

CSD Working Paper

WHOSE OWNERSHIP? WHICH SOCIETY?

Robert Hockett

CSD Working Paper No. 05-28

2005



Center for Social Development



Washington

WASHINGTON · UNIVERSITY · IN · ST · LOUIS

George Warren Brown School of Social Work

Whose Ownership? Which Society?

Robert Hockett
Assistant Professor
Cornell Law School

CSD Working Paper No. 05-28

2005

Center for Social Development
George Warren Brown School of Social Work
Washington University
One Brookings Drive
Campus Box 1196
St. Louis, MO 63130
tel 314-935-7433
fax 314-935-8661
e-mail: csd@gwbmail.wustl.edu
<http://gwbweb.wustl.edu/csd>

ACKNOWLEDGEMENTS: Thank you to [Bruce Ackerman, Greg Alexander, Anne Alstott, Dick Arneson, Christian Barry, Kaushik Basu, Rick Brooks, Jerry Cohen, Marc Fleurbaey, Richard Freeman, John Geanakoplos, Michael Graetz, David Grewal, Henry Hansmann, George Hay, Ravi Kanbur, Doug Kysar, Daniel Markovits, Ted Marmor, Jerry Mashaw, Trevor Morrison, Sanjay Reddy, Mathias Risse, John Roemer, Susan Rose-Ackerman, Michael Sandel, Vicki Schultz, Amartya Sen, Michael Sherraden, Bob Shiller, Martin Shubik, Bill Simon and Roberto Unger] for helpful conversation as to various among the subjects of this article. They are not, of course, to blame for my enduring errors. Vysali Soundararajan provided first-rate research assistance.

WHOSE OWNERSHIP? WHICH SOCIETY?

Robert Hockett

CONTENTS

I. INTRODUCTION: AN “OWNERSHIP SOCIETY” THAT WE CAN CALL OUR OWN	1
II. OWNING UP TO WHO WE ARE: THREE POLITICAL SELF-UNDERSTANDINGS.....	3
A. <i>Civic Republicans</i>	3
B. <i>Classical Liberals</i>	11
C. <i>Pragmatic Consequentialists</i>	18
III. DRAWING OUT THE COMMON CORE: OUR EFFICIENT EQUAL-OPPORTUNITY	
REPUBLIC	23
A. <i>Autonomy as Responsible Liberty</i>	24
B. <i>Responsible Liberty as Equal Opportunity</i>	26
C. <i>Sidestepping the Boundary Dispute</i>	31
1. <i>Core Opportunity-Endowments</i>	32
2. <i>Market, Measurement & Distribution Mechanism</i>	38
3. <i>Measuring the Endowments & Realizing the Market</i>	44
D. <i>Equal Opportunity as Efficiency</i>	48
E. <i>The Efficient Equal-Opportunity Republic is the Template of</i> <i>Our “Ownership Society”</i>	52
IV. OWNING AT THE CORE: ASSETS, OPTIONS & ENDOWMENTS IN THE EFFICIENT	
EQUAL-OPPORTUNITY REPUBLIC	53
A. <i>Ownership & Liberty</i>	55
1. <i>In Theory & in Law</i>	56
2. <i>In Citizen-Psychology</i>	65
3. <i>In Sum, Working with the Abstraction & Endowment Effects</i>	70
B. <i>Ownership & Responsibility</i>	72
1. <i>Once Again in Theory</i>	73
2. <i>Again, Using the Heuristics Wisely</i>	74
3. <i>Using the Legal Endowment</i>	78
V. CONCLUSION: FROM THEORETIC COHERENCE TO IMPLEMENTARY COHERENCE	82

I. INTRODUCTION: AN “OWNERSHIP SOCIETY” THAT WE CAN CALL OUR OWN

The idea of an “ownership society” is hardly new to American politics or law. Indeed it might be called the seventeen year cicada of American domestic policy – emerging once per generation onto the national agenda, generating just a bit of buzz, then receding once again to leave a mass of empty husks and buried eggs behind. Unlike the furtively flourishing insects, however, ownership-promoting proposals seldom have, upon emergence, crescendoed to a deafening din. Nor have they sounded the same notes to everyone’s ears.¹ Rather, “ownership solutions”² and their cognates – “homesteading,”³ “stakeholding,”⁴ “assets for the poor,”⁵ etc. – have been proffered to or on behalf of differing constituencies for differing reasons, and thus have tended to mean different things to different people. It is tempting to hypothesize that it is just this fragmentation and this polyvalence that account, at least in part, both for the general idea’s recurrence and for its every time receding.⁶

This Article is written with a view to synthesis and in the hope of permanence. It is predicated on the premise that the notion of an “ownership society” is both so close and so important to us that we never have stepped back from it to view it as one whole. We have yet to theorize it and pursue it as one comprehensive public project. We have spoken more of “programs” than “societies,” leaving the ideal that animates the programs insufficiently articulated or elaborated. That ideal, in turn, by dint of both its being left implicit and its mythic resonance with who we like to think we are, often has prevented us from thinking-through the detailed and pragmatic *requisites* of ownership. And so it has resulted indirectly in some failures of some “programs” – and an undue pessimism, in the wake of failure, over what “society” can do to *advance* “ownership”.

