

Are the Economic Liberties Basic?

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According to a familiar picture, two main opponents face off in contemporary debates about economic justice. On one side, libertarians argue that most efforts by the state to bring about greater economic justice are illegitimate because they involve violations of side-constraints demanding respect for natural rights to private property. On the other side, liberals insist that property rights are best regarded as subordinate implications of an overall account of justice – one that includes economic justice – rather than as constraints on such an account. Liberals tend to be confident about winning this argument. They find it hard to see how libertarians could justify singling out property rights as having such extraordinary priority over other demands and claims of justice.

In his smart 2012 book, *Free Market Fairness*, John Tomasi joins liberals in rejecting the property-rights absolutism of libertarianism. Tomasi insists, however, that a careful examination of liberal principles leads to the conclusion that there are serious constraints after all on what the state may do to promote economic justice. Unlike libertarians, Tomasi does not ground this argument in an account of natural rights. Instead, he points out that important priority relations

are already recognized in leading contemporary formulations of liberal justice. Following terminology coined by John Rawls, Tomasi notes that liberals extend special protections to certain “basic liberties,” even where such protections impede the state’s pursuit of economic justice or of other facets of the public good. Tomasi’s central claim is that the economic liberties ought to be added to the list of basic liberties that are afforded this special protection. According to Tomasi, the recognition of economic liberties as basic would not prevent a social safety net funded out of taxation or a system of publicly funded education from being guaranteed to all citizens (91-92). But it would prohibit the state from pursuing many of the more egalitarian policies that are favored by “high” liberals in the Rawlsian tradition.

Tomasi has succeeded at writing an ambitious and interesting book that is successful at conveying subtle points of political philosophy in an engaging and accessible fashion. I remain unconvinced, however, by the book’s central claim that the economic liberties should enjoy special protection. I organize my critical reflections on this claim into four sections. The first considers some ambiguities in the claim itself. The second confronts the claim head-on, asking whether Tomasi has provided good reasons for regarding the economic liberties as basic. The third and fourth then consider several further arguments offered by Tomasi and contend that they do not succeed at justifying the book’s central claim.

1. A Dilemma for Tomasi

When Tomasi claims that the economic liberties should enjoy special protection, there are two ideas that stand in need of further clarification: the idea of the “economic liberties” and the idea of “special protection.” As we shall see, depending on how Tomasi specifies these ideas, two conclusions are possible. One is that accepting the claim would not in fact place much of a constraint on what the state can do to promote economic justice and would not leave Tomasi in sharp disagreement with high liberals like Rawls. Another is that there would indeed be a significant constraint on the state and it would be so severe as to conflict with the guarantee of a social safety net.

The key question about the economic liberties is what exactly they include. One of Tomasi’s most appealing examples is the case of Amy, a college dropout who manages to save enough money to open her own pet shop (66). When she walks into the shop every morning she feels a special pride in seeing her name up on the sign. The liberty that seems important here is the liberty to start and control one’s own business rather than to rely for one’s employment and direction on an enterprise or organization controlled by somebody else. If this were all that was entailed by economic liberty, however, then the disagreement with high liberals would not be very sharp. In part this is for a reason to be highlighted below – that high liberals can acknowledge some kind of presumption in favor even of non-basic liberties. The main point to make immediately, however, is that freedom of occupational choice is already recognized as a basic liberty by many

liberals, and the right to start a business is plausibly regarded as an aspect of this freedom.¹

Tomasi does not limit the economic liberties to the right to start a business, however. He suggests that the right to personally negotiate the terms of one's employment is also an important liberty, as is the right to enjoy one's earnings and so to be free from onerous levels of taxation. An important question here is why these various rights belong together. The right to start and control one's own business is plausibly connected with the overarching value of self-authorship highlighted by Tomasi. But it is less clear how self-authorship is related to freedom from taxation. One might think that high taxes would make a person like Amy less *likely* to devote great amounts of energy to running her own business, but not necessarily less *free* to do so. It is also unclear why self-authorship requires personal negotiation of one's terms of employment. Why can't relatively powerless employees exercise self-authorship by organizing together to negotiate collectively?

