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The Fictitious Liberal Divide: Economic Rights Are Not Basic

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Abstract: The main question dividing classical and high liberals is about how economic rights rank compared to other rights and public goals. That is, the question is about what can or cannot outweigh such rights. High liberals argue that economic rights can be outweighed by any legitimate state interest, such that they are prima facie rights. Neoclassical liberals, conversely, have recently sought to elevate economic rights to basic rights, which could then only be outweighed by other basic rights. This paper shows where the real debate should be for classical liberals, challenging Samuel Freeman's widely held distinction between classical and high liberalism. Economic rights are prima facie for all liberals in that they can be outweighed by, say, considerations of utility or social justice. Although neoclassical liberals are correct to say that such rights are much more important than high liberals normally recognize, it does not follow that economic rights are basic.

Keywords: basic rights, classical liberalism, economic rights, eminent domain, high liberalism, neoclassical liberalism

JEL Classification: A13, P14, H13

I. Are Economic Rights Basic According to Classical Liberals?

It is common to assume that the core disagreement between classical and high liberals concerns the harmonization of economic rights with a theory of justice. On the one hand, high liberals, like John Rawls and Samuel Freeman, have argued that economic rights can be outweighed by social justice. On the other hand, classical liberals, like Friedrich Hayek and Milton Friedman, are known for defending economic rights against those who would override them so as to pursue extensive programs of taxes and transfers. Therefore, it is usually thought that the

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main question dividing classical and high liberals is about how economic rights rank compared to other rights and public goals. Such was Freeman's argument in his paper "Capitalism in the Classical and High Liberal Traditions":

> Where liberals primarily disagree is on the nature and status of economic rights and liberties, including the extent of freedom of contract and rights to private property in land, raw materials, and other productive resources (2011, 20).

More precisely, Freeman argued that economic rights are "basic" for classical liberals, in the sense that they are restrictable only by other basic rights; by contrast, economic rights are "prima facie" for high liberals, such that they can be overridden to provide the means to ensure that citizens can take advantage of their basic liberties. Recently, neoclassical liberals, like John Tomasi (2012, 42), Jason Brennan (2012), and Daniel Shapiro (1995a), have argued that economic rights are indeed basic in the classical liberal tradition. As such, they embrace Freeman's widely held view according to which economic rights are basic for classical liberals, and prima facie for high liberals. This paper challenges such a view.

There is no real disagreement about the nature of economic rights within the liberal tradition.[1] Both classical and high liberals, I argue, share the same understanding of economic rights as prima facie rights, not as basic rights as defined by Rawls. One could retort that classical and high liberals disagree about what economic rights people have; but people have mostly the same economic rights according to these two

[1] The classical liberal tradition emerged in the pioneer writings of John Locke, and it was most famously championed by Adam Smith. Later, it was developed by economists like David Ricardo, Carl Menger, and Alfred Marshall, as well as by philosophers like Bernard Mandeville, Alexander von Humboldt and Alexis de Tocqueville. In this paper, I focus on twentieth century classical liberals, like Friedrich Hayek, Milton Friedman, Ludwig von Mises, and Richard Epstein. The high liberal tradition, conversely, emerged in the pioneering writings of John Stuart Mill, and was later developed by John Rawls. It is most commonly associated, for example, with Ronald Dworkin, Thomas Nagel, Thomas Scanlon, Amartya Sen, Elizabeth Anderson, and Samuel Freeman. The basic principles of classical liberalism are individual freedom, market capitalism, limited government, and the rule of law, while high liberalism is more distinctively concerned with social justice, equality, and poverty. Neoclassical liberals, like John Tomasi and Jason Brennan, combine the ideals of both the classical and high liberal traditions. That is, they adopt the high liberal assumption that the social order must be justifiable to everyone, including the worst-off, and they think that market institutions can be so justified, such that classical liberal conclusions about policy can be derived from the high liberal understanding of social justice.

liberal traditions. Both classical and high liberals defend property rights and freedom of contract, although both acknowledge that such rights can be limited, for instance, by regulations on land use, monopolies, and building codes. This paper will therefore attempt to bridge the gap between these two liberal traditions, focusing specifically on the classical liberal side of that gap. The gap, it seems, is due to inflated rhetoric coming from both sides, which overshadows an important consensus regarding the nature of economic rights.

Classical, high, and neoclassical liberals have created a fictitious divide. It is true that these three liberal traditions have different views on, say, social justice. Classical liberals like Hayek (2013, xix), for example, have characterised social justice as a "mirage", as well as a "fraudulent", "meaningless", "thoughtless", "empty", and "vacuous" concept. High liberals, following Rawls (1999, 3), have defended social justice as "the first virtue of social institutions". It is an approach which neoclassical liberals have also embraced, though they highlight the importance of market capitalism for ameliorating poverty. There are enough genuine disagreements between liberals that we do not need to invent fictitious ones, such as the purported disagreement about basic economic rights.

Many high liberals like Rawls, as Freeman noted (2007, 49), have downplayed the importance of economic rights for a theory of justice. Conversely, classical liberals are known for criticizing such "economic exceptionalism", that is, the undue relegation of economic rights to a lower level of protection (Tomasi, 2012, 58). It would thus appear that although classical and high liberals may agree on a few common redistributive policies to help the poor, they simply cannot agree on the nature of the economic rights behind any such redistribution. This is a mistaken intuition, which may lead one to get the wrong impression about the liberal theory of economic rights. Contrary to what many now defend, following Freeman, economic rights have never been basic in the classical liberal tradition. Both classical and high liberals understand economic rights as prima facie, which means that they can be outweighed by considerations of utility or social justice.

