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DEMOCRATIC LEGITIMACY AND ECONOMIC LIBERTY*

By John Tomasi

I am developing a hybrid theory of liberal governance that I call market democracy.[1] Market democracy combines insights from classical liberals such as F. A. Hayek with insights from "high liberals" such as John Rawls.[2] Like classical liberal views, market democracy affirms the primary importance of private economic liberty. It sees a wide-ranging right to economic freedom as among the weightiest constitutional rights of liberal citizens. Like views in the high liberal tradition, however, market democracy affirms a robust conception of social justice as the ultimate standard of institutional evaluation. Basic rights and liberties in place, a set of institutions is just only if it is specifically designed to benefit the poor. As a consequence of the scope and weight assigned to economic freedom, market democracy strictly limits the scope of legislative authority in economic affairs. Instead, market democracy emphasizes the use of markets in pursuit of social goals. The distributional requirements of social justice are to be pursued mainly through the forces of spontaneous economic order.

I have long been attracted to the classical liberal and libertarian emphasis on private economic liberty. At its best, I see that emphasis as being based on a robust ideal of agency. Possessing some particular bundle of material goods, for classical liberals, is not nearly as important as possessing those goods because of one's own actions and choices. Free individuals should be aware of themselves as central causes of the lives they lead. It is not just captains of industry or heroes of Ayn Rand novels who define themselves through their accomplishments in the economic realm. Many ordinary people—middle-class parents, single-moms, entry-level workers—become who they are, and express who they hope to be, by the personal choices they make about working, saving, and spending. For classical liberals, diminishing personal agency in economic affairs—no

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[1] John Tomasi, *Free Market Fairness* (Princeton, NJ: Princeton University Press, forthcoming, 2012).

[2] The term "high liberal" was coined by Samuel Freeman, "Illiberal Liberals: Why Libertarianism Is Not a Liberal View," *Philosophy and Public Affairs* 30, no. 2 (2001): 105–51.

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matter how lofty the social goal—drains vital blood from a person's life. When private economic freedoms are curtailed, libertarians claim, people become in some important sense less free. People in this broad tradition also emphasize property rights for instrumental reasons: property rights are linked to other basic rights, promote the creation of social wealth, and mitigate the dangers of concentrated political power. But the claim that property rights protect liberty has always seemed most important to me.

I am also drawn to the classical liberal idea of "spontaneous order." Sometimes social goals are most effectively pursued directly, for example by the creation of a governmental program guaranteeing the delivery of some needed good or service. But classical liberals emphasize that at other times—perhaps most times—social goals are best pursued indirectly. A commercial market is a paradigm of a spontaneous order. The production of the most ordinary commercial good—a lowly pencil—requires the mobilization of a staggeringly complex system of actors: foresters, miners, sailors, metallurgists, chemists, gluers, and more. As Leonard Read observed, there may be literally "*not a single person on the face of this earth*" who knows how to make a pencil.[3] Yet pencils are produced. These complex productive systems typically were not planned: they evolved. These systems are products of human action but not of human design. Friedrich Hayek argues that a free society is best thought of as a spontaneous order. In such a society, people should be allowed to pursue their own goals on the basis of information available only to themselves.[4] Along with the moral ideal of private economic liberty, I find the classical liberal and libertarian emphasis on spontaneous order deeply attractive.

At the same time, I am increasingly attracted to a form of political justification widely associated with the high liberal tradition. While libertarians such as Robert Nozick justify political forms by naturalistic arguments about self-ownership, classical liberals such as Hayek and Richard Epstein ground their institutional recommendations mainly on consequentialist arguments about efficiency or happiness (I elucidate this distinction between libertarianism and classical liberalism below). By contrast, many left-liberal theorists recently have adopted a different approach to political justification.[5] If a set of political and economic institutions is to be just and legitimate, those institutions must be justifiable in principle to the citizens who are to live within them. According to John Rawls, the problem of political justification is to be settled "by working out a problem of deliberation."[6] This approach need not require the

[3] Leonard Read, "I, Pencil" *The Freeman,* December 1958.
[4] F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).
[5] Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, Inc., 1974).
[6] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 17; and John Rawls, *A Theory of Justice,* revised edition, (Cambridge, MA: Harvard University Press, 1999), 16.

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literal consent of all the members of society (a requirement that would lead us toward anarchy). It does require, however, that institutions pass a test of acceptability to citizens understood as beings who, in their moral nature, wish to live together on terms that all can accept. As Gerald Gaus has shown, this deliberative approach can be interpreted in different ways and thus can lead to different political conclusions.[7] Still, according to Rawls and many other philosophers on the left, this deliberative or "democratic" approach is closely connected to a further idea: the idea of social, or distributive, justice.

Against the libertarians (and many classical liberals), left-liberals insist that the concept "justice" applies to more than mere individual actions. Instead, the social order as a whole—the pattern in which goods and opportunities are distributed or, better, the set of institutions that generate such patterns—can properly be described as just or unjust. Social justice requires more than the protection of the formal rights of citizens. In Rawls's elegant phrase, justice requires that citizens "share one another's fate."[8] If institutions are to be acceptable to all, those institutions must be arranged so people can look upon the special skills and talents of their fellow citizens not as weapons to be feared but as in some sense a common bounty. There are many formulations of the distributional requirements of social justice within the left-liberal tradition. Here is a general formulation that will do for now: justice requires that institutions be designed so that the benefits they produce are enjoyed by all citizens, including the least fortunate among them. Everyone is the author of a life, and the storyline of that life is fantastically important to each of them. We honor the importance of self-authorship when we insist that our institutions leave no one behind. Like the deliberative approach to political justification, I find this idea of social justice extremely attractive.

In developing a market democratic approach to liberal governance, I seek to combine ideas from these two rival liberal traditions and demonstrate how they fit together into a philosophically coherent whole. Market democracy rests on three theses: 1) economic liberty is among the basic constitutional rights and liberties held by liberal citizens, 2) social justice, on some interpretation to be specified, is the ultimate standard of social evaluation, and 3) as a matter of ideal theoretic analysis, the institutions of market democracy realize the conception of social justice specified in thesis 2) even while affirming the priority of economic liberty set out in 1). Further, if market democracy is to be a philosophically coherent view, this set of theses should be defended in a way that is strongly principled. Let us say that a defense of a set of theses is strongly principled if the

[7] Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (New York: Cambridge University Press, 2011).

[8] Rawls, *Theory of Justice,* 102. This phrase was deleted from the revised edition. For an interesting discussion of this change see Loren Lomasky's "Libertarianism at Twin Harvard," *Social Philosophy and Policy* 22 (2005): 178–99.

defenses of all the theses are grounded in a common set of foundational ideas.[9]

In this paper, I wish to offer a defense of the first thesis mentioned above: that private economic liberties must be recognized as constitutional essentials by any properly liberal regime. However, given my wider commitment to theses 2) and 3), I approach this task in a slightly unusual way. Unlike the defenses of economic liberty traditionally offered by libertarians and classical liberals, I wish to defend the importance of economic liberty in terms of the same foundational ideas that are commonly used by high liberals to defend social justice.[10] In particular, I hope to show that a powerful right of economic liberty is a requirement of respecting citizens as free and equal self-governing agents committed to a principle of mutual self-rule.

I begin with a few words about economic liberty. I then sketch a map of the ideological terrain, showing how market democracy differs from traditional accounts of high liberalism, classical liberalism, and libertarianism alike. I then turn to my main task, which is to offer a defense of private economic liberty on grounds of democratic legitimacy.

I. Economic Liberty

When I speak of economic liberty in this paper, I shall mean "liberty" in a broad sense to include a variety of elements like those the legal scholar Wesley Hohfeld called "rights-relationships." So economic liberties may refer to *claim-rights,* where a right-holder has a claim on some duty-bearer to act or to forbear from acting in some specified way; or to *liberties* proper, whereby a right-holder is at liberty with respect to others to perform some act or not to perform that act; or to *powers,* where a right-holder is in a position such that he may alter the rights, duties, liberties, or powers of some duty-bearer.[11] Whether used in a moral or legal sense, then, the term "liberty" here is used to cover a wide variety of rights-relationships.

James Nickel helpfully describes the *economic* liberties as involving "a right to independent economic activity" and "a right to own personal and

[9] Imagine a classical liberal position that affirms a strong set of private economic liberties on grounds of economic efficiency, but affirms a tax-funded social safety net as a requirement of beneficence. (Milton Friedman is sometimes interpreted as having defended a version of classical liberalism exhibiting this structure.) The justification for this position would not be strongly principled.

[10] Obviously, there are other logically coherent approaches available here. For example, one might seek to justify a concern for social justice in terms of the same foundational ideas by which libertarians or classical liberals commonly defend the priority of economic liberty. That is not my project.