So one issue that seems underdeveloped in Tomasi's account concerns the content of the economic liberties. A second concerns the idea that, as basic liberties, the economic liberties ought to be given special protection. Part of what it means to say that a liberty is basic is to say that it ought to enjoy special priority

¹ When Rawls writes that "What kind of work people do, and how hard they do it, is up to them to decide in light of the various incentives society offers" (*Justice as Fairness*, p. 64) he seems to be glossing the freedom of occupational choice. The gloss seems compatible with recognizing the right to start one's own business as an aspect of such a freedom.

vis-à-vis other aspects of justice and the public good. But what exactly does this special priority entail?

In Rawls's theory of justice, the special priority enjoyed by the basic liberties is characterized quite precisely as *lexical* priority. A particular basic liberty may be limited to protect other basic liberties – to bring about a coherent, stable and adequate scheme of basic liberties. And Rawls is open to the suggestion that basic liberties may also be limited to protect some minimal standard of basic needs. But otherwise, for Rawls, the special priority of the basic liberties means strict or lexical priority: other aspects of justice and the public good can be pursued only by those means that fully respect the basic liberties.

Clearly, Rawls's conception of special priority is not the only one available. One could imagine a conception that attached some extra weight to claims of liberty over (say) claims of equality but that calibrated the weighting so as, in effect, to allow for some trade-offs between liberty and the other concerns. If we locate Rawls and lexical priority at one end of the spectrum, then at the other end might be the minimal idea that equally strong claims of liberty and equality should be decided in favor of liberty. In between lie an indefinite number of positions corresponding to different weights that might be attached to the relative importance of liberty over other concerns.

It is hard to tell where along this priority spectrum Tomasi intends to place his claim that private economic liberties are basic. In a number of places, he says that they are “on a par with” the traditional civil and political liberties, and strongly

associates his account of basic liberties with Rawls. These passages suggest a strict lexical ordering under which private economic liberty can be limited for the sake of other basic liberties but not for the sake of other values. In other places, however, Tomasi suggests that “some heightened degree of judicial scrutiny” be applied to violations of private economic liberties, (92), which seems consistent with positioning his main claim elsewhere along the spectrum.

One consistent theme is that the book is introducing a “research program” rather than defending a fully specified proposal. It is a family of views, many of which still await elaboration and specification. So vagueness about the precise meaning of special priority might be regarded as a feature not a bug of the account. But there is a dilemma lurking here for Tomasi. The more that he emphasizes the lexical priority of the basic liberties (including the economic liberties), the less confident one can be that market democracy will provide a meaningful safety net for all citizens. The resources needed to provide such a safety net would have to be raised through taxation, but taxation for this purpose would be ruled out by private-property rights. Anticipating this kind of concern, Tomasi expresses considerable confidence that market democracy will stimulate enough economic growth that the safety net would be provided spontaneously, without onerous taxation (87). I’m perplexed by and skeptical about Tomasi’s discussion of these matters, but they are beside the point being considered here. Claims about special priority are claims about what to do *if there is* a conflict between different concerns. Priority claims that seem objectionable are not made

less so by asserting that the conflict in question is unlikely to arise. By insisting on the lexical priority of a package of basic liberties that includes the economic liberties, Tomasi would effectively be saying that he prioritizes economic rights over even fairly minimal attempts to fund a social safety net. Put in this light, the position is not as moderate or appealing as it initially appears.

On the other hand, if market democracy works with a weaker conception of special priority, then the idea that the economic liberties are “on a par with” other basic liberties should probably be abandoned. On a liberal view, certain traditional basic liberties *are* as a package properly given very strict priority. When the economic liberties are decoupled from the other basic liberties, the disagreement between market democracy and high liberalism becomes harder to pinpoint. For instance, Rawls does suggest that some kind of presumption ought to be given even non-basic liberties. For this reason, it seems open to Rawls and other high liberals to agree that the law should not prohibit Amy from opening her own business for no reason at all, or even without a pretty good reason. If Rawlsians can move some of the way towards addressing Tomasi’s concerns, it also seems like Tomasi is prepared at times to make major concessions to high liberals. When he allows for “tax-supported public education” in pursuit of “equal opportunity,” the idea that liberties from taxation are basic seems to have disappeared from view (109).