By using the language of basic rights, neoclassical liberals run the risk of misrepresenting their own theory. Because basic rights can only be outweighed for the sake of other basic rights, to say that economic rights are basic is to disallow eminent domain, largely justified by considerations of utility, as well as, to a large extent, the taxes-and-

transfers system of the modern welfare state, which cannot entirely be justified by other basic rights. Such a position cannot plausibly be a liberal one. In fact, "liberalism has always accepted without question", said Frank Knight, "the doctrine that every member of society has a right to live at some minimum standard, at the expense of society as a whole" (1982, 61f). Provided that such is indeed an accepted liberal doctrine, as both Hayek (2013, 249) and Friedman (2002, 192) acknowledge, the status of economic rights is clearly in need of additional clarification. The notion of economic rights has often been used to exaggeratedly widen the gap between classical and high liberals, while I argue that it can rather be used to narrow such a gap.

This paper will argue that neoclassical liberals, contrary to their own rhetoric, do not in fact regard economic rights as basic, nor do classical liberals. To be more specific, section II provides a reconstruction of the main arguments defended by John Rawls, Daniel Shapiro, and John Tomasi regarding the importance of economic rights for a theory of justice. Section III reviews the debate about the nature of economic freedom within the classical and high liberal traditions, distinguishing four concepts of rights. Section IV then examines three ways in which we may understand the liberal divide between classical and high liberals. The following sections examine two cases of eminent domain to uncover the acceptable classical liberal limits to most economic rights: section V discusses *Kelo v. City of New London*, which is about the use of private property, and section VI discusses *Hawaii Housing Authority v. Midkiff*, which is about the autonomy of people, and demonstrates why social justice can override economic rights. The paper concludes by arguing that the only difference between classical and high liberals concerns the strength of the reasons required to outweigh economic rights.

II. THE DIVERSITY ARGUMENT FOR ECONOMIC RIGHTS BEING BASIC

Let us begin by a brief reconstruction of what may be called the "diversity" argument for economic rights being basic, which is endorsed by many neoclassical liberals today. Rawls denied that most economic rights counted as part of the "basic" liberties protected by his first principle (2001, 114). Shapiro and Tomasi criticized Rawls, arguing that economic rights should count as basic, which, following Alan Patten, I will show is incorrect. My thesis is that there is no disagreement in the liberal tradition regarding the nature of economic rights, although there is a clear disagreement regarding the importance of such rights for

people. In the end, I argue, the diversity argument invalidates the neoclassical liberal conclusion.

A right is basic, according to Rawls, when it can only be outweighed by other basic rights, and when other aspects of justice can be pursued only by those means that fully respect the basic rights. The list of basic rights Rawls (1993, 291) proposed goes as follows: freedom of thought, liberty of conscience, the political liberties, freedom of association, the freedoms specified by the liberty and integrity of the person, and the rights and liberties covered by the rule of law. Yet economic rights are conspicuously missing from such a list, which Rawls explains by introducing the following three arguments:

(Ri) The "moral powers" argument—that is, basic rights must provide the social conditions that enable free and equal persons to exercise and develop his or her most significant capacities. The first moral power is the capacity for a conception of the good, and the second is the capacity for a conception of justice (2001, 112f).

(Rii) The "diversity" argument—that is, basic rights must maintain and protect the flourishing of a wide variety of determinate conceptions of the good within the limits of justice (1993, 303f).

(Riii) The "overlapping consensus" argument—that is, basic rights must help to constitute and promote a stable society under modern democratic conditions (1993, 140ff).

Rawls argues that neither capitalist nor socialist economic rights can "be accounted for as necessary for the development and exercise of the two moral powers" (1993, 298). That is, he insists that his theory of justice has no commitment to either capitalism or socialism, as the economic rights these theories defend are not required to exercise and develop the two moral powers. For this reason, most economic rights are not basic—they do not make up his first principle of justice (Freeman 2007, 49). For example, Rawls states that "the right to private property in natural resources and means of production generally, including rights of acquisition and bequest" is not basic (2001, 114). The only exceptions are, first, the "right to hold and to have personal property" (1993, 298), and, second, a right to freedom of occupation (2005, 308, 335)—both of which are basic because they fall under the

"liberty and integrity of the person". But more conventional economic rights, like a right to free exchange or commercial property rights, Rawls insisted, are not basic. Such rights can be outweighed by some reasons of public good and possibly even by perfectionist values. The absence of most economic rights from Rawls's list of basic rights has been a major problem for classical liberals, and has been challenged by neoclassical liberals.

Shapiro objects to the Rawlsian argument detailed above that Rawls was mistaken about the implications of his theory of basic rights. Even though some rights may not be "required" by (Ri), Shapiro notes, they may still be "compatible" with (Ri)—and Rawls clearly thought that both capitalism and socialism were compatible with his theory of justice, for otherwise he would not have said that his theory is indifferent between them. Hence, Shapiro writes that:

> once one shows that a certain right is compatible with the exercise and development of the two moral powers, then the diversity argument can legitimately be used to support that right by showing that the recognition of the right allows a greater diversity of (permissible) conceptions of the good than would exist were the right not recognized (1995b, 63).

Inasmuch as some economic rights are compatible with (Ri), they may be regarded as basic by using the diversity argument (Rii).