By drawing out explicitly the ways in which the mythos of an “ownership society” has made covert appeal to the three distinct but overlapping strands that constitute our national self-understanding, and by illustrating how that rough ideal in turn recurs covertly in specific programs and proposals, we can lay the groundwork for a more coherent and enduring public

project: the commitment to a broader ownership of value-productive and -retentive assets by all of our citizens. That commitment would seem all the more fulfillable today than in the past, in view of new finance-technologies that scarcely could have been envisaged in the past. All that's wanting, then, would seem to be the aforementioned synthesis and full articulation – and the institutional design that gives concrete, informed expression to it.

If I am correct in this, then we are faced here, now that “ownership” and “society” are uttered in one breath, and now that “finance” can “engineer” what hitherto has not been engineerable, with a most extraordinary opportunity. We face the chance at last to reconcile our longest-running, mutually antagonistic views of government and public policy. We face the chance to usher-in what might be called “a Jeffersonian republic by Hamiltonian means.”⁷

In Part II, then, this Article provides a brief elaboration of our three political self-understandings – what I'll call the civic republican, classical liberal and pragmatic consequentialist traditions. It emphasizes in particular the first two understandings' shared and still compelling vision of a free – and freeholding – citizenry who jointly constitute a virtuous *res publica*; and the third tradition's emphasis upon “results,” experimentalism, basic fairness and efficiency. My claim is that these three traditions still, between them, add up to our vision of ourselves as a society – and that they are fully reconcilable for purposes of thinking-through and bringing-in an “ownership society”.

Part III synthesizes one self-understanding from the three traditions laid out in Part II, with the aim of shifting from a retrospective and contemporary to a forward-looking point of view. It braids the overlapping strands together into one coherent, systematic public understanding of what “ownership society” should broadly mean. And in doing so it sketches two broad strategies for realizing that society.

Part IV then lays out the detailed contours, requisites, and full significance of “owning” in that “ownership society.” In effect, it bridges broader policy to detailed program. It does so by translating ethically intelligible “resource” and “opportunity” into legally and psychologically cognizable “asset” and “ownership”. In effecting that translation, Part IV arrives at more

specific prescriptions and strategies for putting into place a distinctively American ownership society.

Part V concludes the Article and sets the stage for the sequel's shift from ideological and legal synthesis to policy and programmatic synthesis. That shift finds its consummation in both (a) a consolidation and reinterpretation of past "ownership society" programs and proposals, and (b) a unified package of programmatic proposals of its own which shares the strengths and skirts the weaknesses of those past attempts at realizing aspects of an ownership society. "Consolidation" and "reinterpretation," "strength" and "weakness" there, of course, are understood by reference to those synthesized ideals and prescriptions that the present Article develops.

Part V also cautions against confounding "ownership societies" with polities in which we simply own some things or are simply "on our own." An efficient equal-opportunity republic, that is to say, is not to be confused with a banana republic. My hope is that the earlier Parts' full elaboration of our fully shared self-understanding and of that understanding's partial realization in informed institutional design, will have served to minimize the risk of that conflation.

II. OWNING UP TO WHO WE ARE: THREE POLITICAL SELF-UNDERSTANDINGS

This Part briefly adumbrates three dominant traditions of American self-understanding. In a crucial sense, these traditions constitute three comprehensive views of who we are. Like others at least in respect of the first two, I call them the "Civic Republican," "Classical Liberal" and "Pragmatic Consequentialist" traditions. An *American OS* will have to be reflective of all three.

A. Civic Republicans

Civic Republicanism (CR) and its late 20th Century rediscovery are well surveyed and discussed in the legal, historic and normative political-theoretic literatures.⁸ Here the focus is on CR's basic tenets and enduring presence in American public policy. Ownership – or "freeholding" – figures prominently in those tenets and in that enduring presence.

Like most ideological traditions, CR constitutes an integrated cluster of ethical, political and economic ideals. It is the latter-day expression of an earlier-elaborated idealization of a particular form of life, lived by a particular segment of Roman society, prior to the coming of Empire from about 60 B.C.E. to 14 C.E.⁹ The idealization process began in earnest with the nostalgic Roman poets and historians of the late Republican and early Empire periods,¹⁰ then resurfaced in Renaissance Florence during the 16th Century. The *loci classici* are the philosophic and historic writings of Machiavelli and Guicciardini, who cast their city-state as a revived Roman republic.¹¹ The Florentines' elegiac theorization of republican Rome made its way northward, through the Netherlands and ultimately into Britain, over the subsequent century. In Britain the most celebrated republican exponents were the "Whig" polemicists of the late 17th and early 18th Century English "Country" opposition, notably Bolingbroke and Harrington, who deplored the era's centralization of political and financial power in the Crown and in London.¹² These writers assimilated the Roman and Florentine ideals to the "freedom-vindicating" English common law, particularly in its storied Anglo-Saxon form in which the local freeholder, as juror, played a conspicuous role in applying, sometimes nullifying, and thus developing, the law.¹³ The Whigs also assimilated the Roman/Florentine ideal to the agrarian way of life familiar to the English country squire.¹⁴

Through Bolingbroke, Harrington and the pamphleteers and playwrights who popularized them,¹⁵ the images and ideals of the Anglo-European republican tradition exerted a critical formative influence upon the attitudes, the thinking, and the very self-conceptions of those radicals who led the American revolt against the British Parliament and Crown.¹⁶ Those same radicals included many who would frame and promote, as well as many who would oppose and resist, ratification of the US constitution.¹⁷ Many of the same persons and their ideological descendents, in turn, prominently set or opposed much nationally formative public policy through the new American republic's early decades as a nation.¹⁸ And as we shall see, many of their ideals continue, in only minimally altered and updated form, as *our* ideals.

