratic citizens.[75] This leads into my final topic, the conception of persons underlying the high liberal tradition.

VII. Conclusion: The Bases of the High Liberal Tradition

I have discussed the main differences between the classical and high liberal traditions. While they both endorse personal liberties as fundamentally important, the classical tradition also gives priority to robust if not unqualified rights of private property in productive resources and other economic liberties, regarding them as of nearly equal significance with other basic liberties. Consequently, the just distribution of income, wealth, and economic powers is for classical liberals largely determined by property rights and the exercise of the economic liberties within a framework of free and efficient markets. Property and economic liberties also largely determine the scope of the classical liberal requirement of equality of opportunity; it is regarded primarily in formal terms, as careers being legally open to talents with an absence of legal discrimination against disfavored groups. Finally, workers' private ownership and control of their means of production is regarded as hopelessly inefficient and hence undesirable. Moreover, the measures needed to put into place and maintain Mill's or Rawls's ideas of property-owning democracy would require the curtailing of many economic liberties and powers that classical liberals regard as fundamental.

What accounts for these differences between classical and high liberals regarding economic justice? Historically, utilitarianism has provided the main philosophical foundation for Anglo-American classical liberalism. Even among philosopher-economists who are part of (or influenced by) the Austrian tradition, such as von Mises and Hayek, a kind of indirect utilitarianism plays a significant role in the defense of their positions.[76] There are, of course, many philosophers who see themselves as classical liberals and nonetheless reject utilitarianism and welfarism generally in favor of a more Kantian or natural law grounding for their view. These views sometimes are hard to distinguish from libertarianism, and when

[74] Rawls, *A Theory of Justice,* rev. ed., 257.

[75] See ibid., 386–88, on the primary social good of self-respect; ibid., 477–78, on self-respect and equal citizenship; and Rawls, *Justice as Fairness,* 114, on property rights, personal independence, and self-respect.

[76] As discussed earlier in note 5.

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they are, I would contend that they are not classical liberal views. But nothing rides on the honorific title "classical liberalism," or "liberalism." What is important are the central features of purportedly liberal views, and the justifications provided for them.

Here I will conclude with some remarks on the primary kind of argument that underwrites the high liberal tradition and the main features I have gone over that distinguish it from classical liberalism. Once again I shall rely on Mill and Rawls. In the work of both, there is to be found an ideal of persons and their essential good that underlies these theorists' conceptions of the distinctive features of high liberalism. For Mill, this is a kind of perfectionist ideal which he calls "individuality": "The free development of individuality is one of the leading essentials of well-being."[77] A person exercises individuality when he or she freely forms and lives according to a life-plan that consists of activities involving the free exercise and full development of the "higher faculties" of reason, understanding, creative imagination, feeling and emotions, and moral sentiments. Individuality, Mill says, includes both the self-development of one's "higher faculties" and self-government according to "the rigid rules of justice."[78] While Mill says that his principle of liberty is grounded not in natural right, but in utility, he famously qualifies this claim, saying that "it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."[79] Achieving individuality is primary among these "permanent interests" and is a large part of Mill's conception of utility.

It is helpful to understand not just Mill's principle of liberty, but, more generally, his account of political and economic justice and the rights of property, as grounded in this ideal of individuality which he incorporated into his utilitarianism. As the basic liberties protected by the principle of liberty are essential conditions of people realizing their individuality, so too this same ideal of a person's "permanent interests" justifies, for Mill, representative democracy, the social equality of women, and the "socialist" revisions to capitalism (as Mill calls them) that he advocates as a necessary corrective to laissez-faire if a market economy is to prove superior to communism. The reason that absolute property and freedom of economic contract are not basic liberties for Mill is not that (in his words) "trade is a social act"; rather, these economic rights and liberties are not essential conditions for citizens generally to realize their individuality and exercise and develop their distinctly human capacities. Indeed, as Mill suggests in some places, the traditional conception of laissez-faire tends to undermine the possibility that many people will realize these

[77] Mill, *On Liberty,* 63 (chap. 3, sec. 2). Mill continues: "It [individuality] is not only a co-ordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things." Ibid.