[11] Wesley Newcomb Hohfeld. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 1964). See also Lawrence Becker *Property Rights: Philosophical Foundations* (Boston, MA: Routledge & Kegan Paul, 1977), 11–21.

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productive property." Nickel then divides the economic liberties into a variety of categories. Simplifying Nickel's schema, we can think of economic liberty as divided into two broad categories: liberties of *working* and of *owning*.[12]

The economic liberties of *working* protect the freedom of individuals to labor and to use labor in productive activities. As Nickel puts it: "This is the liberty to employ one's body and time in productive activity that one has chosen or accepted, and under arrangements that one has chosen or accepted." The other main categories of economic liberty that Nickel describes—those of transacting, holding, and using—can be subsumed under our category of *ownership.* Thus, the liberty of transacting allows individuals to engage in free economic activity: "This is the freedom to manage one's economic affairs at the individual and household levels and on larger scales as well." Transacting involves the liberty to trade in the market place, to create things for sale, and to save and invest. It also covers the freedom of individuals and groups to start, run, and close down businesses such as factories, shops, farms, and commercial enterprises of many sorts. The economic liberty of holding concerns freedom in the realm of several property. "This category covers legitimate ways of acquiring and holding productive property, using and developing property for commercial and productive purposes, and property transactions such as investing, buying, selling, trading, and giving." Finally, there is a range of liberties concerning using. "This is the liberty to make use of legitimately acquired resources for consumption and production." The liberty of using protects the freedom of citizens to buy, use, and consume natural resources, consumer goods, and services. On the commercial level, this liberty protects production-related consumption (such as deciding which parts to use, or which power sources to purchase). On the domestic level, it protects a range of personal economic decision-making, including questions about what to eat and drink, what to wear, what type of housing to have, and a wide range of services—including what forms of entertainment, of cultural experience, and perhaps what educational experiences and which health care services—one might choose to purchase.

These categories of economic liberty overlap in a variety of ways. If a school teacher uses his summer break to remodel the basement of his home, for example, he might be described as exercising a liberty of working or one of owning (for example, that of holding). Nonetheless, this simplified schema gives a sense of the range of activities at play when we speak of economic liberty. Most important, the economic liberties of working and owning can be interpreted in a great variety of ways, both in terms of the range of activities each category of liberty is understood to

[12] James Nickel, "Economic Liberties" in *The Idea of a Political Liberalism: Essays on Rawls,* ed. Victoria Davion (Lanham, MD: Rowman and Littlefield, 2000), 155–76. Nickel lays out his four-category scheme of economic liberty on pp. 156–57.

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cover and in terms of the social importance assigned to those activities. To see this, let's look more closely at the idea of ownership.

Anthony Honoré, in a classic article, defines ownership as "the greatest possible interest in a thing which a mature system of law recognizes."[13] By studying a great variety of legal systems, Honoré suggests that the concept of ownership can be broken down into eleven aspects or "incidents." These are: 1) a right (claim) to possess (exclusive physical control of a thing); 2) a right (liberty) to use (in the narrow sense of personal use and enjoyment); 3) the right to manage (the power to determine how and who will use a thing); 4) the right to income (a claim to the benefits from possession of a thing); 5) a right to capital (including the power to alienate a thing and the liberty to consume and/or destroy it); 6) the right to security (an immunity from having one's things taken by compulsion); 7) the right of transmissibility (the power to transfer one's property rights in a thing to another person, as in a bequest); 8) the right to absence of term (ownership is long-lasting, such that a person's claim is immune from expiration); 9) the prohibition of harmful use (ownership includes a duty not to use the property in a way that harms others); 10) liability to execution (owners are liable for their debts and their property may be repossessed in payment for them); and 11) residuary character (rights of ownership sometimes expire, and thus may come to be vested in some other person or entity).[14]

Honoré does not defend these "incidents" as moral requirements of ownership. Rather, he simply observes that when most mature legal systems address issues of ownership, they see ownership as involving most or all of these eleven aspects. Honoré suggests that this *de facto* convergence on the formal aspects of ownership might be explained by the "common needs of mankind and the common conditions of human life." Nonetheless, as Honoré is quick to point out, each of these aspects can be interpreted in different ways. Thus, while mature legal systems tend to include the same eleven incidents in their concept of ownership, this certainly does not mean "all systems attach an equal importance to ownership (in the full, liberal sense) or regard the same things as capable of being owned."[15] A socialist system, for example, might recognize this full conception of ownership but limit the range of things that can be owned—for example, by not recognizing private ownership rights to productive machinery.[16] Other systems may regard ownership as including the incidents of income and transmissibility, but limit the weight assigned to those aspects of ownership out of concern for other social values (for example, they may subject income and bequests to steeply progressive

[13] Anthony Honoré, "Ownership," *Oxford Essays in Jurisprudence: A Collaborative Work,* A. G. Guest, ed. (London, New York: Oxford University Press, 1961), 107–47.
[14] Ibid., 113–24.
[15] Ibid., 109.
[16] Ibid., 110.

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rates of taxation in pursuit of some social goal). As Honoré notes, his formal analysis "is not meant to prejudge the issue, how far private ownership should stretch and to what extent it should be modified in the public interest."[17] The economic liberties of ownership, like those of working, can be interpreted in a great variety of different ways in terms of scope and weight.

By scope, I mean the range or number of private economic activities that are to be protected, where "activities" refers to the liberties of working or owning. Thinkers in the liberal tradition interpret the scope of economic liberty in diverse ways. With respect to the economic liberties of *working*, for example, a narrow interpretation of scope might only recognize freedom of occupational choice as meriting protection. A wider interpretation of scope might include freedom of occupational choice, but also include protections for individuals to decide for themselves how many hours they are willing to work each week. The question of the scope of the economic liberties of working also covers issues about what kinds of work might merit protection. Freedom of labor might (or might not) be interpreted to include protections for a great variety of paid activities ranging from surrogate motherhood, controversial forms of entertainment (such as exotic dancing, extreme fighting, or "dwarf-tossing"), and sexual services of various kinds. At its widest interpretation, as affirmed by some libertarians, the scope of the liberty of working might even protect practices such as indentured servitude.[18]

With respect to the economic liberties of *owning*, scope refers primarily to the range of kinds of things that are recognized as being ownable. On a narrow reading, for example, ownership might be interpreted to apply only to personal (nonproductive) property. (An even narrower reading, perhaps, might deny private ownership altogether, as in a forced cooperative where all things are required to be held in common.) Wider readings might extend the range of private ownership to include productive property (businesses, arable land, the means of production). As with the issue of working, further points out on the continuum might include an ever wider and more controversial listing of things identified as subject to the claims, liberties, and powers attendant to (private) ownership: animals, works of art, bodily organs, persons, and more.

Unlike scope, weight refers to the importance assigned to these private economic activities compared to other values and goals. The more important the private economic activities of working and ownership are deemed to be, the stronger the legal protection given to those activities. An important threshold on this continuum of protection concerns whether a given economic liberty—a right of working, say, or of owning—is considered

[17] Ibid., 108.

[18] I think of indentured servitude as primarily involving questions of labor, while slavery is more fundamentally an issue of ownership. I am open to alternative ways of categorizing these issues.

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weighty enough to merit protection as a basic, constitutional right. Even among constitutionally protected rights, some of those rights can be deemed weightier than others. But all rights deemed weighty enough to be entrenched in the constitution protect activities that are thereby significantly insulated from legislative interference.

Not all rights are constitutionally protected, of course. Legislative bodies can set out economic liberties of various sorts—claim-rights, powers, and immunities—and economic rights and liberties set out that way can vary in their degree of weightiness compared to other sorts of rights and social concerns. Speaking generally, then, economic liberties are treated as more weighty to the degree that they are accorded greater political protection, and less weighty the more susceptible they are to being overridden by other moral values and social goals.

So liberals disagree about the range and importance of protection that should be accorded private economic activity. We can use these distinctions to help us draw a conceptual map of the diverse terrain of contemporary liberal thought.

II. The Conceptual Terrain

By "classical liberalism," I mean a broad school that includes "libertarianism" as a subset. Classical liberalism is the liberalism of Adam Smith, David Hume, F. A. Hayek, and Richard Epstein as well as libertarians such as Robert Nozick, Eric Mack, and Jan Narveson. High liberalism, by contrast, is the liberalism of John Stuart Mill, T. H. Green, John Rawls, Ronald Dworkin, Martha Nussbaum, Thomas Nagel, Samuel Freeman, Joshua Cohen, Will Kymlicka and a great many other contemporary scholars. One way to distinguish between kinds of liberalism is by their differing conceptions of economic liberty. Classical liberals affirm what I call a *thick* conception of economic liberty; high liberals, a *thin* conception.