Central to CR, again as to most ideological traditions, is a defining conception of human

nature at its basest and most elevated. And there is a corresponding view of the appropriate forms and roles of political and economic, therefore legal, organization. To CR thinking, baser human nature seeks dominion, unchecked ownership. It seeks dominion not just over nature for the satisfaction of one's basic needs, but over *more* than what is needed. Unchecked, the lust for power and for acquisition issues forth in tyranny, the grab for full control over resources, over one's fellows – in essence, merely a species of resource – and indeed over all that one is able to acquire or subdue.¹⁹

One's fellows, however, offer one redemption of a sort. Not only do they check the spread of one's dominion; they constitute a means by which to check and to transmogrify one's power-lust itself. For one must *reason* – or at least must bargain – with one's fellows if a constant state of wasteful war would be avoided. One has, and to some unspecified Aristotelian degree is even naturally disposed, to cooperate with others to address the challenges posed to all by resource-scarcity and potentially wasteful, destructively competitive activity. And one must deliberate, even come to share a common sense of purpose with one's fellows if one would work *effectively* with them through time.²⁰

The acts of deliberation, cooperation and coordination in communion with others transmute one's baser human nature into something nobler in the CR story. The desire for dominion over resources becomes productive economic activity and conduces to nonglutinous self-sufficiency – a partial liberation from, rather than obliteration of, the natural environment. The desire for dominion over one's neighbors becomes the sense of self-worth and fundamental dignity essential to effective while not overreaching action, and therefore to effective self-government. Rather than a world of one or several power-maddened tyrants owning all and lording over everyone such as each person's boundless will, unchecked, would seek, CR sees a world of many virtuous and sober nobles. Each such noble holds a humbler realm – his "estate" – and each regards the others as rough equals in shared thought and action. Will is modulated into "virtue" – a critical republican watch-word – which in turn is seen at least in part in social terms – in this case, the value of a social equilibrium of roughly equal, moderated wills and

equal, moderated spheres of human action.

Society and individual, then, are mutually dependent in a fundamental symbiosis to the CR way of thinking. And both as cause and as effect, in turn, of the virtuous republic, CR sees each citizen as *owning* some proportional allotment of the aggregate of substrate *resources* – the stuff on which the peoples’ lives are made.²¹ As effect, because one crucial reason for and product of the binding together of persons into society is the stable apportionment of life-sustaining materials among potentially competing claimants.²² And as cause, because in order truly to *participate* responsibly on equal terms in shared public life, one must both hold a *stake* in the aggregate of resources with which public life is fundamentally concerned, and possess that dignity and self-respect and partial independence which such stakeholding confers.

It is not surprising, then, that the idealized Virgilian or Virginian “yeoman farmer,” and that polity which he and counterparts had seemed to constitute in republican Rome, in post-Magna Carta England, and in parts of British North America came to occupy a hallowed role in the CR imagination. Arable land, at least until a century ago, was the productive, autonomy-conferring resource par excellence. And it bound the owner to his community: The freeholder was a nobler and accountable, less exploitative and irresponsible figure than the “absentee landlord”.²³ The early Roman citizen-soldier-farmer, beneficiary of Greek learning yet free of corrupting Athenian urbanity, was the very prototype of sober-minded, nature- and natural law-respecting Stoic dignity. And he was, of course, the prototype of the American “Minute Man.” The Roman Senate was in turn the very prototype of purposeful and public-spirited deliberation – as well, of course, as of the *US* Senate. And the seizure of power by, and the subsequent imperium and “mob”-dependence of, Julius Caesar and his successors constituted a mythic “Fall” of nearly Biblical proportion.²⁴ It illustrated both the constant vulnerability of virtue to lust, immoderate acquisition and corruption, and the ever-present danger that virtuous republican political-economy and self-government might degenerate into plutocracy, demagoguery and dictatorship.²⁵

Before turning to the enduring appeal of CR thinking in American political and economic

life, we'll do well to take explicit note of the ambivalent role that rough *material equality* plays in that tradition. On the one hand, the place of egalitarian thinking in CR seems manifest. It is the rough equality of human capacities, along with the rough identity of human interests and corruptibility that render mutual support rather than mutual antagonism so well-advised. And the coordinately idealized image of "every man [as] a king"²⁶ (his "home being his castle") implicit in the vision of that "sturdy yeomanry" which serves as "backbone" to republican self-government bears obvious egalitarian significance. It is doubtless partly for this very reason that the ascendancy of "Jeffersonian democracy" in early 19th Century America is seen both as a triumph of CR – Jefferson having been the arch-republican of early American politics – and of democratic egalitarianism.²⁷