Consider the case of the capitalist kibbutz. If your understanding of the good life is to become a businessperson, then you may do so in a capitalist society, though not in a socialist one. If your understanding of the good life, conversely, is to live in a kibbutz or a commune, then you may do so in both a socialist and a capitalist society. The socialist theory of economic rights would not permit some capitalist endeavours, as Shapiro notes, while the capitalist theory of rights is perfectly compatible with socialist endeavours, for instance, people living in a kibbutz. Consequently, "market capitalism allows a wider variety of conceptions of the good to exist than does market socialism" (1995b, 78). Jason Brennan also uses such an asymmetry argument in his critique of socialism—"Capitalism is tolerant. Want to have a worker-controlled firm? Go for it. Want to start a kibbutz or commune in which everything is collectively owned? No problem" (2014, 95). Not only does (Rii) support the capitalist theory of economic rights, but so does (Riii). Whereas market capitalism could indeed be the object of an overlapping

consensus, market socialism could not, as it would put a stop to some conceptions of the good life. Liberals should conclude that economic rights are basic, says Shapiro, as Rawls's arguments for basic rights in the non-commercial realm implies in the commercial realm that capitalism is to be the preferred kind of market economy. People should have a basic right to free exchange and a basic right to own and acquire natural resources and means of production.

Tomasi introduces another formulation of the diversity argument, which he illustrates rather convincingly with the following example. Amy is a college dropout who dreams to open her own business: "Amy saves her money, builds a sterling credit rating, wins a bank loan, and finally opens her own pet shop", 'Amy's Pup-in-the-Tub'. "What does it mean to Amy to walk into her own pet shop each morning", Tomasi asks (2012, 66), "or, when leaving after a particularly long day, to look back and read her name up on the sign?" According to Tomasi (2012, 182f), it means that economic rights are basic, since they are an "essential condition of responsible self-authorship". Because many commercial activities within a market capitalist society are a "deeply meaningful" aspect of people's lives, and because economic decisions can "define" a person and be "bound up with one's identity", Tomasi argues that economic rights should be considered basic (2012, 77f). Consequently, like Shapiro, Tomasi "affirms a thick conception of economic liberty as part of a broader scheme of rights and liberties designed to enable citizens to exercise and develop their moral powers" (2012, 69). As Alan Patten notes (2014, 367), Tomasi's argument is as follows:

(Ti) A sufficient reason for recognizing a liberty as basic is that it protects activities and projects that people regard as highly meaningful.
(Tii) Many people regard private economic activities and projects as highly meaningful.

Therefore,

(Tiii) The private economic liberties should be regarded as basic.

"The main problem with the argument," says Patten, "as I see it, is that its premise (i) seems badly overinclusive" (2014, 367). Some activities or social practices may be highly meaningful for people, like perhaps dog fighting or going to the shooting range, and yet it is far from obvious that these should be basic rights. We may also note that

such a definition of basic rights does not echo the Rawlsian arguments discussed above. In fact, (Ti) is much more inclusive than (Ri), (Rii), and (Riii) taken together. Moreover, as Patten explains, self-authorship also rests on non-liberty conditions, say, for Amy, winning a bank loan. "When the economic liberties are basic", Patten notes, "it becomes that much harder for the state to protect and promote the other conditions that must be satisfied if people are to enjoy self-authorship" (2014, 369). If we are concerned with self-authorship, we should not exclusively focus on the protection of economic rights at the expense of the other issues.

I agree with Patten, but I think there is a more fundamental problem with the diversity argument championed by neoclassical liberals, which is that it does not address Rawls's core definition of basic rights, according to which a right is basic when it can only be outweighed by other basic rights. The neoclassical liberal critique of the high liberal position says that economic rights are more important than high liberals acknowledge. I assume neoclassical liberals are correct, as economic rights are indeed deeply meaningful, and yet it does not follow that such rights are basic. There are two questions that must be assessed separately. First, what is the importance of a given right for some people? Second, what may outweigh a right from the public point of view? The critiques of Rawls championed by both Shapiro and Tomasi focus on the first point, while we should rather focus on the second. In other words, a problem with the diversity argument for basic economic rights is that it only shows that such rights are extremely important for people, not that they are basic in the sense of being restrictable only by other basic rights.

III. DISTINGUISHING ABSOLUTE, LICENSE, PRIMA FACIE, AND BASIC RIGHTS

"The program of liberalism, therefore, if condensed into a single word", said Ludwig von Mises, "would have to read: property" (1962, 19). The classical liberal tradition has commonly defended a comprehensive theory of property rights, which, following Roman law, accounts for rights of use and disposal—i.e. "*usus, fructus et abusus*" (see, for instance, Hayek, 1978, 20; Friedman, 2002, 7-21; Acton, 1993, 194f; Epstein, 2003, 2). Economic liberties may be divided between the liberties of labour, transacting, holding, and using property, all of which are fundamental for classical liberals. Such an understanding of

economic rights is then said to be "thick", that is, these rights are given a wide scope and their protection is considered particularly important. A distinction between "thick" and "thin" understandings of economic rights, for that reason, is a widely accepted way to distinguish classical from high liberalism (Brennan and Tomasi, 2012), which is what I will now challenge.

It is commonly thought that high liberals defend a "thin" understanding of economic rights, as they often limit the range of such rights they recognize as a matter of justice. For example, John Stuart Mill wished to restrict the right to bequest, to prohibit the right of property over the raw material of the earth, to restrict the right of property over land, and to abolish the wage relationship (1909, II.ii.4, II.ii.5, II.ii.6, IV.vii.4). Rawls later furthered this approach, as he believed that rights of acquisition and bequest, as well as rights of property over means of production and natural resources, were not basic (2001, 114). Before we conclude that economic rights matter very little for high liberals, however, it may be useful to get a better sense of the debate over the nature of economic rights, as the literature is filled with contradictory, ambiguous, and often confusing definitions of the concept of "right".

Although there are marked conceptual differences, it might very well be that there is no genuine disagreement between classical and high liberals, but just a confusion about the different concepts of rights. To introduce a bit of conceptual clarity, let me propose the following terminology:

(1) Absolute rights—that is, "A right is absolute," says Alan Gewirth, "when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions" (1981, 2).
Example: liberty of conscience.