Most liberals agree that some rights and liberties are more important than others. These basic liberties merit a high degree of political protection, typically by being entrenched in the constitution. On their lists of basic liberties, most liberals include some economic liberties, such as the right to own property, along with civil liberties, such as the right to a fair trial, and political liberties, such as the right to vote. But liberals differ about the scope of the economic liberties they consider basic. Classical liberals tend to interpret economic liberty as having the same wide scope accorded to the other categories of basic liberty. Just as the recognition of religious liberty requires the general protection of independent activity in the religious realm, economic liberty requires the general protection of independent activity in economic matters. Wide freedom of economic contract and general rights regarding the ownership of property are prominent features of the thick conception of economic liberty affirmed by classical liberals.

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A crucial division within the liberal tradition begins with Mill's ambivalent treatment of economic liberty. According to Mill, liberty involves "framing the plan of our life to suit our own character."[19] While Mill affirms liberties of thought, association, and religion as protecting liberty, he sometimes suggests that economic liberties should be treated differently. Decisions people make with respect to questions of labor and ownership in their lives have no intrinsic connection to liberty in Mill's sense. While economic laws may govern the production of goods, the systems by which goods are distributed are social creations, subject to collective choice and control.[20] Since economic activity is not an expression of liberty, rights and powers of ownership and labor should mainly be defined by the requirements of utility: "Property is only a means to an end, not itself the end."[21]

Continuing in this high liberal tradition, John Rawls likewise adopts a platform of economic exceptionalism, according to which economic liberties are singled out for relegation to a lower level of protection. Compared to Mill, Rawls is more forthright in his skepticism about the moral value of private economic liberty. Regarding freedom of labor, Rawls recognizes only a limited right to occupational choice as a basic right, relegating the freedom to engage in self-organized economic activity as well as the freedom to hire others for productive purposes as issues to be determined through legislative debates. Regarding ownership, Rawls recognizes only the right to personal property as a basic right, severing off any rights protecting the ownership of productive property (family farms, businesses, and other "means of production"). Those wider economic rights, Rawls states, are not "necessary for the development and exercise of the moral powers."[22] Since independent activity with respect to those other economic issues is not an expression of liberty, any rights and powers regarding those activities should be crafted with an eye toward the realization of broader distributional requirements, in light of prevailing demographic and sociological conditions, etc. This thin conception of economic liberty is a hallmark of the high liberal tradition.

Continuing with this approach of demarcating liberal schools in terms of their treatment of economic liberty, "libertarianism" is identifiable as a variant within the classical liberal tradition.[23] Like classical liberals, lib-

[19] John Stuart Mill, *On Liberty* (Indianapolis: Hackett, 1978), 12.

[20] "Unlike the laws of Production, those of Distribution are partly of human institution: since the manner in which wealth is distributed in any given society, depends on the statutes or usages therein obtaining." John Stuart Mill, *Principles of Political Economy* (Indianapolis: Liberty Fund, 2006), 21.

[21] Ibid., 223. For most of his career, Mill advocated that governments leave the economy largely unfettered. However, this was not because he believed citizens had basic rights to economic liberty. Rather, he thought free economic regimes would tend to produce good consequences.

[22] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 298.

[23] For a useful survey of the varieties of libertarian thought, see Matt Zwolinski, "Libertarianism," *The Internet Encyclopedia of Philosophy,* http://www.iep.utm.edu/libertar/.

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ertarians affirm a thick conception of economic liberty. But while traditional classical liberals affirm economic liberties as on a par with the other traditional liberal rights and liberties, libertarians affirm those economic liberties as the weightiest of all rights, and possibly even as moral absolutes. Some libertarians believe that all rights—including rights of free speech, free association, and sexual freedom—are simply instances of property rights. (The right to free speech is a right to use one's mouth—which one owns—in a certain way.) Libertarians such as Nozick see economic liberties as so weighty that the liberal state must enforce most any contract that citizens enter into—including even ones in which people sold themselves into slavery.[24] While classical liberals such as Hayek advocate limited tax-funded support for education and a safety net, the libertarian approach rules out such programs. Because of these positions, high liberals such as Freeman claim that ("right") libertarianism should not even be counted as a properly liberal view.[25]

III. Economic Exceptionalism

Market democracy affirms a thick conception of economic liberty as among the constitutional rights of liberal citizens. As liberal citizens have a general right to independent activity and decision-making in the religious, associational, and intellectual aspects of their lives, so too market democracy recognizes a general right protecting citizens' choices and actions with respect to economic questions.

This is a fundamental point of moral disagreement between market democracy and the "left-liberal" versions of high liberalism that dominate the academy today. While affirming general rights of speech and religious practice as basic rights, high liberals such as Rawls treat the economic freedoms of citizens differently. Of all the traditional rights of liberalism, the economic liberties—and only those liberties—are to receive special definitional narrowing.

Instead of a general right to free economic activity, for example, Rawls specifies that citizens only have a basic economic freedom regarding their choice of occupation and the ownership of personal (nonproductive) property. The question of whether it is morally acceptable to single out eco-

[24] Because Nozick altered parts of his view, his critics sometimes claim that he rejected libertarianism altogether. See Robert Nozick, *The Examined Life* (New York: Basic Books, 1989), 287. There is textual evidence against this claim. See Robert Nozick, *Invariances* (Cambridge, MA: Harvard University Press, 2001), 281–82, passim. I thank Jason Brennan for conversations about these passages.

[25] Samuel Freeman, "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View," *Philosophy and Public Affairs* 30, no. 2 (Spring, 2001): 105–51. A more complete map would include "left-libertarianism," on which see Michael Otsuka "Self-Ownership and Equality: A Lockean Reconciliation," *Philosophy and Public Affairs* 27 (1998): 65–92; and Peter Vallentyne and Hillel Steiner, eds., *Left-Libertarianism and its Critics: The Contemporary Debate* (New York: Palgrave, 2000).

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nomic liberty to be constrained in this way is a major junction point, perhaps *the* major junction point, within the history of liberal thought. Can this high liberal platform of economic exceptionalism be justified?

Given the importance of this question, it is surprising that high liberal arguments for economic exceptionalism are often presented only obliquely and in an unsustained fashion. Defenses of economic exceptionalism usually take the form of critiques of thick economic freedom. Let us examine these critiques.

One way high liberals seek to undermine the importance of property rights is to claim that property is a legal convention. The economic liberty of ownership exists as a product of regulatory definitions, rules and conventions. Now, the idea that property is a legal convention has been widely accepted by classical liberals at least since Hume.[26] Critics of thick economic liberty, however, add a stinger to this idea. If property is a legal convention, this means that claims to ownership are conceptually posterior to the regulatory rules that define and constrain them. So property rights cannot serve as a basis for limiting those regulatory rules. As Liam Murphy and Thomas Nagel put it: "Private property is a legal convention, defined in part by looking at the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity."[27]

Against the property-absolutist claims of some libertarians, Murphy and Nagel claim that the system of social rules that potentially impact on property rights is logically prior to those property rights. Thus: "The logical order of priority between taxes and property rights is the reverse of that assumed by libertarians."[28] Murphy and Nagel note that many ordinary citizens believe that they have some kind of right to their pre-tax income, a right that proposals for taxation must overcome. But they argue that these "everyday libertarian" notions are baseless confusions.

Murphy and Nagel direct their argument from legal convention against absolutist conceptions of ownership rights.[29] However, they then proceed as though their critique of pure libertarianism *ipso facto* rules out classical liberal accounts of ownership as well. Libertarians may well object to the way Murphy and Nagel characterize the "absolutism" of their defenses of property rights. This is an important issue, but we can set it aside. For us,

[26] "Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice." David Hume, *A Treatise of Human Nature,* L. A. Selby-Bigge, ed. [Oxford, 1960 (1888)], 491. Milton Friedman says: "What constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident-propositions." Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition* (1962; University of Chicago Press, 2002), 26.

[27] Thomas Nagel and Robert Murphy, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002), 8.

[28] Ibid., 33.

[29] See Gerald Gaus's compact critique in "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Liberal Tilt," *Social Philosophy and Policy* (2010): 233–75, at 259.

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the important point is that, when applied to non-absolutist defenses of thick economic liberty, this argument from legal convention quickly loses its force. Indeed, applied against the classical liberal conception of economic liberty that I wish to defend, the argument from legal convention is generalizable so as to render it either trivial or circular.

First, let us look at a generalized version of this argument. Consider any legal convention, which we will call "X," where X is defined in part by looking at the surrounding systems of rules and regulations that impact on it. According to the argument from legal convention, systems that impact on X cannot be evaluated by asking whether they impact on X (as though X has an independent existence and validity). But now for X, instead of a libertarian conception of property rights, substitute: 1) the right to vote; 2) the right of bodily integrity; or 3) the right to free intellectual development (such as that protected by freedom of the press). I suggest that any of these rights, and many more besides, could equally well be substituted for X. All basic rights and liberties are socially constructed in important ways.