Yet on the other hand, to remain with Jefferson for a moment, that arch-republican also held aristocratic pretensions, as did many of his peers including that other great republican icon, George Washington.²⁸ Both men actually *owned human beings*, moreover, and saw themselves as members of an almost "natural" ruling class. That class's lot – worn ostentatiously as "burden"²⁹ – was periodically to serve the people notwithstanding the alleged distastefulness of public life, then retire in noble dignity to their "ranches" or estates once national emergencies were past.³⁰ Beyond that, what was to be done once all *new* lands were *appropriated*? Were we then to take from the over- to give to the under-endowed if ownership-imbalances came to afflict the republic and threaten effective self-government? This faultline over who it is who should be "equal" and how equity should be maintained, possibly the product of incompletely worked-out ideals, possibly that of an incomplete commitment, runs throughout the CR tradition as it unfolds through American political and economic history.³¹

Present-day historians are broadly united in attributing the essentials of CR to the political-psychological and interpretive predispositions of those late-18th Century Americans who led the revolt against the British Parliament and Crown and founded one of the first of modern republics.³² The vocabularies, style of thinking, even style of dress of the American founders all were quite self-consciously republican in nature. CR attitudes and thinking also are

quite prominent in early policies and controversies advocated, implemented and/or argued over during the first decades of the American republic.

Of greatest consequence for present purposes are early American land, trade and industrial policy. One of the first American changes to the English common law was the abolition of fee tail and primogeniture, this with a view to broadening the incidence of freeholding across the population.³³ Early efforts to restrict the franchise to land-holders also are well noted, if not indeed notorious.³⁴ And these need not be thought as inegalitarian as they are simply stakeholder-voter-oriented.³⁵ The Northwest Ordinance, in turn, immediately opened federal lands to westward migrants. The aim in this case was not simply to subject those lands to productive cultivation – a pragmatic consequentialist aim which I discuss below – and certainly not, in conception, to enable existing land-owners simply to enlarge their estates. The aim was, rather, to foster the expansion of a populace of responsible republican freeholders.³⁶ Jefferson's Louisiana Purchase, of doubtful constitutionality but a perceivedly exigent opportunity, was actuated by essentially the same ideological vision – simultaneously egalitarian, national resource-expanding, and broad, productive ownership-fostering.³⁷

Similar understandings prompted the Jeffersonians' – including Madison's – opposition to tariffs on imported manufactured goods.³⁸ The republicans rejected tariffs not as early, pre-Ricardian exponents of the efficiencies of free trade, or as prophets of an early 19th Century WTO. Rather, they opposed them because tariffs appeared likely both to harm the interests of American farmers and to foster American industrialization and consequent urbanization – both of which the Jeffersonians rejected on CR *ideological* grounds.³⁹ Jefferson and his many influential followers simply sought a different America than that sought by Hamilton and his allies. Hamiltonians saw a more or less autarkic, independent *state* with a well developed internal division of labor and advanced industrial capacity, able to participate on equal terms with other economically advanced states on the world stage. Jeffersonians saw a nation of autarkic *households*, all of whom owned enough land to support themselves and purchase inexpensive implements from the “slave house” manufactories of Europe. Those households therefore would

possess sufficient productive autonomy and leisure to take part on more or less equal terms with one another in the strictly limited affairs of collective self-government.⁴⁰ Yet both sides argued their positions in similar terms – the terms of CR self-sufficiency.⁴¹

In the end, of course, neither Hamilton's nor Jefferson's vision of America decisively edged-out the other. And this, we'll see below, is because those visions actually are complementary. Jefferson was more than magnanimous, he was in a way prophetic, when in his first inaugural he announced that "we are all Federalists, we are all Republicans."⁴² What is more immediately to present purposes is how Jeffersonian visions – even as the trajectory of economic development steadily rendered America more Hamiltonian and urban-industrial than Jeffersonian or rural-agrarian – continued to resonate in American political discourse and public policy.⁴³

Perhaps most conspicuous among latter-day Jeffersonian national policies has been the Homestead Act of 1862, discussed at greater length in this Article's sequel. At a time when the US already had begun to rival Britain as the most thoroughly industrialized society among the community of nations, and when the urban-industrial North – under the new, "Republican" Party's first president, Abraham Lincoln – was decisively and Hamiltonianly federalizing the nation in disciplining the ersatz-Jeffersonian, "anti-federalist," plutocratic plantation-based agricultural South,⁴⁴ national policy aimed nonetheless to take population pressure off of the cities, develop internal lands, and in so doing broaden the class of independent, responsible, productive freeholding citizens.⁴⁵ The terms in which this legislation was proposed and advocated could have come from Jefferson or Harrington or Tacitus himself.⁴⁶ Similar actuating aims prompted early proposals to afford each freed slave in the US "forty acres and a mule," these latter resources to be derived from the break-up of the large, extended Southern haciendas.⁴⁷ CR thinking also is evident in the continual romanticization, to this day, of "the family farm," "the small farmer" and his simple virtues in connection with federal farm and even estate tax-reduction policies. And this is notwithstanding that such policies tend actually, nowadays, to benefit agricultural conglomerates and dynastic families rather than the humble

Stoic free-holder.