(2) Basic rights—that is, a right is basic, according to Rawls, when it can only be outweighed by other basic rights, and when other aspects of justice can be pursued only by those means that fully respect the basic rights, or, as Rawls phrased it, basic rights "have an absolute weight with respect to reasons of public good and of perfectionist values" (1982, 8).
Example: due process.

(3) Prima facie rights—that is, a right is prima facie when it can be outweighed by some other considerations so as to pursue, say, other aspects of justice or utility.
Example: property rights.

(4) Licence rights—that is, rights that only exist as a creation of some rules, as legal permissions.
Example: the right to practice medicine.

Such a terminology of rights follows the main intuitions we encounter in the literature. The concept of absolute right is simple enough—the exercise of such a right should never be infringed upon. Freedom of conscience immediately comes to mind. "Of that freedom", Justice Cardozo once proclaimed, "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom" (*Palko v. State of Connecticut*, 302 U.S. 319, 1937). Hence, liberals will typically say that such a freedom is "of the very essence of a scheme of ordered liberty" to use Cardozo's words, making it immune to legislative judgement.

The concept of prima facie right is much more common. In fact, most rights are properly included into such a category, as we will see. License rights are slightly different in that they refer to a legal permission, normally backed by a legal document attesting the given permission—for example, a licensor grants a license to the licensee. None of these rights are especially controversial, save for the last category of rights, the so-called "basic" one. Economic rights are supposedly basic for classical liberals, but not for high liberals. I disagree, but before I explain my disagreement, let me say a bit more about the terminology of rights I have introduced so as to avoid any misunderstanding.

When different categories of rights are so listed, the typical way to understand the differentiation is through the respective importance of the rights. That is, when classical liberals criticize Rawls for not including most economic rights in his list of basic rights, they often assume that by doing so Rawls downgraded economic rights in general. I do not wish to engage in a hermeneutical argument over what Rawls meant to say. The important point is that the above terminology of rights does not say anything about the importance of rights for people. License rights can indeed be more important than basic rights in many cases. For instance, one may prefer to have access to a doctor than the

right to vote, since one may consider one's health more important than the health of democracy. In this case, then, a license right would be more important than a basic or a prima facie right, depending on how we decide to categorize political rights.

Therefore, the above ordering of rights is not meant to convey the importance of some rights. The distinction is rather about what can or cannot outweigh these rights. It is not because a given right can be outweighed by some considerations that it is less important in the overall scheme of ordered liberty than another right, which, putatively, could not be outweighed by these considerations. Let me thus be very clear. The fact that most high liberals wish to restrict the range of economic rights they recognize to be basic does not necessarily mean that they equally wish to restrict the range of economic rights to which citizens have access, or that they regard such rights as unimportant. It means that they understand economic rights as being outweighed by some other considerations, say social justice—and yet we should observe that classical liberals think in exactly the same way.

Basic rights delineate the space within which a given state may be authoritative, as Platz noted (2014, 25), such that these rights cannot be sacrificed to pursue some other objectives, like efficiency or equality of opportunity. In other words, there can be no trade-off that sees, for example, several units of economic growth realized at the expense of one unit of a basic right. If economic rights were basic, your local government could not build a major highway crucial for the development of your region if one irritable landlord were to refuse to sell his land. But even classical liberals who have most enthusiastically defended the importance of economic rights accept that a public agency may expropriate someone's private property if it deems it to be in the public interest—say, to build a military base or a highway. As Hayek explains, "that the government may have to exercise the right of eminent domain for the compulsory purchase of land, can hardly be disputed" (1978, 217). Eminent domain is an established liberal practice.[2] Economic rights can be outweighed for many reasons, and the real question for liberals, therefore, as Hayek noted, is about "the conditions under which the particular rights of individuals or groups may occasionally be infringed in the public interest" (1978, 217).

[2] My argument is aimed at liberal theory, though such theory is also affected by liberal practices. Hence, I will consider American cases of eminent domain in the second half of the paper as a test for the neoclassical liberal theory of economic rights. That it fails to explain such a standard practice, I take it, is indicative of a flaw in the theory itself.

In response, one could retort that the above terminology uses Rawls's understanding of basic rights, which, as Shapiro notes, is idiosyncratic. We should accordingly adopt a different definition. "A basic right has a considerable degree of moral weight", said Shapiro, "so that it typically defeats perfectionist claims and claims of societal or aggregate well-being" (1995a, 120). The problem with such a definition is that one must assume that all rights have indeed a "considerable degree of moral weight", without which they would not be rights, save perhaps for license rights, and yet it does not follow that they will defeat claims of aggregate well-being. Though Shapiro defines basic rights by their moral weight and Rawls by the three arguments detailed above, we should notice that both of these definitions have something in common—they do not allow us to aggregate, thus disconnecting basic rights from the reality of liberal states today where rights are often overridden for reasons of utility or justice, rather than for the sake of protecting other basic rights. This is the crucial feature of basic rights. It is what defines the nature of such rights: one person's basic right cannot be outweighed by less considerations on the part of others, even many others, but only by other basic rights.

If economic rights were indeed basic, as neoclassical liberals say, we would most likely be forced to accept a minimal state of the sort advocated by Robert Nozick, which, as Epstein notes, does not allow for any forced exchange—be it outright dispossession, taxation, or regulatory takings like zoning ordinances. In other words, to regard economic rights as basic would be to understate the critical role forced exchanges play in the liberal understanding of the political system. "It is only when some individuals are forced to surrender their individual rights in exchange for the protection the state provides", says Epstein, "that the emergence of the state becomes possible" (2005, 287).

Now, from a high liberal point of view, it is true that we could still defend the welfare state, even if economic rights were basic. If we have a full set of basic rights, then we might need to restrict basic economic rights to ensure that citizens can take advantage of their other basic liberties. We would need taxation to protect the political and legal rights and, for instance, might need zoning regulations to protect freedom of association.