Perhaps there is a sweet spot along the priority spectrum that permits taxation to support a safety net and some very limited form of equal opportunity

while still protecting key aspects of economic liberty that high liberals and social democrats would be likely to downplay. A worry about this suggestion is that it will turn out to be ad hoc. If this is where converts to Tomasi's approach want to position themselves, they ought to provide some principled justification for thinking about priority in this intermediate way. Suppose, for instance, that Tomasi insists that there is a strong presumption against a tax on Amy's small-business earnings. Why think that taxes intended to fund the safety net could meet this presumption but not taxes intended to promote equal opportunities for the children of Amy's neighbors or customers?

2. Are Economic Liberties Basic?

Suppose we set aside the questions about what exactly is entailed by the claim that economic liberties are basic. The main question I wish to consider in the remainder of my remarks concerns the grounds for thinking that the economic liberties have this special status. Why should the economic liberties be regarded as basic?

Tomasi's remarks about this issue are scattered throughout several chapters of the book. The main argument seems to go as follows:

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

Therefore,

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

Although the precise language is quite varied, Tomasi's discussion of the basic liberties seems to lean on an argument of this form in several key passages. In one passage, he says that, "for many people, commercial activity in a competitive marketplace is a deeply meaningful aspect of their lives" (182). For these people, treating economic liberty as basic is an "essential condition of responsible self-authorship" (183). Earlier in the book he argues that economic decisions "are not mere details within a person's life," but help to "define" a person and can be "bound up with one's identity" (77-78). It is because economic decision-making means so much to people that economic liberties are essential to responsible self-authorship. Without these liberties, "decisions about matters that affect them intimately would have been taken out of their hands and decided for them by others" (77).

The main problem with the argument, as I see it, is that its premise (i) seems badly overinclusive. In a pluralist society, different people will regard a great many different ends and activities as meaningful or important for their identity and self-definition. Some find meaning in private economic pursuits, as Tomasi suggests. Others find meaning in religion, family, neighborhood, and art. Still others find their hobbies, sports, forms of recreation, or guns to be highly meaningful. And some people derive great satisfaction from solidaristic relationships with their fellow workers, relationships that might be most fully

realized through workplace self-government (which Tomasi disparages (190-91)). If premise (i) were accepted, it seems that all these ends and activities would deserve protection by a basic liberty.

In response to this observation, Tomasi might bite the bullet and agree that the list of basic liberties may be considerably longer than either his book or high liberals assume. But this response risks losing sight of what it means to call some liberty basic. As we have seen, when a liberty is basic, respecting it should be given priority over other concerns. As the list of basic liberties is lengthened, however, it becomes more likely that some of the deprioritized concerns are themselves essential conditions for some people to be authors of their own lives.

To see the problem, it is important to recognize that liberty is not the only condition necessary for a person to pursue the ends and activities that are meaningful to her. To be a responsible self-author, a person with a strong preference for some particular end, E, needs to have the legal liberty to choose E. If she is railroaded by the law into choosing not-E over E, or if E is regulated out of existence, then her self-authorship is compromised. The familiar but important point to recall, however, is that the presence or absence of a legal liberty to choose E is not the only condition that is relevant to a person's self-authorship. A person's economic circumstances may be just as consequential for her capacity to pursue the activities and goals that she regards as meaningful. Consider the example of Amy again. Tomasi notes that, despite being a college dropout, Amy was able to amass a sterling credit rating that eventually allowed

her to secure a loan to start her own business. It is easy to imagine a slight variation on Amy's case – call it the case of Betsy – in which things don't turn out so well. Whether it is because of risk-averse lenders, or something about her own situation or needs, Betsy is never able to get the loan, and so never has the opportunity to quit her unsatisfying job and become her own boss. She has all the economic liberty she needs, but she lacks sufficient access to resources to follow the life-plan she has determined for herself.

Betsy's case is one in which self-authorship in the economic realm – her dream of starting her own business – is thwarted, despite the protection of the relevant liberty, because important non-liberty conditions are unsatisfied. The same scenario is possible for people whose identity and self-definition are focused on other spheres of activity – family, neighborhood, art, recreation, etc. The fact that their society protects the economic or other liberties does not guarantee that they will enjoy self-authorship in the ways that they value because various non-liberty conditions have to be satisfied too.