Consider the right to bodily integrity. We cannot know the content of this right except by reference to the surrounding rules that identify when that right is impinged. Is getting bumped in the hallway a violation of the right to bodily integrity? We answer that question only by looking at the complex system of social rules and definitions (such as those that define various forms of assault and battery) that are relevant to this particular right. So too the right to vote must be given definitional content by rules that set out how often elections will be held and determine how they will be structured.

So the observation that "property is a legal convention" does no normative work specific to issues of property (aside from perhaps blocking the pure libertarian claim). We must evaluate systems that impact on economic liberty the same way we evaluate systems that impact on any other "legal conventions." Namely, we must consider the best substantive arguments that can be advanced to tell us what degree of protection from impingement each of those "legal conventions" merits. Whatever "independent existence and validity" the economic liberties have must come from those moral arguments. The strength (or weakness) of those arguments is unaffected by statements about economic freedom's status as a legal convention. With respect to assertions about the legitimacy of restrictions on economic liberty, the claim that such liberties are legal conventions is trivial.

The only way to make the argument from legal convention undermine the importance of thick economic liberty would be to antecedently assume that the moral arguments supporting such liberty are weak or nonexistent. But, again, the observation that "property is a legal convention" does no normative work to support that assumption. With respect to claims about the legitimacy of restrictions on economic liberty, the legal-convention argument about property is circular.

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To avoid these problems, high liberals sometimes offer a supplementary argument against economic liberty. This argument seeks to attach the legal-convention critique uniquely to questions of private economic liberty. With economic liberties, this argument goes, a result of their social protection is that large inequalities will emerge between people. These inequalities are far beyond the inequalities that would have occurred in a Hobbesian state of nature. In the state of nature, as Murphy and Nagel point out, "there is little doubt that everyone's level of welfare would be very low and—importantly—roughly equal. We cannot pretend that the differences in ability, personality, and inherited wealth that lead to great inequalities of welfare in an orderly market would have the same effect if there were no government to create and protect legal property rights . . ."[30]

However, this argument also can be generalized with respect to "legal conventions" besides property. Consider freedom of thought, including intellectual freedom. In the state of nature everyone's level of intellectual attainment would be very low and therefore roughly equal. In society, with rules protecting intellectual freedom, differences in intellectual talent, personality, and ambition will lead to much larger inequalities of learning and intellectual accomplishment. Some will fill their heads with gossip about Hollywood stars and the doings of game show contestants. Others will devote themselves to the study of arcane problems in philosophy (such as the question of what it is like to be a bat).[31] Whether we are considering economic or intellectual liberty, however, the simple fact that social protections magnify inequalities tells us nothing. The important question is the moral one about how we should think about these inequalities. Liberals answer that question first and foremost by examining the moral importance of the activities that give rise to such inequalities in the first place. The observation that economic liberties are social conventions does nothing to undermine the market democratic claim that such liberties should be recognized as basic rights.

Consider a different argument, this one offered by Rawls, against the affirmation of thick economic liberty—though again this argument is presented only obliquely. Recall that in a democratic society, citizens are committed to act in relation to others on terms that they can publically endorse together. Thus one of the central aims of democratic society is to resolve "the impasse . . . as to the way in which social institutions are to be arranged if they are to conform to the freedom and equality of citizens as moral persons."[32] However, Rawls says that the choice between the traditional economic liberties of capitalism (such as private ownership of productive property, and the freedom of individuals to negotiate the terms of their own employment) and the economic liberties of socialism

[30] Nagel and Murphy, *The Myth of Ownership*, 16–17.
[31] Thomas Nagel "What Is it Like to Be a Bat?" *The Philosophical Review* 83 (1974): 435–50.
[32] Rawls, *Political Liberalism* 338–9.

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(which allow only ownership of personal property and a limited freedom of occupational choice) is too controversial to be decided as matters of political justice. Even a philosophically compelling argument, he says, is "most unlikely to convince either side that the other is correct on a question like that of private or social property in the means of production."[33] In the face of these sharply conflicting views, it is unlikely that an overlapping consensus could be reached on this issue. Rawls says the choice between capitalism and socialism must be to left to later stages of justification "when much more information about a society's circumstances and historical traditions is available."[34] In this way, Rawls denies that the economic liberties of capitalism should be recognized as basic rights.

This is curious argument. For one thing, it is not obvious that socialism affirms economic liberty in a liberal sense at all. For socialists, "economic liberty" involves the right to participate in collective decision-making about the uses of socially-owned property.[35] There are complicated issues here, but classical liberals have good reason to be skeptical: the socialist approach appears to involve a form of *political* liberty rather than one of economic liberty. Imagine a conception of religious liberty under which each citizen was given a say about what religious practices would henceforth be required by all members of the community. Rather than protecting individual freedom in the area of religion, such a system would violate religious liberty in the liberal sense by making religious decisions subject to collective decisions. Similarly, socialism gives primacy to collective decision-making in economic affairs, rather than protecting independent economic decision-making and activity on the part of individuals and voluntary partnerships.[36]

Even if we grant the cogency of the socialist conception of "economic liberty" within the liberal context, this argument faces serious problems. First, Rawls's plea for neutrality on economic issues fits ill with his own later assertion that socialist regimes (such as liberal democratic socialism) realize liberal justice while even tepidly capitalist regimes (such as welfare state capitalism) violate that standard. Further, Rawls bases his ostensible plea for neutrality on this issue on the claim that the choice between socialism and capitalism is too divisive to be settled as a matter of political justice. But such an approach would require that we disfigure the core democratic standard that people should live together on terms that all can

[33] Ibid.

[34] Ibid., 298.

[35] For a definition along these lines, see John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 114.

[36] Market democracy makes room for worker-owned firms, and so for whatever forms of economic freedom might be available therein. Against liberal socialism, however, market democracy insists that citizens cannot be compelled to work in worker-owned firms. Nor can workers be compelled to join unions, though individuals may have the right to do so for purposes of collective bargaining. In all these areas, market democracy insists that we protect the private economic liberties of liberal citizens.

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accept. As noted earlier, the public reason standard can be interpreted in a variety of ways. Within Rawls's own system, however, that standard requires merely that we seek consensus among citizens who are politically reasonable, rather than among all citizens regardless of the content of their views.

To see the appeal of this approach, consider another example involving religion. Imagine a liberal constitutional democracy within which a large faction of citizens is committed to using the state to impose its preferred religious viewpoint on small factions of citizens holding deviant views. So, as a matter of sociological fact, the status of religious liberty is a matter of controversy in that society. On Rawls's approach to public reason, our commitment to democracy would not allow us (let alone require us) to prescind from philosophical investigations about whether religious liberties should be recognized as among the basic rights of those liberal citizens.

Similarly, even if it were the case that the choice between private and public ownership of productive property was a topic of significant disagreement within the liberal democracies of the west (which it manifestly is not), this sociological fact could not cut off philosophical investigations into the moral standing of thick economic liberty for liberal citizens. With questions of economic liberty, like those of religious liberty, the mere fact of controversy cannot by itself render an issue unfit for public reason arguments. The value pluralism democratic theorists must respect is *reasonable* value pluralism. The mere fact of controversy cannot pull the plug on discussions about the moral requirements of liberal democracy.

So we return to our question: What could justify the high liberal platform of economic exceptionalism? As we have seen, high liberals treat the economic liberties differently than the other traditional liberal freedoms. Rather than including a general right protecting the choice-making of citizens in economic affairs, Rawls's list of basic liberties includes only two narrowly crafted economic liberties: a right to own personal (nonproductive) property, and a limited right to occupational choice. To understand the high liberal platform of economic exceptionalism, we need to take a closer look at the moral powers and their relation to the list of basic liberties.

IV. The Moral Importance of Economic Liberty

Politics is about coercion. Rules against murder, prohibitions against fraud, and policies about the conduct of elections, all require coercive backing. The most basic question philosophers ask about political life concerns the conditions under which the use of such coercion is morally justified. Since Locke, many liberals have given some notion of consent, or justifiability, an important role in legitimating political coercion. The

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liberal principle of legitimacy is this: the use of political coercion is legitimate only if that coercion is conducted on the basis of principles that can be endorsed by the people subject to that coercion. As Rawls puts it, legitimate political authority requires a "constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of their common human reason."[37] The question then arises: Under what conditions might this principle of democratic legitimacy be satisfied?

In order to endorse a set of the political rules, people must first be capable of assessing those rules. To assess political rules, citizens must exercise powers of judgment known as "moral powers." As responsible self-authors, as I describe people exercising the first of these moral powers, citizens are understood to have the capacity to make a realistic assessment of the life options before them and, in light of that assessment, to choose to pursue some course of life as their own. Without this capacity, citizens would not be able to assess what they believe society ought to allow them to do. The other moral power, in my terms, concerns the capacity people have to recognize their fellow citizens as responsible self-authors too. This involves recognizing that their fellow citizens likewise have lives to lead that are important to them. Since they are capable of recognizing this, citizens are capable of committing themselves to abide by just rules of social conduct. Without this capacity, citizens would be unable to evaluate how well the rules of their society square with their commitment to honor their fellow citizens as responsible self-authors.