From a classical liberal standpoint, however, it is not clear that the same is true, because it is not clear that many other rights are basic. Though classical liberals support democracy, for example, their defense

has never been particularly enthusiastic, and it was never suggested that political rights can only be overridden for the sake of other basic rights. The same goes for most rights, like freedom of association, such that classical liberals have indeed argued that they are extremely important, but not that they cannot be outweighed by enough instances of some lesser objectives. If economic rights were basic, while most other rights are prima facie, liberals would then be forced to confine the state to the minimal functions of the night-watchman state, which would make no sense from a classical liberal standpoint.

Therefore, the neoclassical liberal line on economic rights has much more radical consequences than either Shapiro or Tomasi acknowledge;[3] these are consequences that would potentially put them outside the main classical liberal tradition, and even outside the liberal tradition. If the right to live were to be considered basic, at best a theory of basic economic rights could justify a minimal sufficientarian state that would make sure that people would not starve to death, though it would not justify anything else. I assume that such a prospect is unattractive for both classical and high liberals, and consequently what follows will attempt to take additional steps toward a classical liberal theory of the welfare state—steps that could not be taken were we to accept the neoclassical liberal argument that economic rights are basic.

IV. THREE WAYS TO UNDERSTAND THE LIBERAL DIVIDE ON ECONOMIC RIGHTS

There are three main ways in which we may understand the liberal divide concerning economic rights, all of which, I argue, are fictitious. They refer to, the *nature*, the *scope*, and the *considerations* that can outweigh economic rights. Let us now pinpoint the disagreement between classical and high liberals, so that we can then examine the reasons that classical and high liberals may use to override economic rights. Classical and high liberals, I will argue, have the same view of the nature, the scope, and the types of reasons that can outweigh economic rights. The only difference concerns the strength of the reasons that are required to outweigh economic rights.

[3] Tomasi's hybrid approach follows the high liberal one, as he labels many rights as "basic" (2012, xxvi)—beside economic rights, the list also includes, for example, civil liberties, like the right to a fair trial, and political liberties, such as the right to vote. But it is not clear that these rights would suffice to justify policies for the betterment of the poor given the stringency of a theory of basic rights.

First, as to the nature of economic rights, we could think that there is a distinction between "thick" and "thin" theories, as do most neoclassical liberals today (Brennan and Tomasi, 2012). "Regarding the liberties of holding (or 'owning'), for example", says Tomasi, "classical liberals affirm not only right to ownership of personal property (as guaranteed even by most socialist systems) but rights to the private ownership of productive property as well" (2012, 23). Fair enough, we may say, but so do most high liberals. Tomasi could then retort that the right of productive property is not basic for high liberals like Mill or Rawls, as they repeatedly wished to limit the scope of such rights. Again, we may say, such an observation is correct, but it does not permit us to distinguish classical from high liberalism; that is, the right of productive property is not basic for classical liberals either. For instance, even though one may have a property right over some land, it does not necessarily mean that one may have the exclusive control over that land, as perhaps some other people may have non-possessory interests in the land, and it does not mean that the land cannot be taken so as to build, say, a military base or a highway. Hence, we have to be careful with the common distinction between "thick" and "thin" theories of economic rights. It is not obvious that the high liberal theory is that much "thinner" than the classical liberal one.

Second, we could then think that if the distinction between "thick" and "thin" theories is not entirely appropriate, we may nonetheless distinguish classical and high liberal theories of economic rights through their scope. Consider a case, which could comically be called the "Scrooge McDuck" case. In his book *Why Not Capitalism* (2014), Brennan criticized those who, like Rawls and Gerald Cohen, establish a distinction between people owning "personal" and "productive" property. The Rawlsian argument is that the right to hold and have the exclusive use of personal property is necessary for a sense of personal independence and self-respect, not a wider conception of property, and therefore these rights ought to be protected in different ways by a theory of justice (1993, 298). Against such a view, Brennan raises the following problem about the Disney character Scrooge McDuck—an exceptionally wealthy business magnate and incidentally also a greedy miser whose fortune was estimated to be about $65 billion by Forbes in 2013: "Is it okay for Scrooge McDuck to have his massive pile of money, so long as he uses it just for swimming and not as capital for investing?" (85). The point is that the high liberal position may seem strange, since,

after all, it is not clear why it should matter how McDuck uses his money. Why is swimming in a pool of gold better than creating jobs by investing money in productive enterprises?

A definition of property that distinguishes between "productive" and "non-productive", or between "personal" and "non-personal" property, we could think, will therefore be unstable. "For the most part", says Brennan, "it seems like the difference between productive and non-productive property is just how we use it. So, at most, socialists don't really oppose allowing people to own private 'productive property'; they oppose allowing people to use their private property in a productive way" (2014, 85). But then the question is the following—is the high liberal view different from the classical liberal one in any significant way? No. Or, is it true that classical liberals do not care about the ways in which people use their property? Again, no. Classical liberals have also established similar distinctions between "productive" and "personal" property. The issue of patents provides us with a clear example of such distinctions. Indeed, as he argued for the obligation that patent holders have to use their patents in a productive way, Hayek (1980, 114) criticized Justice McKenna, who had previously delivered the following opinion:

> As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 404, 1909).

Not so, said Hayek: we can indeed establish a distinction between productive and non-productive property, and we may force people to use their property in a given way. That is, we may force patent holders to use their property in a productive way, and we may force land owners to use their property in a non-productive way—as, for example, municipalities commonly do when engaging in town planning, like the landmark case in nuisance *Sturges v. Bridgman* (LR 11 Ch. D. 852, 1879) established, or later *Adams v. Ursell* (1 Ch. 269, 1913). This is also true for the doctrine of reasonable use for riparian owners in water law. Hence, this way of understanding the divide between classical and high liberals is fictitious as well.