[78] Ibid., 70 (chap. 3, sec. 9).

[79] Ibid., 15 (chap. 1, sec. 11).

great goods. Under those circumstances, "the great social evil exists of a non-labouring class" that is able to work but which subsists off the labor of others.[80] As a result, "the rich regard the poor as, by a kind of natural law, their servants and dependents," and the working classes are without "just pride," or a sense of self-respect; they "return as little in the shape of service as possible."[81] The principle well-being of the laboring classes is primarily dependent on their own mental cultivation and their taking care of their own destiny.[82] This can only occur under working conditions of "association without dependence."

Rawls makes it explicit that an ideal of the person and a person's essential good grounds his principle of equal basic liberties and provides the standards for specifying which liberties are basic and have priority over other social values. The ideal of "free and equal moral persons" who have fundamental interests in the realization of their "moral powers" of practical reasoning and social cooperation combines with an ideal of a "well-ordered society" that is grounded in relations of reciprocity and mutual respect which are acceptable to all its citizens. These ideals of persons and society underwrite Rawls's second principle of justice, including the difference principle. Like Mill, Rawls holds that classical liberal property rights and the enforcement of the traditional doctrine of laissez-faire are not conditions of free and equal persons' adequate development and full exercise of their moral powers and their achievement of their rational autonomy, "and so are not an essential social basis of self-respect."[83] Nor are laissez-faire property rights and relations generally acceptable terms of social cooperation among free and equal persons who desire to cooperate on grounds of reciprocity and mutual respect. Instead, laissez-faire undermines the likelihood that many citizens will ever achieve these essential goods.

One of the main contributions Rawls makes to liberal and democratic theory is the idea that the liberties and procedures historically associated with liberalism and with constitutional democracy should be conceived as grounded, not upon utilitarianism or an *a priori* conception of natural law and natural rights, but upon an ideal conception of persons and of society. The freedom and equality of persons are fundamental liberal values. Liberals have different interpretations of these values, and these are embedded in different ideals of persons and their social relations. Rawls's conception of the person and of society, and Mill's idea of persons' "permanent interests" in the free development of their individual-

[80] Mill, *Principles of Political Economy,* Book IV, chap. vii, sec. 1, p. 758: "I do not recognize as either just or salutary, a state of society in which there is any class which is not 'labouring'; any human being, exempt from bearing their share of the necessary labours of human life, except those unable to labour, or who have fairly earned rest by previous toil."

[81] Ibid., 767.

[82] Ibid., 763.

[83] Rawls, *Justice as Fairness,* 114.

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ity, provide the foundations for these theorists' high liberal conceptions of fundamental liberties and social and economic justice. One or more alternative conceptions of persons and their social relations are implicitly relied upon by classical liberals too, to bolster their arguments for capitalism and market distributions. Many historical and contemporary classical liberals (such as David Gauthier, Richard Posner, et al.) see persons as rational utility-maximizers, who are willing to make trade-offs between all their desires and interests in pursuit of maximum individual utility. There are other classical liberals and libertarians who reject such welfarism and advocate laissez-faire capitalist freedoms and robust or absolute property rights on different grounds; they too rely, implicitly if not explicitly, upon a different conception of persons and their social relations than Rawls, Mill, and others in the high liberal tradition.[84] If there is any progress to be made in debates about the importance to liberalism of capitalism, robust private property rights, and the essential role of markets in establishing economic justice, it will require awareness and discussion of the different and conflicting ideals of persons and their social relations that liberals implicitly rely upon in the positions they advocate. At issue in these debates is not simply the nature of our economic and social relations, but ultimately the kinds of persons that we are and can come to be.

Philosophy and Law, University of Pennsylvania

[84] Thus, libertarians such as Nozick might regard persons in the first instance as self-owners with absolute rights in their persons as well as their possessions, and society as a free association of such owners whose relations are contractually specified. The question then becomes, what capacities and features of persons justify our seeing ourselves and our relations primarily in this way?

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