If people are to be capable of endorsing the rules that are to govern them, they must be free to exercise and develop their two moral powers. The idea that people have special moral powers or capacities in their roles as citizens has a long history, with philosophers defining these powers in various ways.[38] Like Rawls, I will follow tradition by distinguishing two central moral capacities. The first is a capacity for what I shall call responsible self-authorship. By this I mean that all healthy adult citizens, regardless of their particular advantages or disadvantages given by birth, have the capacity to develop and act upon a life plan of their own (whether that plan be individual, collective, or otherwise shared). People are life-agents and their agency matters. As responsible self-authors, they have the capacity to realistically assess the options before them and, in light of that assessment, to set standards for a life of a sort that each deems worth living. The second power is more obviously social in nature. This is the moral capacity to honor one's fellow citizens as responsible self-authors

[37] Rawls, *Justice As Fairness*, 41.

[38] Adam Smith described people as simultaneously "self-interested" and "other regarding." Rousseau and Kant offered accounts of the moral powers of citizens. For an illuminating discussion of the idea of moral powers in Rousseau and Kant in relation to that of Rawls, see Thomas A. Spragens Jr., *Getting the Left Right: The Transformation, Decline, and Reformation of American Liberalism* (University Press of Kansas, 2009), 68–71.

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too. By this I mean that citizens can recognize that their fellow citizens have lives to lead that are fantastically important to each of them. Whenever they call on the coercive force of the law, they need to be careful to do so in a way that fully respects their fellow citizens as self-authors too.[39]

The role of the basic liberties is to protect those powers. In a society without a general right protecting freedom of speech, a ruling party might allow speech on a wide range of topics but forbid speech by their rivals. Denied access to those forms of speech, the citizens would lack important information about the character of their regime, and perhaps even about the value of political speech itself. Without protection of that general liberty, the evaluative capacities of the citizens would be stunted. Even if they acquiesced to the system of governance, their endorsement would not be as robust as the liberal principle of legitimacy requires.[40] Thus, in drawing up a list of basic liberties, we are seeking to identify a set of liberties that "provide the political and social conditions essential for the adequate development and full exercise of the two moral powers."[41] The basic liberties are those liberties that must be protected if citizens are to develop their evaluative horizons, thus making them capable of truly governing themselves.

Formally speaking, therefore, the stipulation and enforcement of a set of basic liberties is a requirement of political legitimacy. But it is important to note that, while politics is always about coercion, this does not mean that the justification of coercion is the *point* of politics. The liberal commitment to the principle of legitimacy is itself derived from a deeper commitment. At base, high liberals are concerned to respect citizens as free and equal self-governing agents—that is, as members of a cooperative venture who nonetheless have their own lives to lead. It is the commitment to the equal importance of each of those lives that leads liberals to the principle of legitimacy. By insisting that the use of political force be justifiable in principle to all, every person is accounted for as a morally social member.[42] So, the imperative to create a social world in which the moral powers of citizens can be fully developed is a requirement of legitimacy. But that imperative springs from the more basic liberal ideal, rooted in the work of Locke, that political institutions must respect people as free and equal moral beings.[43]

Thus, basic rights are requirements of democratic legitimacy. For this reason, the list of basic rights has a special status within any liberal

[39] For Rawls's discussion of the moral powers, see e.g., *Justice As Fairness,* 18.

[40] Consider another example: Imagine a society that tailored the right of religious freedom to allow the practice of any religion whatsoever—so long as such practice was conducted only in private homes.

[41] Ibid., 46.

[42] See Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* vol. 37 (1987): esp. 128.

[43] I thank Jason Swadley, Zak Beauchamp, and Jason Brennan for discussion of these ideas.

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schema. The protection of the rights on this list is prior to any other social aim—whether that aim be economic prosperity or the pursuit of some distributional goal (such as lessening social inequality, or maximizing the bundle of wealth personally controlled by the poor).[44] Again, democratic theorists can differ about the strength of the priority they assign to basic rights over other social values. Within the orthodox high liberal schema, a basic liberty can only be restricted in order to prevent a more severe restriction to some other basic liberty (or to the scheme of basic liberties as an integrated whole).

The priority assigned to the basic liberties has significant institutional implications. Because the basic liberties are requirements of political legitimacy, high liberals argue that the basic liberties (and the basic liberties alone) should be entrenched in the constitution.[45] The basic liberties are prerequisites for the legitimate exercise of democratic authority. Legislative measures that infringe on those liberties are thus illegitimate. The pursuit of social goals, whether by legislative rule or the exercise of executive prerogative, must not violate the basic rights and liberties enshrined in the constitution.

High liberals claim that some narrowly specified economic liberties should be recognized as basic while other dimensions of economic liberty should be excluded. So high liberals claim that some forms of independent economic activity must be protected if people are fully to develop and exercise their moral powers, while other aspects of personal economic freedom need not be so protected. However, the moral reasoning high liberals use to justify the inclusion of their preferred economic liberties cannot explain why the other aspects of economic liberty must be excluded. On the contrary, the same reasons high liberals offer in support of their preferred economic liberties apply with at least as much force to the aspects of economic freedom they wish to exclude.

Consider freedom of occupational choice. It is easy to see why high liberals affirm this particular economic liberty as a basic right. After all, imagine a society that does not affirm a right to occupational choice. In pursuit of some important social goal, the legislature in this society decides to create a panel of experts (or perhaps a computer program) that assigns an occupation to each citizen. A society organized in this way would not respect citizens as "free and equal self-governing agents." People ordinarily spend a large percentage of their time engaged in their occupation. This is one reason why the choice of occupation is often a profound expression of identity: as Aristotle once noted, what we do influences who we are. By choosing which occupation to pursue, we express our values. We say something about what projects we think are worthy of our

[44] On the distinction between these distributive goals, see Derek Parfit, "Equality and Priority," *Ratio* (New Series) X, no. 3 (1997): 202–21.

[45] Rawls, *Justice As Fairness*, 46.

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time, how we value the monetary rewards of work compared to the other rewards of work, and about how we balance the value of work with the other parts of our lives.

However, once the right of occupational choice is allowed to be a basic right, it becomes unclear how the other liberties of working can be excluded. Those thicker liberties of working, recall, involve "the liberty to employ one's body and time in productive activity that one has chosen or accepted, and under arrangements that one has chosen or accepted."[46] If the freedom to choose an occupation is essential to the development of the moral powers, the freedom to sell, trade, and donate one's labor looks equally essential for the same reasons. After all, one is defined by one's workplace experience not simply by *what* profession one pursues. One is also defined by *where* one chooses to work, by the *terms* that one seeks and accepts for one's work, by the *number of hours* that one devotes to one's work, and much more besides.

These are not mere details within a person's life. The particular pattern of decisions one makes in response to these questions about working often goes a long way to defining what makes one person's life distinct from the lives of other people. A society that denied individuals the right to make decisions regarding those aspects of their working experience would truncate the ability of those people to be responsible authors of their own lives. Indeed, denied these fuller freedoms of labor, citizens would no longer *be* authors of their own lives. Decisions about matters that affect them intimately would have been taken out of their hands and decided for them by others. The evaluative horizons of those citizens would be narrowed by their experience of life under conditions in which those aspects of liberty were denied. Even if people in such a society acquiesced to these restrictions on their liberty, they would not be in position to endorse the rules of their society in anything like a full or robust manner. Freedom of labor, and to use labor in production, is an essential aspect of a social world that encourages citizens to develop and exercise their moral powers of responsible self-authorship.

A similar argument applies to the economic liberties of ownership. It is easy to see why high liberals affirm that a right to own personal (non-productive) property is important. Ownership rights to such property can provide a person with personal security: citizens with these rights know that they can hold something that cannot be taken away from them. Personal property can include vitally human things such as food, shelter, and clothing. Ownership rights in such things can shelter people from domination by others. The ownership of personal property can also serve as an expression of identity: the things one lives with and attends to on a daily basis help provide moorings to people, providing a kind of stability of life experience through time.

[46] Nickel, 156.

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However, rights to the ownership of productive property have many of these same features. The ownership of productive property provides security. Ownership of productive property—say, savings in the form of stocks and bonds—provides individuals and families with a measure of independence. (Permitting citizens to hoard cash, while denying them the right to purchase stocks or other securities, would not be a significant concession to the freedom owed to such citizens). Ownership rights in productive property are not only important for entrepreneurs. Such rights free ordinary, working-class people from forced dependence on the state and its agents. People who have ownership stakes in productive property are by that very fact able to stand on their own feet and make important life choices for themselves. Without such rights, people must depend on the decisions of committees or the outcomes of political campaigns. So the independence and security provided by the right to own productive property is not a mere privilege of economic elites: it is a common experience of citizens in societies where such rights of ownership are affirmed.