Third, we could think that the debate is about the moral considerations that can outweigh economic rights. But here again the divide is fictitious. For now, I propose to examine the reason of necessity, where there is no disagreement between classical and high liberals. This will permit us, in the next sections, to consider two other reasons, namely utility and social justice, which will be more fruitful to understand the liberal divide. As we will see, the only difference between classical and high liberals is about the comparative strength of economic rights versus such reasons, though there is no disagreement about the reasons themselves. One unit of economic rights is worth more for classical liberals than for high liberals, and one unit of social justice is worth more for high liberals than for classical liberals.

The idea of necessity does not need more than a few words, and therefore we may dispose of such a question immediately. Necessity has always been a possible justification or an exculpation for breaking the law. The Law allowed the Jewish people to defend themselves on the Sabbath. One may run across the lawn of one's neighbour if one is chased by ravenous zombies. One may break a window to escape a fire. One may commandeer a vehicle to rush to the hospital. Jean Valjean may steal bread to feed his sister's starving children. Overall, these cases remind us that forced exchanges can be initiated in cases of extreme necessity. "For all human Laws are, and ought to be so enacted", said Hugo Grotius, "as that there should be some Allowance for human Frailty" (1625, 1.IV.vii). In the law of restitution, for example, necessity suspends property rights, Epstein explains (2005, 300), as an owner may be considered a wrongdoer if he refuses access to his property to someone in necessity, like the use of a dock to escape the ravages of a coming storm. On this point, again, classical and high liberals will agree, and accordingly we must look elsewhere if we are to pinpoint their disagreement.

V. KELO V. CITY OF NEW LONDON—A REVERSE-ROBIN HOOD CASE OF TAKING

Let us turn to the question of utility, which is much trickier from a liberal point of view. Following Rawls (2000, 366) and Freeman (2001, 52f), we could think that the liberal divide can be explained by looking at the different types of reasoning liberals use to justify economic rights. Such an explanation was also endorsed by Tomasi (2012, 103) who distinguishes the classical liberal "ends-directed" reasoning from

the high liberal "deliberative" reasoning. That is to say, the rationale behind economic rights is often thought to be consequentialist for classical liberals, though not for high liberals, which, as this section will show, misrepresents classical liberalism.

Consider *Kelo v. City of New London* (545 U.S. 469, 2005), a case of eminent domain. A redevelopment plan was supposed to revitalize the ailing economy of the city of New London, and therefore the city purchased property in the Fort Trumbull neighborhood, through its development agent, and sought to enforce eminent domain to acquire land from owners unwilling to sell. Pfizer Corporation was supposed to build research facilities on the land, and thus the city initiated condemnation proceedings when the owners of the rest of the property, the petitioners, refused to sell. The Supreme Court, in a controversial 5-4 decision, justified the enforcement of eminent domain under the Takings Clause of the Fifth Amendment, saying "nor shall private property be taken for public use, without just compensation". Economic development, the Court ruled, qualifies as "public use" under the said clause.

Classical liberals disagreed. They endorsed the principal dissent issued by Justice O'Connor. The decision, it argued, eliminates the distinction between private and public use of property. In fact, the redevelopment plan was all for Pfizer, a major pharmaceutical corporation, which subsequently left the land of Fort Trumbull as an undeveloped empty lot. Hence, Justice O'Connor criticized the reverse-Robin Hood understanding of the taking power—taking from the poor and giving to the rich. Justice Thomas (at 518) issued a separate dissent in which he also observed the following: "Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not".

Kelo v. City of New London is indicative of an under-appreciated ambiguity concerning economic rights. We all agree that people have property rights, and that these rights may be outweighed by some considerations of utility, for example to build a highway. But not any consideration of utility will do. In fact, if we were to accept the *Kelo* case of eminent domain, we would have to accept taking from the poor to give to the rich inasmuch as it leads to some economic development, which would make no sense from a classical liberal point of view. This led Richard Posner to ask, "But if 'economic rejuvenation' is a public

use, what is to prevent a city from condemning the homes of lower-middle-class families and giving them free of charge to multimillionaires?" (2011, 72).

Though economic rights are fundamental to economic development, we have to remember that the exercise of any such right is also limited by a theory of justice. There is no real disagreement on such a point, which is one thing critics of the classical liberal tradition have often missed since they depict such a tradition as generally based on consequentialist considerations regarding the beneficial effects of economic rights. Indeed, Freeman (2007, 45) understands high liberalism as primarily concerned with the "freedom and independence of the person", while he sees classical liberalism as focused on "individual happiness". In so doing, Freeman followed Rawls (2000, 366) who had established a similar distinction between the "liberalism of freedom" and the "liberalism of happiness"—the former being high liberalism and the latter being classical liberalism.

In other words, it is common to understand high liberalism as being moved by a deep concern to respect people as free and equal citizens, and, conversely, to understand classical liberalism as a consequentialist program, the goal of which is to pursue overall happiness. Once we consider *Kelo v. City of New London*, however, we may understand that such a portrait of classical liberalism is mistaken. Classical liberals, after all, opposed the redevelopment plan in the Fort Trumbull neighborhood, and therefore they opposed a claim of aggregate welfare, which should make us question the usual ways in which we depict the divide between the classical and high liberal theory of rights.

Against this claim, one could argue that the classical liberal critique of *Kelo* is not principled, as if the redevelopment plan had worked, then classical liberals would have backed the plan. Not so, said Epstein (2014, 358). That the whole redevelopment project fell through, that the land is still an empty lot today, and that the promised new jobs and tax revenues never materialized, does not change a thing from a classical liberal point of view. This case of eminent domain was unacceptable, and it would still have been so had the project succeeded, everyone living happily ever after. We should not take from the least well-off so as to then give to the best-off—this cannot be understood as a compelling state interest.