Chords similar to those sounded by 19th Century land and trade policy continued to resonate, until early in the 20th Century, in labor and industrial policy debate. While it is by now a commonplace to associate labor and wage income in near Pavlovian fashion, that association was hotly contested through most of the 19th Century.⁴⁸ Much of the agenda of the labor movement up until the 1890s did not concern itself with raising wages, shortening the work week or improving working environments. Rather, that agenda aimed at abolishing the wage system altogether and replacing it with a system of worker ownership and consumer/producer cooperatives – early prototypes of today’s ESOPs.⁴⁹ The displacement of artisanal and craft production by highly centralized, bureaucratically organized modes was seen, and constantly described, as a threat to the dignity of work and the independence of the citizenry – hence, to the enduring of republican self-government itself.⁵⁰ Though it seems to be forgotten now, today’s Republican Party during its early years in the late 1850s – as well as, again, its first successful US presidential candidate, Abraham Lincoln – were as opposed to “wage slavery” in the North as they were to chattel slavery in the South.⁵¹ And the most influential labor organization in America up into the 1880s, the Knights of Labor, both devoted itself to the abolition of wage labor and articulated its positions in starkly CR terms.⁵²

The same terms figured into late 19th and early 20th Century industrial policy – sometimes simply as advocated by sizable numbers of Progressive and Democratic Party-members and platform-formulators, sometimes as actually implemented. Woodrow Wilson’s “New Freedom,” for example, sought to diminish the size of at least non-“natural” business concentrations⁵³ on grounds that on the whole less concentration meant more business-*owners*, hence more CR citizens. Louis Brandeis, an architect of Wilson’s early policies, advocated business-fragmentation on the same grounds even *where* economies of scale might render concentration “natural” or efficient.⁵⁴ The early history of American antitrust policy featured arguments along the same lines, even to the point of permitting some forms of integration – resale price maintenance arrangements, for example, which resulted in higher consumer prices. The reason

was that such arrangements nonetheless facilitated republican freedom by ensuring a larger number of independently owned and operated retail establishments.⁵⁵ *Consumer* interests – hence, lower prices and perhaps therefore greater social efficiency in the form of aggregated welfare – of course ultimately became the sole touchstone of antitrust policy. But “producer” interests – at any rate, shop-owner interests – for a long while figured prominently, both in legislative argument and in court decisions, again for explicitly articulated, CR-grounded reasons.⁵⁶

We find CR thinking and its exaltation of nonurbane simplicity, plain-spokenness, moderation, hard work, productive virtue, independence and self-sufficiency in more than land-talk, farm-talk, tax-talk and early labor and antitrust talk. We find it in the continuing deploring of “dependency,” “indignity” and “laziness” which some have claimed to find associated with US welfare programs prior to the “end of welfare as we [knew] it.”⁵⁷ We find it in attacks upon “the special interests in Washington” and “beltway thinking” by the self-styled virtuous bumpkins and “outsiders” who run for (Washington, beltway) office. We find it in some calls for campaign finance and electoral reform, and for an associated return to a more “deliberative democracy.”⁵⁸ We find it in calls for “restorative justice” and “alternative dispute resolution” to replace “liberal” rights- and rules-oriented litigation, on grounds that the former, in contrast to the latter, foster shared understanding and civic cohesion.⁵⁹ We find it in advocacy and implementation of term-limits for legislators and executives, and the correlative deplorings of a “professional political class.”⁶⁰ We find it still enshrined in our very constitution, in the Guarantee Clause.⁶¹ (Some find it in the First Amendment too.⁶²) And we find somewhat attenuated CR thematics at work in a great many proposals of recent years advocating “stakeholding” in the forms of employee-owned enterprise, “privatized” Social Security “personal retirement accounts,” ever more tax-advantaged “individual retirement accounts,” matching-funded “individual development accounts,” “universal savings accounts,” and even lump-sum transfers to all newborn children or adults upon attainment of adulthood.⁶³

What most if not all of these disparate proposals and rhetorical posturings have in

common are their idealizations of individual responsibility, self-sufficiency, civic participation and in many cases greater relative equality on the one hand, their associations of these virtues with a secure, healthy, well-functioning, self-governing democratic-republican polity on the other. Probably for this very reason, most of these proposals also exert a certain attraction over the thinking of “capital letter” Republicans and Democrats alike. Again, Jefferson was prescient in proclaiming that, at least in one sense, “we are all [Civic] Republicans.” I’ll exploit that fact below and in the sequel, in a synthesis of national self-understanding that can animate a distinctively American “ownership society”.

B. *Classical Liberals*

Before the relatively recent revival of interest in CR and its role in the American political tradition, the role of classical liberalism (CL) had figured prominently in the work of an earlier generation of historians.⁶⁴ CL and its modern variants might in fact constitute the only ideological tradition more discussed, defended and elaborated through the years in the periodic legal and philosophic literatures than CR itself.⁶⁵ Once again, then, we can here confine ourselves to laying out the broader contours, highlighting some inner tensions, and indicating some ownership-pertinent currents in American public policy that are readily appreciable as CL in spirit.