Further, just as personal property can be bound up with one's identity, for many people the ownership of productive property plays a profound role in the formation and maintenance of self-authored lives. Sometimes the identity-casting relationships people have to productive property are conspicuously material: as with the way a farmer identifies himself with his field, or the owner of a small business identifies with her shop and its customers and employees.

Other times the identity-casting role of ownership is more intellectual, or activity-based. Successful investment bankers, for example, often take an almost professorial approach to their study of financial trends. Through the roles they play as buyers and sellers of productive property, such people often *become* diligent researchers, creative analysts, and fiercely independent ("contrarian") thinkers. This is true of entrepreneurs in other areas as well.

None of this is to deny that the prospect of financial rewards (beyond that needed for bare security) is a strongly motivating factor in people for whom the personal control of productive property plays a central part of their lives. But rights to the ownership of productive property protect projects that are significant to people for reasons that go far beyond the prospect of personal wealth. Societies that protect the ownership of productive property as a basic right can increase the range of projects, and the forms of economic relationships, that are available to citizens.[47] Such societies broaden the evaluative horizons of citizens. The economic liberties make it possible for citizens with diverse values and interests to

[47] For example, I am a shareholder in a cooperatively owned ski area (Mad River Glen, in Fayston, Vermont). As a member of that co-op, I participate in deliberations about how we will manage our collectively owned property (such as our policy, enthusiastically renewed each year, of banning snowboarders).

more fully develop and exercise the powers they have as responsible self-authors.

Economic liberty can enhance the freedom of citizens on the output, or consumer side as well. Many people define themselves by the financial decisions they make for themselves and their families. Should everyone in our family pack his or her own lunch this week so that we will have money to go to a movie or restaurant together next weekend? Is it more important to provide our children with separate bedrooms or to add money to college savings accounts opened in their names? What percentage of my earnings should I spend on living now, and what percentage should I save for retirement and for my end-of-life care? Should I take advantage of a sale to purchase a new television or should I build up my savings in case I lose my job? How much should we spend on sport, or on home entertainment, or on culture, or on education, and over what time frame?

Questions about long-term financial planning require that people think seriously about the relation between the person that each is at that moment and the person one will become many years in the future. They call on people to take responsibility now for the person each will later become. The taking up of these responsibilities is a passageway from the dependence of childhood (or late adolescence) and into the more challenging and independent world of adulthood. On Rawls's own description, we must respect citizens as beings who are "capable of adjusting their aims and aspirations in light of what they can reasonably expect to provide for." Economic decisions call on people to do just this. Such decisions require that people assess their most basic values and, in light of that assessment, set themselves on a course of life that is their own. Economic liberty protects these important aspects of responsible self-authorship. Indeed, among the most important protections needed by responsible self-authors are those that empower individuals to act and to make decisions about the economic aspects of their lives.

Charles Murray writes eloquently about the satisfaction ordinary people gain from work. Paralleling Rawls's discussion of self-respect, Murray says that people need to feel that the things they are doing with their lives are *important*. Murray criticizes the model of the European social democracies on these grounds. Programs for the universal provision of social goods "take the trouble out of life." In doing so, Murray worries, the model "drains too much of the life from life." As a result of one hundred years of economic growth, Murray says that a central problem faced by most citizens in advanced societies is not a lack of material resources but the problem of "how to live *meaningful lives* in an age of plenty and security."[48] By insulating people from economic risks, the European model denies ordinary citizens opportu-

[48] Charles Murray, *In Our Hands*, 82 (emphasis mine).

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nities to feel the special sense that they have done something genuinely important with their lives. The material benefits of social democracies come with a moral opportunity cost.

Murray describes a man who holds down a janitorial job and thereby supports his family (we could as easily imagine a single-mother who takes on a difficult job). Such people, Murray suggests, are doing something genuinely important with their lives. Regarding the janitor, Murray states "He should take deep satisfaction from that, and be praised by his community for doing so." If those same people lived under a system in which they were heavily insulated from economic risks, for example by being assured that they and their children will be well provided for whether or not they themselves contribute, then that status goes away. "Taking the trouble out of the stuff of life strips people—has already stripped people—of major ways in which human beings look back on their lives and say, 'I made a difference.' "[49] The experience of risk seems to be an essential precondition of the sort of self-respect that liberals value.

We should worry about the high liberal platform of economic exceptionalism for all these reasons. A society that denies people the chance to take up questions of long-term financial planning for themselves, or that restricts the ways in which individuals and families can respond to such questions, thereby diminishes the capacity of its citizens to become fully responsible and independent agents. So too a society that limits the freedom of individuals to negotiate the specific terms of their employment, or that makes their ownership of productive property subject to calculations about social expediency, no matter how benevolent their intentions in doing so, thereby creates social conditions in which the moral powers of citizens can be exercised and developed in only a stunted way. Just as respect for the freedom and equality of citizens requires the recognition of religious, associational and intellectual liberty, respect for citizens requires the recognition of economic liberty as well. As a requirement of liberal legitimacy, and to respect the freedom and independence of all classes of citizens, wide-ranging rights of economic liberty should be recognized as among the basic rights of liberal citizens.

When I say that private economic liberties are among the *basic* rights of liberal citizens, I am not suggesting that these rights will play an equally important role in the self-authorship of every citizen. The private economic liberties may be more central to the process by which a small-business owner develops herself as a responsible self-author than they are in the case of someone with a different life plan—say one centrally concerned with political campaigning. So too, the exercise of political liberties may be more central to the life project of the campaigner than they are

[49] "The Happiness of the People" *2009 Irving Kristol Lecture,* American Enterprise Institute for Public Policy Research, (Washington, DC: The AEI Press, 2009), 7–9.

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to the business owner, just as religious liberties may be more important to the self-authorship of a practicing Catholic (or a committed atheist) than to a person who rarely considers spiritual issues at all. Rather, in recognizing these rights as *basic*, we affirm them as components of a fully adequate scheme of rights and liberties. As a set, basic rights allow citizens to develop their capacities of responsible self-authorship, without requiring that they all conform to any one view of the good life (or even agree about the relative importance of personal decision-making in these different spheres of their lives—political, economic, and religious, for example).[50]

This, precisely, is the problem with the high liberal approach. Rawls makes the protection of private economic liberty a political matter, one to be decided by different liberal societies in different ways in light of cultural conditions. Thus, "liberal (democratic) socialism" would allow only rights to personal (nonproductive) property, while "property-owning democracy" would allow (limited) rights to the private ownership of productive property as well. But this way of accommodating the importance of private economic liberty flouts the requirements of democratic legitimacy. Like political liberty (and religious liberty too), the protection of private economic freedom is a precondition of citizens' extending their evaluative horizons. In seeking the most appropriate specification of the basic rights and liberties, we seek the specification that most fully allows citizens to develop themselves as responsible self-authors and that displays the respect they have for their fellow citizens as responsible self-authors too. As I have argued, private economic liberties have a special role in protecting citizens as they develop and exercise these moral capacities. The platform of economic exceptionalism renders high liberalism a morally impoverished view.

There is an elephant standing within the theoretical framework of high liberalism. For it is not only classical liberals and libertarians who affirm the fundamental importance of private economic liberty. Like most citizens in contemporary western liberal constitutional democracies, I suspect that most contemporary high liberals would affirm a significantly thicker conception of economic liberty than high liberal paragons such as Mill and Rawls. As Jeremy Waldron admits: "nobody these days seriously imagines an economy either at the national or international level in which private property and markets do not loom large."[51] But if left liberals

[50] Conversation with Charles Larmore sharpened my understanding of these issues, even though our convictions on these matters diverge.

[51] Waldron, "Socioeconomic Rights and Theories of Justice," working manuscript November 2010, http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__academics__colloquia__law_economics_and_politics/documents/documents/ecm_pro_066908.pdf, p. 3.) Most democratic theorists argue that private property is publically justifiable so long as welfare rights are also guaranteed (typically by the state). See Corey Brettschneider *Democratic Rights: The Substance of Self-Government* (Princeton, NJ: Princeton University Press, 2007), especially 114–35.

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abandon the canonical high liberal platform of economic exceptionalism, they immediately begin moving away from a social democratic and toward a more market-democratic interpretation of basic rights. In taking those steps, high liberals do not necessarily have to become full-blown market democrats. They might still claim that some aspects of private economic liberty should be splintered off and denied the protection accorded to the other liberal rights. But then they owe us a moral explanation of how any such narrowing of private economic liberty enhances the status of persons as responsible self-authors. There are reasons why such arguments are unlikely to be forthcoming.