The challenge to Tomasi should be coming into view. There is a substantial cost when basic-liberty status is conferred on the economic liberties, a cost that should make high liberals reluctant to endorse this amendment to their position. When the economic liberties are basic, 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. Judged from the standpoint of self-authorship, treating the economic liberties as basic is not neutral. People who are

comfortably off with respect to the non-liberty conditions and who have preferences focused on economic goals and activities benefit from special protections for the economic liberties. Where satisfaction of the non-liberty conditions is uncertain, or where preferences are non-economic in character, the opposite is true. In these situations, self-authorship is impeded by special protections for the economic liberties.

To be clear, I am not arguing against protections for the economic liberties. The important point is that the interest such liberties would protect – the interest in self-authorship – requires both liberty- and non-liberty-based protections, depending on a person’s situation, needs, and preferences. It would be unfair for public institutions to single out the liberty-based protections for special consideration. This would be to elevate the self-authorship of some over the self-authorship of others. The economic liberties are appropriately balanced against other concerns that are relevant to self-authorship rather than treated as somehow prior. The economic liberties, in short, are concerns of justice, and should be regarded as weighty, but they are not basic liberties.

3. A Problem of Consistency?

Tomasi suggests that his account of the basic liberties is meant to follow Rawls. He notes that Rawls does recognize as basic two minimal economic liberties – freedom of occupational choice and freedom to own personal property. He goes on to argue that “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” (76). Occupational choice is protected because occupation is for many people a “profound expression of identity” (77). And the right to own personal property is based on considerations of security, non-domination, and identity. For Tomasi, these very same reasons support the more robust economic liberties that he defends. So perhaps it was inconsistent for Rawls to affirm the basic liberties that he did while refusing to add the economic liberties to the list?

This argument from consistency with Rawls strikes me as unsuccessful. In general, the Rawlsian basic liberties do not have very much to do with the considerations adduced by Tomasi. In Rawls, the primary function of the basic liberties is to develop and protect the “higher order interests” that citizens have in being able to sustain two fundamental moral powers – the capacity for a conception of the good and the capacity for a sense of justice. Some of the key basic liberties, including the freedoms of conscience, speech and association, are designed to put individuals into a position where they can intelligently formulate and reformulate a conception of the good of their own. Others, especially the political liberties, serve the function of securing politically a framework of justice and of defining a basic relationship of social equality between all citizens. The claims about meaningful ends and identity highlighted by Tomasi do not play a major role in Rawls’s general characterization of the basic liberties.

It is true that some of Rawls's remarks about freedom of conscience do edge towards the account offered by Tomasi. Parties to the original position are motivated to protect liberty of conscience by an expectation that the persons they represent will have firmly held religious, philosophical, and moral views that they will want to honor. But conscience seems special in ways that make it problematic to extrapolate to other ends and commitments. For one thing, the commitments that fall under the heading of conscience present themselves to their bearer as "non-negotiable," and often as obligatory, in ways that are not true of other kinds of ends. Another point is that judgments about religion, philosophy, and morality seem particularly central to a person's autonomy. And a third consideration is that persons normally have some set of moral/philosophical/religious views or other, whereas there is much more contingency about whether a person has economic ambitions (of the sort highlighted by Tomasi) or not.

The inconsistency charge is not any more compelling if one considers the minimal economic liberties that Rawls does regard as basic. There is little explanation in Rawls of the basis of freedom of occupation, but it is not hard to imagine the sort of account that might be given. Most people spend a large fraction of their waking hours at work and it would be harshly constraining of their efforts to lead their own lives for the state to assign them to a particular occupation when they might choose something different. The right to personally negotiate the terms of one's own employment simply does not implicate anything

so central to the lives of most people, especially if this is mainly construed as a right against schemes of collective bargaining.

Rawls does mention a rationale for the right to hold personal property. “The role of this liberty,” he says, “is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers” (PL, 298). Now Rawls might be wrong about this. It is possible that no property rights at all are needed to foster the desired sense of self. It is also conceivable that people need a fuller set of property rights, including weighty rights to ownership of the means of production, to develop this sense of self (although, depending on the details of the claim, someone who defends this position may be committed to denying that citizens of a social democracy have a sufficient material basis to develop their moral powers). The point to emphasize, however, is that *if* Rawls’s account of personal property is correct, then there would be no inconsistency in denying basic liberty status to ownership of the means of production. If personal property is a sufficient basis for the sense of self in question, then productive property is not necessary.