CL has little – though certainly something – to do with “liberalism” understood in that pejorative sense employed by self-styled “conservative”⁶⁶ pundits and politicians. Again like CR and other ideological traditions, it constitutes an integrated cluster of ethical, political and economic understandings – understandings largely held in common by present-day “liberals” and “conservatives” alike. As with CR, we find in CL a view of human nature, a coordinate view of the proper role of social organization, and thus a view about appropriate political, economic and legal arrangements. Also as with CR, we find ambivalence – now sharpened – toward equality. Indeed we might view CL as a sharpened, “streamlined” version of CR itself, a successor to that earlier tradition in societies that have moved from being homogeneously agricultural to

heterogeneously commercial and industrial in nature.

On the question of human nature, CL is more subtle than CR. In keeping with its relative modernity, it purports to be noncommittal on the metaphysics or psychology of the subject. Yet CL would seem to be committed nonetheless to *some* conception of the self by virtue of what it demands on selves' behalves.⁶⁷ Central to CL is the concept of autonomy – the fundamental right of individuals to shape their lives, their destinies, their very personalities or selves.⁶⁸ Hence the canonical CL rights to “life,” to “liberty,” to “the pursuit of happiness” and “property.”⁶⁹ The first is self's organic substrate, the second its sphere of unconstrained activity. The third connotes the self's self-chosen ends in acting – in contemporary terms, its “plan of life”⁷⁰ – and the fourth is that material which selves must use in *seeking* ends and in becoming, shaping or determining themselves. The notion of an “ownership society,” we'll see, requires that we think about the proper boundaries of and relations among these four CL autonomy-related rights.

The only *restriction* of autonomy typically recognized as legitimate by pure CL finds expression in the proverbial kicker, “as consistent with the freedom of others.”⁷¹ Drawing the line of demarcation between legitimate autonomy and externality implicit in this formula of course has proved to be conceptually and practically perplexing.⁷² But intuitively the notion strikes one – at any rate the typical American – as more or less “natural.” It is implicit in the familiar ideas that “what you do in your own home – though not in public – is your own affair”;⁷³ that “my right to swing my fist ends at your nose”; that “I have the right to control my own – but not your – body”; that “with freedom comes responsibility – the responsibility to respect the equal freedom of others”; and so on.

The CL shrinkage of the *locus* – as it were the beneficiary – of autonomy from the CR household to the individual, and its counterpart expansion of the *sphere* of autonomy to all materials that might go into fabrication of the self – as distinguished from the autarkic familial estate – results in a metamorphosis of the CR conceptions of virtue and value. Value in the CR tradition is that which is valued by jointly deliberating and cooperating freeholders sharing a more or less common – agricultural – form of life. Ends, and with them value, accordingly are

more or less homogeneous among CR's constituent households. It unproblematically makes sense to speak of "*social* value" in the CR tradition. Value to unadulterated CL, by contrast, is, like CL's constituents and their forms of life, more disaggregated and various. "Social" value, in so far as the phrase bears meaning, therefore comes to be seen as a dynamic composite of or shifting equilibrium among many distinct individual *valuations*. *Markets* therefore ought, though oddly seldom do, come to figure prominently as preferred sites of valuational expression and allocation in at least a thorough-going CL thinking.⁷⁴ (Part III will exploit this role.) They are sites where the aggregation of relative valuations of disparate goods traded by disparate persons potentially provides, in the form of relative prices, the only ethically cognizable relative "social" valuation of goods.⁷⁵

In the less market-oriented idiom more familiar to Rawlsian liberals, a "thick" conception of the good – i.e., a widely shared, more detailed specification of what constitutes the good life⁷⁶ – yields in CL to a "thin" conception. Under the latter, "the" good life is simply any life that is rationally planned in accordance with the autonomous agent's view of what constitutes a good life. "Comprehensive views" – conceptions of "the" good life – are restricted to like-minded individuals, hence to the "private" realm. "Public" life, by contrast, is governed only "thinly" by such minimal principles as conduce to each person's roughly equal capacity to formulate and pursue her own "thick" conception of the good life. It is as though the CR respect for the rough equality of "power" among freeholders has been modernized to respect for the rough equality of individuals' "life-planning" or "happiness-pursuing" autonomy.

One aspect of the CL respect for equal life-planning or happiness-pursuing autonomy – at least where it is thorough-going and consistent – is respect for every person's equal claim upon the stock of resources exogenously available for such pursuit.⁷⁷ Full solicitude for CL's right to liberty, that is, requires that special attention be paid CL's right to property. This takes us to the importance of the aforementioned liberty/externality boundary to the realm of ownership itself, not just to the realm of action: What one may *own*, not just what one may *do*, becomes a politically critical question. The material implications of equality thus come to constitute yet

more acute a matter for CL even than for CR. Part III seeks to work a resolution to the problem in synthesizing CL with CR and with the other dominant American political tradition. For the moment I simply highlight the importance of the problem to CL in its “sharpened” form:

The liberal conception of the self as work of art can grow particularly nettlesome when attention turns to the artist’s materials. For CR the matter was in some ways simpler than it is for CL. Worthwhile life took essentially one form – agrarian. Households accordingly sought ownership of a more or less homogeneous good – arable land. Rough equality in holdings of that resource was both a predicate and a goal of successful republican self-government. What to do, then, in theory was clear: Allocate land more or less equitably. And rough equality in holdings of land, in view of its relative homogeneity, would have presented but minimal measurement difficulties. It was only in practice that problems might have arisen – problems rooted in the psychology of ownership charted *infra*, Part IV.