First, any proposal to limit core economic freedoms must not run afoul of the basic liberal concern for the self-respect of citizens. Rawls describes self-respect as having two aspects: a sense of one's own value and a reasonable confidence in one's ability to fulfill one's intentions.[52] With respect to that second aspect, left liberals typically hasten to emphasize that it requires that people be given the material means needed to pursue their goals effectively. But, as we have seen, the mere possession of material means is not sufficient: a person's self-respect is diminished if one is not (and so cannot think of oneself as) the central *cause* of the life one is leading. Having others secure them with "material means" could not provide liberal citizens with that form of self-respect.

There is an analogy with feminism. Before feminism brought about the recognition of women as legal bearers of private economic liberties, women were denied essential preconditions of their self-respect. Having others provide them with all the "gilded material means" in the world could not secure that self-respect for them.[53]

Margaret Holmgren argues that people have a fundamental interest not simply in doing well in life (say in the sense of possessing certain goods) but in doing well *as a consequence of their own activities.* Indeed, Holmgren sees economic agency as a primary good, a precondition of self-respect. Parties in Rawls's original position, therefore, "would want to secure for themselves the opportunity to advance by their own efforts."[54] As Holmgren points out, recognizing this interest does not require that it always trumps all other interests people have: in situations in which people are simply unable to act for themselves, their needs may well be tended to by others without damage to their self-respect. But in the ordinary course of life, she argues, people do have a fundamental interest in seeing themselves as central causes of the lives they are leading. People respect themselves, in part, because of their own genuine achievements. Economic liberties protect this fundamental interest.

[52] Rawls, *Theory of Justice,* rev. ed., 155–7; 386–7.

[53] I develop this idea in "Can Feminism Be Liberated from Governmentalism?" *Toward a Humanist Justice: Essays in Honor of Susan Okin* (New York: Oxford University Press, 2009).

[54] Margaret Holmgren, "Justifying Desert Claims: Desert and Opportunity," *The Journal of Value Inquiry* 20 (1986): 265–78.

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Moreover, and significantly, Rawls emphasizes that a condition of the first aspect of self-respect—valuing oneself—is that one be esteemed by others. So Rawls's account of self-respect stresses the importance of status, how we think others value us. Regarding this need for status, crucially, Rawls writes: "the need for status is met by the public recognition of just institutions, together with the full and diverse internal life of the many free communities of interests that the equal liberties allow." Thus, "*the basis for self-respect in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties.*"[55]

And so, with respect to the fundamental economic liberties, market democracy again asks: How can individuals have self-respect if their fellow citizens deny them the right to decide for themselves how many hours they will work each week and under what precise terms and conditions? How can they think of themselves as esteemed by their fellow citizens if those citizens call on the coercive force of the law to impede them in deciding for themselves how much (or little) to save for retirement, the minimum wage they may find acceptable for various forms of work, or to dictate to them the parameters of the medical care that will be available to them?

In emphasizing the importance of economic liberty for responsible self-authorship, I do not deny the other, more instrumental, rationales that classical liberals sometimes offer in defense of property rights and other economic liberties. A robust system of economic liberty—regarding ownership and working—can assist people in making the most efficient use of dispersed knowledge for productive purposes.[56] Economic liberties allow diverse social interests to be peacefully coordinated without recourse to coercive, collective procedures. Property rights can provide bases of resistance against corrupt, oppressive, and fiscally irresponsible uses of political power.[57] The economic liberties are also linked strongly to many other basic rights, in the sense that "blocking them substantially blocks important parts of other liberties that are widely accepted as basic" (for example, economic liberty is linked to freedoms of religion, communication, association, movement, as well as political liberty).[58]

My primary argument for a thick conception of economic liberty, however, is the moral one. Regardless of the orthodoxies we have inherited, open-minded advocates of deliberative democracy should reject the platform of economic exceptionalism. A thick conception of economic liberty is a requirement of democratic legitimacy.

[55] Rawls, *Theory of Justice,* rev. ed., 476 (emphasis mine).

[56] F. A. Hayek, "The Use of Knowledge in Society, *American Economic Review* (American Economic Association, 1945).

[57] Milton Friedman, *Capitalism and Freedom* (Chicago: The University of Chicago, 1962), 15.

[58] Drawing on the work of Henry Shue, Nickel calls arguments for economic liberty of this type "linkage arguments" (in "Economic Liberties," 157. For historical discussion, see Richard Pipes, *Property and Freedom* (New York: Alfred A. Knopf, 1999).

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V. Kantian Roots

I have been describing market democracy as offering an alternative approach toward private economic liberty taken by contemporary high liberal theorists. But this market democratic approach to economic liberty can claim deep roots in the high liberal tradition as well.[59]

Along with Mill, Immanuel Kant is often mentioned as a founding figure of high liberalism.[60] Kant's political philosophy, like his moral philosophy, is founded on an ideal of autonomy. Freedom, in the sense of being a chooser of one's own ends, is the fundamental right of every person. By virtue of their common humanity, persons have an equal right to this freedom.[61] But freedom also requires that agents be able to choose the means to their ends. Since we are material beings seeking to exercise our autonomy in a material world, we require "external objects of choice" to pursue our ends. For Kant, secure rights to property emerge as postulates of reason derived from our common nature as independent choosers. Reason also shows that the state is required to convert the provisional rights to property in the state of nature into formal rights backed by law. Property rights, for Kant, are among the most important rights of citizens. So Kant is a mixed figure in the history of liberal thought. Because of his emphasis on the moral capacities of citizens and the idea of public authorization of right, Kant can be called an early high liberal. Because of his emphasis on economic liberty and the ideal of formal equality, however, Kant might just as well be described as a classical liberal.[62]

Kant's approach helps highlight the differences between market democracy and the approaches of classical liberals and libertarians working in the Lockean tradition. Following Locke, many classical liberals ground

[59] The account of Kant's theory of property given in this paragraph, as well as the contrast between Kant and Locke developed in the next paragraph, is informed by research done for me over the summer of 2010 by Jason Swadley, as well as by a superb unpublished article manuscript by Swadley entitled "Economic Liberty and the High Liberal Tradition" (draft of August 2010). My understanding of Kant's political philosophy also particularly has been improved by Arthur Ripstein's *Force and Freedom: Kant's Legal and Political Philosophy,* (Cambridge, MA: Harvard University Press, 2009). The applications of these ideas to market democracy are my own.

[60] Freeman, "Illiberal Libertarians," 106. Note that, in a departure from my usual terminological practice, I am here using the term "high liberal" to denote a method of justification, rather than a set of substantive moral commitments. Classified in terms of his substantive moral commitments, Kant is a classical liberal (on which see the following note).

[61] "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity." Immanuel Kant, *Practical Philosophy* (Cambridge University Press, 1999), 393.

[62] Allen Wood writes: "Kant's political philosophy or theory of right, considered by itself, is merely a version of classical liberalism." Wood continues: "It is based on two familiar liberal tenets: (1) Competition is nature's means for the development of human faculties; and (2) The state's function is to regulate competition by protecting property and coercively enforcing formal principles of right." (Allen W. Wood, "Kant and the Problem of Human Nature" in Brian Jacobs, ed., *Essays on Kant's Anthropology* (Cambridge Books Online, Cambridge University Press, 2009), 22.

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property in some concept of self-ownership. On this approach, property rights emerge as a relation of persons to objects in the world: for example, by the process of self-owners mixing their labor with unowned things. Conceived of this way, property rights are strongly prior to the state. The state exists to protect preexisting rights and so is bounded by those rights.[63] Market democracy takes a more Kantian approach. Rather than grounding a thick conception of economic liberty on self-ownership, market democracy focuses on the moral ideal of citizens living together as responsible self-authors. Market democracy affirms a wide range of individual freedom regarding economic questions for the same reasons it affirms general liberties with respect to religious and associational questions: a thick conception of economic liberty is a necessary condition of responsible self-authorship. Ownership rights, on this approach, are not so much relations between persons and objects as they are relations between persons as moral agents. Rights emerge as a social recognition that honoring the capacity of one's fellow citizens to be self-authors requires that one respects their capacity to make choices of their own regarding economic matters. To restrict the capacity of people to make economic choices or, worse, to treat their economic activities merely as means to the social ends of others, would violate the dignity of such persons and so would be to treat them unjustly. Wide rights to economic liberty, while recognizable without the state, are validated and made fully binding by the political community. For market democracy, the requirements of economic liberty help define the shape and limits of the state, even without being radically prior to it.