The *Kelo* case challenges the assumption of, say, Rawls, Freeman, and Tomasi, according to which economic rights are justified by an

"ends-directed" reasoning for classical liberals, and by a "deliberative" reasoning for high liberals. The classical liberal reasoning is manifestly not "ends-directed", as it opposed economic development, inasmuch as such development was realized at the expense of the least well-off. Of course, the classical liberal state requires a practice of forced exchanges, which, in turn, will make everyone better-off, and yet the reasoning behind such a practice is often justified by social justice, as the next section will show. A reverse-Robin Hood theory of justice as we can find in *Kelo* is unacceptable for classical liberals, even outrageous as a matter of policy. But that is not to say that classical liberals cannot accept Robin Hood cases of eminent domain, like high liberals do.

VI. Hawaii Housing Authority v. Midkiff—A Robin Hood Scenario

This section will now explain how social justice may override one's property interest, and why the diversity argument Tomasi championed should lead liberals to the conclusion that economic rights are prima facie. Consider *Hawaii Housing Authority v. Midkiff* (467 U.S. 229, 1984), which is a case of oligopoly in land ownership. 22 landowners owned about 72 percent of fee simple titles on the island of Oahu, where about two-thirds of the population of Hawaii live. The land being concentrated to such an extent in the hands of a few private owners was a remnant of the feudal system and the caste organization in Hawaii. That is, traditionally, the aliʻi nui and kaukau aliʻi lines ruled and controlled the main Hawaiian Islands. The Hawaii State Legislature, therefore, used eminent domain to take land and redistribute it to private residents. In an 8-0 decision, the Supreme Court held that such redistribution was constitutional, as a legitimate exercise of the police powers so as to correct a market failure.

Once more, classical liberals disagreed with such a decision. In this case, according to Epstein, "there was no serious holdout problem between landlord and tenant to justify a scheme whose sole purpose was to allow sitting tenants to use state force to require their landlords to sell, allowing the tenants to become outright owners of the property they lived on" (2014, 358). I agree with Epstein to say that the test used in that case was unacceptable from a classical liberal viewpoint, namely an extreme version of the rational basis test for which any conceivable public purpose is sufficient to defeat some property rights. However, there was manifestly still a problem that needed to be addressed, and

one could have reached the same conclusion through a more stringent standard of review. This case is indeed much trickier than the first one we examined—unlike *Kelo* that was moved by a reverse-Robin Hood theory of justice, we now have a Robin Hood scenario.

The problem is as follows: people could not become homeowners on Oahu. They could live their entire lives without ever having the opportunity to own their homes. As a result of the feudal system in Hawaii, land was concentrated in the hands of few families, and accordingly homeownership was inaccessible to most residents of Oahu. For families who have lived on Oahu for generations, we may think, not being able to buy a house is indeed a compelling reason to use eminent domain. Property rights are prima facie rights that can be restricted or even denied to secure some social values—and homeownership is probably one such value from a classical liberal viewpoint, especially after we consider the case of Amy, the college dropout, as presented by Tomasi. That commercial activities within a market capitalist society are a "deeply meaningful" aspect of the people's lives, as Tomasi argued, does not lead to the conclusion that economic rights are basic, as rather to the fact that these rights may be outweighed if only to preserve the values these rights stand for—say, homeownership and autonomy.

It is true that eminent domain is an anti-monopoly device, and thus one could retort that this case of eminent domain is better understood in an anti-oligopoly manner. But *Hawaii Housing Authority v. Midkiff* can also be understood as an attempt to further the liberal value of homeownership. Let me explain. "Real estate is a heterogeneous good", Posner notes (2011, 70), "and so a particular parcel in the hands of a particular owner will generally yield him an idiosyncratic value that is on top of the market value. Eminent domain operates to tax away that value; if market value is $X and total value (including idiosyncratic value) is $1.2X, then if the government takes property by eminent domain it pays for it in effect by spending $X out of the government's own coffers and $.2X out of the owner's pocket". Simply put, homeownership creates idiosyncratic value, which was manifestly taken in the *Kelo* case in a reverse-Robin Hood manner, while in the *Midkiff* case such a value was given to lessees in a Robin Hood manner. The question, then, is whether the interest of homeownership is compelling enough, and whether the relation of the law to that interest is appropriate enough from a classical liberal viewpoint. If we accept the main classical liberal arguments, the answer is probably yes.

We have now come full circle. Tomasi argued that economic rights should be basic because they are essential for self-authorship. Conversely, *Midkiff* shows how having the possibility to outweigh economic rights is sometimes essential for self-authorship. Hence, as I announced, economic rights cannot be basic for any liberal.

Notice one important point: classical liberals opposed the *Kelo* case, though they can certainly embrace the *Midkiff* case. Why? Taking from the poor and giving to the rich is manifestly not a compelling state interest, and therefore the *Kelo* case can be pushed aside somewhat easily. However, reducing inequality, ameliorating poverty, and furthering the value of self-authorship are compelling state interests from both a classical and a high liberal standpoint. In other words, social justice is a fundamental concern of the entire liberal tradition, which, we may now understand, can defeat property interests. This is especially true if about three-quarters of the population does not have access to homeownership. In this case, several units of social justice outweigh a few units of property rights. A similar argument could perhaps justify progressive taxation, a basic income guarantee, or some other welfare state policies if there was a compelling problem of inequality that needed to be solved from a classical liberal standpoint (Melkevik 2016; 2017).