For CL, by contrast, where many forms of worthwhile life, not just agrarian life, are pursued, a greater variety of resource-types go into happiness-pursuit. Those resources are heterogeneous, perhaps incommensurable. Thus it is no longer immediately apparent what roughly “equal claims” to such resources can mean. Add to this fact the fact that CL historically has emphasized community, hence mutual responsibility, less heavily than has CR, and it grows particularly puzzling just what “we” are required to do, if anything, about disparities in happiness-pursuing opportunity. State action to redistribute resources in keeping with fair distribution principles, moreover, would involve organized coercion – the abusive use of which is something against which both CR and CL counsel that the citizenry remain ever-vigilant. In view of uncertainty, then, in addition to traditional CL suspicion of authority and CL down-playing of responsibility, concerted egalitarianly-motivated action can appear, superficially at any rate – especially to those from whom the state might confiscate – an affront to, rather than a vindication of, liberal autonomy itself. CL therefore bears within itself in practice, if not in theory, ambivalence toward equality quite counterpart to that displayed by CR. That ambivalence finds expression in the divide between self-professed “libertarian” and “egalitarian”

adherents to the liberal tradition.⁷⁸

On the other hand, by CL's own lights, it *cannot* be the case that we are required to do *nothing* about resource inequities. It is "self-evident" that one's successful "pursuit of happiness" depends critically upon her holdings of "property". What sense is there in the claim that "all men are created equal," and in the consequent exaltation of each person's equal right to pursue happiness, if the practical capacity to *realize* that right might differ quite dramatically from individual to individual according as each is born, altogether faultlessly and arbitrarily, to different parents, different educational and social opportunities, and so on? For liberalism not to degenerate into mere libertinism, then, and for the freedom of one to be consistent with the equal freedom of others, some degree or form of "initial" opportunity- or resource-equalizing must be advocated by the thoroughgoing liberal. It is the counterpart, in the realm of material ownership, to the CL "fist and nose" question that arises in the realm of action. Unearned inequality is externality as surely as is legally discouraged tortious behavior.

The CL tradition, complete with inner tensions, figures prominently in many of the seminal writings and debates that, in tandem with the CR tradition, both stamped and reflected the thinking of the American founders. Most American secondary school or university students are exposed to the CL notion of a voluntarist "social contract" that has so influenced our society's self-understanding from its earliest days.⁷⁹ Most students probably also have been exposed to the writings of those 16th, 17th and 18th Century CL philosophers from whom the notion derives, and are familiar with the influence that those writings – particularly those of Hobbes, Locke, possibly Rousseau and certainly Montesquieu – directly exerted over the minds of the American founders.⁸⁰ Indeed, the best known product of the mind of that most celebrated of American *civic republicans* – Jefferson's Declaration of Independence, from which the earlier mentioned enumeration of rights to life, liberty etc. derives – is widely observed to read quite nearly as an abstract of Locke's *Second Treatise on Government*, a classic liberal sourcebook.⁸¹

The "individualism" – as distinguished from CR "solidarism" – that is characteristic of the CL sensibility also has been a commonplace among the "ordinary people" of America from

early on in the republic's social history. That feature finds expression to this day in, among other places, the fact that our most frequently encountered interpretations of the aforementioned "social contract" seem to involve more conditions that we impose upon "society" in return for our "consent" to join, than conditions to which we agree to subject ourselves in return for society's protection. Probably the most authoritative historical observer of this American liberal individualism was, of course, de Tocqueville, who both charted the rootedness of individualism – hence, CL – in American communal localism – CR – and drew attention to the ever-present danger that the former might subvert the latter.⁸² We find this very tension singled-out and worried-over to this day, most recently in a spate of Tocquevillian-ringing critiques of contemporary American CL sensibility.⁸³

Probably those great American public debates in which CL and its tensions have figured most prominently have been legal – above all, constitutional – in nature. Much of First Amendment jurisprudence can be read as an attempt by judges to demarcate classic CL boundaries – the boundary between "public" and "private," and the boundary between legitimate liberty and impermissible cost-externalization broadly defined. With respect to the public/private divide, one conventional view of the courts' Religion Clauses jurisprudence is that it is aimed simultaneously at safeguarding individuals' right to form and live-out their "comprehensive views" of "the good life" free of state coercion, and at preventing the state from favoring some such comprehensive views over others.⁸⁴ With respect to the liberty/externality divide, the courts have famously judged the proverbial shouting of "Fire!" in the crowded theatre to fall squarely on the externality side of the divide.⁸⁵ But they of course struggle to this day over where "hate speech," some forms of commercial speech and pornography, and political campaign expenditure fall.⁸⁶