Kant's political theory also helps highlight another important difference between market democracy and traditional classical liberal views: while many classical liberals advocate a social safety net funded by taxation, market democracy can provide a rationale for the safety net that is thoroughly principled. (Recall that a rationale for a policy is "thoroughly principled" if the same reasoning that supports the wider features of the view also support that particular policy.) For Kant, the state exists as a requirement of the free and independent nature of the citizens. As an empirical fact, citizens sometimes fall into conditions of abject poverty. Citizens in that position become dependent on the charity of others and so become unable to participate in the united will needed to authorize public law. Kant advocates a tax-funded safety net: "For reasons of state, the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs."[64] Market democracy's affirmation of

[63] In the opening lines of *Anarchy, State, and Utopia,* Nozick states: "Individuals have rights, and there are things that no other person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do." p. ix.

[64] Kant, *Practical Philosophy,* 468 (quoted in Swadley, 12).

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tax-funded social safety net programs follows this pattern. The very status of people as responsible self-authors may be threatened by conditions of extreme need. The state must be empowered to act to protect people's moral status as self-authors. But, unlike many traditional classical liberals, market democracy's justification of the safety net is strongly principled. After all, the same reasons that market democracy uses to justify the social safety net also justify the market democratic position against the pervasive encroachments on economic liberty allowed by high liberals such as Rawls. Without constitutional guarantees protecting their independent economic decision-making, people cannot fully exercise their moral powers of self-authorship. For all these reasons, market democracy affirms the importance of economic liberty, and thus rejects the high liberal platform of economic exceptionalism.

VI. Conclusion

At the start of the essay, I said that market democracy rests on three theses: 1) the private economic liberties of capitalism are among the basic rights of all liberal citizens, 2) social justice, on some interpretation to be specified, is the ultimate standard of evaluation for liberal political and economic institutions, and 3) as a matter of ideal theoretic analysis, the institutions of market democracy realize the conception of social justice specified in thesis 2) even while affirming the priority of economic liberty set out in 1).

I have focused on the first thesis, arguing that a thick conception of economic liberty is a requirement of democratic legitimacy. However, that first thesis is entangled with the other two in an interesting way. In particular, people who start with strong commitments to social justice [as contained in thesis number 2)] may well worry that the affirmation of private economic liberties as basic rights may rule out the achievement of social justice [against the assertion made in thesis 3)].

According to Samuel Freeman, for example, an implication of the claim that economic liberties should be treated on a par with the other basic rights and liberties is that "it limits considerably a liberal society's ability to regulate the uses of property, economic contracts, and business transactions and activities." Without such regulations, small numbers of people could establish economic monopolies that would leave many citizens destitute and unemployed. Under these conditions, Freeman continues, many free and equal citizens would be unable to achieve economic independence and so be unable to pursue a wide range of reasonable life plans.[65]

Two points about this worry are worth noting. First, market democracy's claim that economic liberties are among the basic constitutional lib-

[65] Freeman, *Rawls* (New York: Routledge, 2007), 57.

erties is a *moral* claim. The claim stands or falls on the strength of the arguments that can be brought forth to show that these economic liberties, like the other basic liberties, are essential preconditions to citizens exercising their moral powers. If that moral argument is persuasive, then an argument based on the secondary institutional implications of that claim has little force. It is true that the market democratic interpretation about the constitutional place of economic liberty would greatly limit the regulatory power of the state in economic affairs (compared, for example, to the economic powers granted to the legislative bodies under left-liberal regimes). But if, as market democracy claims, the protection of thick economic liberty is a "first principle" concern of legitimacy, this observation might call into question the cogency of market democracy as an integrated liberal view, but it cannot count as an objection to thesis 1). It would be akin to objecting to religious liberty on the grounds that such liberty would greatly limit the power of the state to regulate the religious affairs of citizens.

The second part of the objection—that the market democratic affirmation of a general right of economic liberty would result in a social world in which great numbers of citizens were dominated unjustly by a small group of economic elites—raises more difficult questions. I believe that this objection, or something like it, plays an important motivational role in the thinking of many people who are committed to the traditional institutions of high liberalism. However, this objection rests on controversial ideas about the requirements of social justice, and about the nature and task of political philosophy itself.

Liberals who work within the deliberative framework can reasonably disagree about the distributional requirements of social justice. I noted one dimension of these disagreements earlier: some think social justice is mainly about equality, while others think it is mainly about giving priority to the interests of the most poor. Rawls's difference principle, which requires that we prefer social and economic arrangements that benefit the poor, might reasonably be interepreted as a prioritarian principle. But even taking that interpretation, we face difficult questions about how to specify what should count as a "benefit" to the members of the least well-off class.[66] One approach, which Samuel Freeman has recently attributed to Rawls, sees the experience of workplace democracy as among the weightiest "benefits" that the difference principle requires us to maximize, even if that requires the reduction of other benefits such as wealth and income.[67] I call this a "social democratic" approach to social justice and contrast it with the market democratic approach that I myself prefer. On that latter approach, the full range of rights and liberties is in place,

[66] Phillipe van Parijs, "Difference Principles" in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge University Press, 2002).

[67] Samuel Freeman, "Capitalism in the Classical and High Liberal Tradition," *Social Philosophy and Policy* 28 (2011).

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and the morally most appropriate way to "benefit" the least well off is by maximizing the bundle of wealth and income personally controlled by the members of that class. I defend this market-democratic thesis about social justice at length elsewhere, so I will not repeat those arguments here.[68] Setting out this interpretive marker, however, helps us when we turn to thesis 3), and the questions about the nature and purpose of political philosophy that arise there.

As a matter of sociological fact, we must acknowledge that a market-democratic regime that affirms thick economic liberty, however lofty the other aims it announces for itself when affirming such liberties, might well degenerate into an unjust society in which some citizens use their positions to prey upon others. But it is equally true that a democratic-socialist regime, or any of the other regime-types favored by high liberals, could, as a matter of sociological fact, fail to achieve its aims and instead degenerate into a condition of exploitation, fiscal irresponsibility, and injustice. In the real world of social life, problems of feasibility, and the possibility of abject failure, are permanent residents.

The question, however, is what philosophers should make of this fact. Perhaps the objection to market democracy is not simply that its favored institutional regimes *could possibly* degenerate in this way, but rather that they are *more likely* to so degenerate than those favored by high liberals (even allowing each to interpret the distributive requirements of social justice by its own lights). Still, this is an empirical claim. Even if it could be decided, a question of philosophical methodology would remain: In the domain of political philosophy, what is the normative status of this empirical claim regarding the relative *likelihood* of rival regimes achieving or failing to achieve their announced aims? Read as a claim about likelihood, the argument in favor of thin economic liberty would rest on the idea that social-democratic regimes should be identified as morally superior because they are more likely, as a practical empirical matter, to achieve the aims of social justice than are market-democratic ones. Viewed this way, however, the concern about degeneration is not so much an objection to market democracy as it is a challenge to defenders of that view. Such defenders must either dispute the empirical claim that market-democratic regimes are less likely to achieve social justice (as they interpret it) than the left-liberal regime-types favored by high liberals, or they must explain why these concerns about empirical likelihood are not relevant to the task of political philosophy, correctly understood.

I believe the market democratic regimes can be defended on both sets of grounds, empirical and ideal-theoretic. Again simply adverting to arguments I develop elsewhere, I believe that the most important defense of market democracy from a philosophical perspective is the one that runs on the level of ideal theory. In working out his idea of

[68] John Tomasi, *Free Market Fairness,* chap. 6 "Two Concepts of Fairness."

"realistic utopianism," Rawls argues that for a candidate regime-type to realize liberal justice, it must aim at liberal justice and also include institutional arrangements that, even if unlikely to achieve justice in some particular set of social conditions, nonetheless could possibly achieve justice. This is the ideal theoretic test that Rawls employs when he identifies his own preferred regime-types—property-owning democracy and liberal socialism—as realizing justice (on his social democratic interpretation of that standard).[69] But employing that same ideal theoretic test, it is not hard to demonstrate that a range of market-democratic regime-types equally realize justice (on our market-democratic interpretation.) Through the lens of ideal theory, regimes that affirm thick conceptions of economic liberty and regimes that adopt a platform of economic exceptionalism are on all fours regarding the question of whether they "realize" the distributional requirements of social justice (as interpreted by each).[70]

I emphasis these points in order to show that market democracy is not merely an *alternative* to the social-democratic conceptions of social justice that have dominated academic discussions for decades. Instead, market democracy is a *moral challenger* to those other more familiar liberal views. Part of the moral challenge market democracy poses to social-democratic approaches resides in the alternative interpretation market democracy offers of the distributional requirements of social justice, such as the difference principle. But market democracy presents a first-level moral challenge to traditional forms of high liberalism as well. A thick conception of economic liberty is a requirement of democratic legitimacy itself. Any account of liberal justice that fails to affirm the economic liberties of capitalism as basic rights is morally defective from the start.

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[69] Rawls, *Justice As Fairness,* 135–40.

[70] John Tomasi, *Free Market Fairness,* chap. 7 "Feasibility, Normativity, and Institutional Guarantees" and chap. 8 "Free Market Fairness."

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