VII. CONCLUSION—ECONOMIC RIGHTS ARE NOT BASIC FOR LIBERALS

In conclusion, there is no real disagreement in the liberal tradition concerning the nature and the justification of economic rights, as both classical and high liberals agree that economic rights may be limited so as to pursue some other aspects of justice or utility, and they both understand such rights as essential components of a system of ordered liberty. If there is any disagreement, therefore, it comes from some neoclassical liberals who are most probably misrepresenting their own understanding of economic rights by calling such rights basic. Their objection to the high liberal economic exceptionalism is sound, but does not imply that economic rights are basic.

This paper has surveyed different ways in which we may understand the divide between classical and high liberals regarding economic rights, and, in each case, I argued that the divide is fictitious. Both classical and high liberals have the same theory of economic rights. They agree that such rights are prima facie, and accept considerations of necessity, utility, and social justice as potentially sufficient to override economic

rights. Therefore, we cannot be content with Freeman's distinction between classical and high liberalism, as this paper has shown. It is not the case that classical liberals said that economic rights are basic in the sense of being restrictable only by other basic rights.

It may, however, be difficult to see where the disagreement is between classical and high liberals. Let me offer the following alternative to Freeman's distinction. The disagreement can be explained by the relative strength economic rights have for classical and high liberals. One unit of economic rights is worth more for a classical liberal than for a high liberal, while one unit of social justice is worth more for a high liberal than for a classical liberal. Several units of social justice can outweigh a few units of economic rights for both classical and high liberals, like in the *Midkiff* case, and yet several units of economic development cannot outweigh a few units of economic rights if we must also sacrifice a few units of social justice, like in the *Kelo* case. This way of presenting the liberal divide, while less remarkable, is nonetheless more accurate. It better explains the classical liberal theory of economic rights and its conditional acceptance of eminent domain.

REFERENCES

Acton, Harry B. 1993. *The Morals of Markets and Related Essays*. Indianapolis: Liberty Fund.

Brennan, Jason. 2014. *Why Not Capitalism?* New York: Routledge.

Brennan, Jason, and John Tomasi. 2012. Classical Liberalism. In *Oxford Handbook of Political Philosophy*, edited by David Estlund, 115-132. New York: Oxford University Press.

Epstein, Richard. 1986. "Taxation in a Lockean World." *Social Philosophy and Policy* 4 (1): 49-74.

Epstein, Richard. 2014. *The Classical Liberal Constitution*. Cambridge, MA: Harvard University Press.

Epstein, Richard. 2005. "One Step Beyond Nozick's Minimal State." *Social Philosophy and Policy* 22 (1): 286-313.

Freeman, Samuel. 2007. *Rawls*. New York: Routledge.

Freeman, Samuel. 2011. "Capitalism in the Classical and High Liberal Traditions." *Social Philosophy and Policy* 28 (2): 19-55.

Friedman, Milton. 2002. *Capitalism and Freedom*. Chicago: University of Chicago Press.

Gewirth, Alan. 1981. "Are There Any Absolute Rights?" *The Philosophical Quarterly* 31 (122): 1-16.

Grotius, Hugo. 2005 [1625]. *De Jure Belli ac Pacis* (*On the Law of War and Peace*). Edited by Richard Tuck. Indianapolis: Liberty Fund.

Hayek, Friedrich. 1978. *The Constitution of Liberty*. Chicago: University of Chicago Press.

Hayek, Friedrich. 1980. *Individualism and Economic Order*. Chicago: University of Chicago Press.
Hayek, Friedrich. 2013. *Law, Legislation and Liberty*. London: Routledge.
Knight, Frank. 1982. *Freedom and Reform*. Indianapolis: Liberty Press.
Melkevik, Åsbjørn. 2016. "No Progressive Taxation Without Discrimination?" *Constitutional Political Economy* 27 (4): 418-434.
Melkevik, Åsbjørn. 2017. "No Malibu Surfer Left Behind: Three Tales About Market Coercion." *Business Ethics Quarterly* 27 (3): 335-351.
Mill, John Stuart. 1909. *Principles of Political Economy*. Edited by Sir W.J. Ashley. London: Longmans, Green and Co.
Mises, Ludwig von. 1962. *The Free and Prosperous Commonwealth*. Princeton: D.V. Nostrand.
Patten, Alan. 2014. "Are The Economic Liberties Basic?" *Critical Review* 26 (3-4): 362-374.
Platz, Jeppe von. 2014. "Are Economic Liberties Basic Rights?" *Politics, Philosophy & Economics* 13 (1): 23-44.
Platz, Jeppe von. 2016. "Social Cooperation and Basic Economic Rights: A Rawlsian Route to Social Democracy." *Journal of Social Philosophy* 47 (3): 288-308.
Posner, Richard. 2011. *Economic Analysis of Law*. New York: Wolters Kluwer.
Rawls, John. 1982. "The Basic Liberties and Their Priority." In *Tanner Lectures on Human Values*, edited by Sterling M. McMurrin. Salt Lake City: University of Utah Press.
Rawls, John. 1993. *Political Liberalism*. New York: Columbia University Press.
Rawls, John. 1999. *A Theory of Justice*. Oxford: Oxford University Press.
Rawls, John. 2000. *Lectures on the History of Moral Philosophy*. Cambridge, MA: Harvard University Press.
Rawls, John. 2001. *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press.
Shapiro, Daniel. 1995a. "Liberalism, Basic Rights, and Free Exchange." *Journal of Social Philosophy* 26 (2): 103-126.
Shapiro, Daniel. 1995b. "Why Rawlsian Liberals Should Support Free Market Capitalism." *Journal of Political Philosophy* 3 (1): 58-85.
Tomasi, John. 2012. *Free Market Fairness*. Princeton: Princeton University Press.

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