4. Agency and the Basic Liberties

Let me conclude by briefly considering one other theme in Tomasi’s book that may be relevant to appreciating his thesis that the economic liberties are basic. In a powerful passage citing work by Charles Murray, Tomasi worries that the

sorts of programs favored by European social democrats risk taking the “trouble out of life” (80). When people are insulated from too many of the risks of ordinary life, they are denied a sense of agency and self-authorship. A janitor who provides for his family cannot think he makes much of a difference if the state would have provided the same resources had he not. Tomasi infers from these observations that there is something of basic importance in allowing people to control their own finances, to make decisions about the terms of their employment, and to own productive property (81).

A related theme recurs elsewhere in the book. It is not enough to live well, Tomasi argues. One must also be the “visible cause of that state of affairs” (184). Tomasi’s view “gives special attention to the importance of *agency*, to what citizens *choose to do* as responsible independent agents. On this view, self-respect comes primarily from seeing oneself as a central *cause* of the particular life one is living.”

Although intriguing, Tomasi’s case of the janitor would need to be sharpened up to be of any help in justifying the claim that the economic liberties should be regarded as basic. One problem is that, in other contexts, we do not tend to think that the fact that a certain outcome would have happened anyways is a reason for thinking that some person’s bringing about that outcome should not be considered an exercise of her agency. A doctor who kills a patient who is soon going to die of natural causes is rightly thought to have exercised agency. A father should not feel less involved in caring for his children just because his co-

parent would have provided the care had he failed to do so. Another problem is that the policy conclusion that Tomasi draws from the example – that people should be able to control their own economic affairs – seems incommensurate with the thrust of the example itself. Taking the example seriously, one might think that it is not enough to give people various freedoms if the state is waiting below with its safety net to catch anyone who falls. If the full implications of the example are taken seriously, the argument is, as I noted, an intriguing one, but to assess it one would need to look at the situation not just from the janitor's standpoint but also from the standpoint of his children. If the safety net is removed to enhance the janitor's sense of agency, what are we to say to his children if their life prospects are marred by his unlucky or imprudent choices?

Leaving the janitor aside, Tomasi's remarks about agency are suggestive of several further forms of argument. In post-Rawlsian debates about distributive justice there is extensive discussion of the relationship between responsibility and justice. Tomasi's image of people not bothering to work because they expect the state to provide for their needs might be understood through the lens of the luck-egalitarian idea that a just distribution ought, in Ronald Dworkin's words, to be ambition-sensitive but endowment-insensitive. The able-bodied who choose not to work can be regarded as taking their fair share in the currency of leisure, so they should not be compensated with income as well. But, if this is the upshot of Tomasi's argument, the relevance for treating the economic liberties as basic is far from clear. Treating the economic liberties as basic would make it *harder* for

the state to ensure that people are not disadvantaged by factors for which they have no responsibility.

A different idea that comes through in Tomasi's remarks is that there is something especially admirable about the self-made (or "self-authored") person. This taps into a fairly standard trope in American conservative thought – the celebration of the self-reliance of the individual entrepreneur. The trouble with this line of thought in the present context, however, is its perfectionism. When settling what basic rights and liberties people should enjoy, it would be wrong to single out one particular form of valuable living amongst many and elevate it to a privileged status.

I do agree with Tomasi's suggestion that agency rather than mere enjoyment or receipt of benefit is central to leading a meaningful life. Philosophy undergraduates learn this from Nozick's "experience machine." But I don't think that this general insight entails that the economic liberties should be regarded as basic. As I emphasized earlier, there are all kinds of ends and activities that people value in our society. Some are entrepreneurial in character, others are not. Agency is exercised in the pursuit of many of these activities, and not just in the economic ones. If the economic liberties were to be regarded as basic, this would clear a potential obstacle to the active pursuit of some activities but at the cost of leaving (or creating) obstacles to the active pursuit of others. This kind of tradeoff is inevitable, but it should be performed in a balanced way, without any general preference for ends and activities with an economic character. As a

result, I am skeptical of the claim that there are agency-related reasons for regarding the economic liberties as basic.