Fourth and Fourteenth Amendment "substantive" due process jurisprudence tracks First Amendment jurisprudence in its puzzling over where to draw the line of demarcation between private and public, liberty and externality.⁸⁷ *Lochner* infamously favored libertarian-liberal freedom of contract over egalitarian-liberal equalizing of de facto bargaining power and

consequent opportunity.⁸⁸ Those decisions of the 1930s circumventing or implicitly repudiating *Lochner* – not surprisingly through the collectivity-concerning Commerce Clause – emphasized effects beyond the farm wrought by the farmer, so to speak. They did so at the forthrightly acknowledged cost of individual farmers’ more immediate and uncoordinated freedoms.⁸⁹ The “civil libertarian” decisions of the later 1950s through the early 1990s⁹⁰ resurrected substantive due process, this time on behalf of so-called “civil” as opposed to “economic” rights. The latter, oddly, were – and oft still are – said to have been “discredited,” rather than simply incorrectly demarcated, by *Lochner*.⁹¹ Quite like *Lochner* itself, however, certain of these civil libertarian decisions arguably strengthen the autonomy of some by permitting perceivedly unjust cost-externalization onto others. To some abortion rights opponents, for example, it seems a mother’s rights to liberty and the pursuit of happiness since *Roe v. Wade*⁹² may inappropriately trump a living child’s – an “unborn person’s” – right to life itself.⁹³

It is of course not to present purposes to attempt a definitive solution to all public/private and liberty/externality CL conundra. What matters for the present is to recognize that, in so far as we continue to struggle with these problems, we are classical liberals, sometimes with a touch of civic republicanism added to our mix.⁹⁴ And we sometimes find our CL struggle taking place within the context of ownership itself – e.g., in debates over tax policy and in continuing constitutional controversy over takings and “unconstitutional conditions”.⁹⁵ What will prove more helpful in the subsequent portions of this Article is that nonetheless, where ownership is our interest there is much room for a broad overlapping consensus among classical liberals and civic republicans alike as to how we should understand and foster ownership. We’ll also see that that consensus is wide open to our other constitutive political tradition.

C. Pragmatic Consequentialists

Not all public policies need be advocated or defended by reference to systematic ideologies. Probably *most* discreet proposals advocated in America – if not indeed in most English-descended societies with their empiricist, experimentalist intellectual traditions – can by

dint of their simple instrumental purposes be argued to conform to any number of sophisticated normative visions. They are simply “good ideas” in any number of senses, are value-wise overdetermined. And this value-overdetermination can itself be advertised as a value – a sort of meta-value rather in the way that tolerance constitutes the CL meta-virtue. It therefore would be convenient to recognize a residual or second order value-space in American public policy, additional to those determined by CR and CL even were “pragmatism” or “results-orientation” not a critical part of our American self-understanding.

As it happens, however, pragmatism or results-orientation does constitute a critical part of our self-understanding. We have prided ourselves precisely on our being a “practical,” as distinguished from a “doctrinaire,” “closed-minded” or “ideological” people. And indeed the so-called “school” of “pragmatism,” as a philosophic orientation, commonly is said to have *originated* in America in the 19th Century – among others, in the thought of Dewey, Pierce and James.⁹⁶ Americans’ best-known intervention in the realm of legal theory – so-called “American Legal Realism” – in turn, for its part can be, and often is, viewed as a kind of “legal pragmatism,” or “instrumentalist” orientation toward the law itself.⁹⁷ In the realms of law and policy alike, then, Americans are thought to care about “results.” We consistently have looked to likely consequences “on the ground” in addressing legal controversies and public policy proposals, and have prided ourselves for that.⁹⁸

Even self-described pragmatists, however, require some criterion or some criteria by which implicitly or otherwise to judge results or consequences good or ill. Meta-values are not helpful absent values. One place to look for such criteria on the American scene, of course, would be the CR and the CL traditions just discussed. In practice, however, the style of thought that I shall call “pragmatic consequentialist” (PC) in the Anglo-American tradition – including both the legal and the legislative traditions – has tended toward two simple, stripped-down focal points as “goodness” determinants. It is these tendencies – both the tendency to settle upon simple rules of thumb, and the contents of those simple rules themselves – that most (though only somewhat) distinguish PC from CR, CL and other policy-evaluative traditions. We shall

see in the next Part, however, that the PC rules of thumb are reconcilable with one another. And we'll see that, in so far as each is modulated by the other, both are consonant with CR and CL where the notion of an "ownership society" is concerned. In fact, it looks as if the PC focal points are simply stripped-down versions of CL values themselves, rather in the way that CL can be thought a "streamlined" version of CR.

The first PC focal point is aggregated wealth or welfare. The rule of thumb associated with that aggregate is to maximize it. The degree of success that a polity attains in seeking to maximize is the degree of "efficiency" that it achieves. In its earliest formulations, this rule of thumb was proffered simultaneously with the second PC rule of thumb, considered *infra* – equalization. As articulated by the first consequentialists in the Anglo-American policy tradition – Bentham and his "Utilitarian" followers – appropriate legislation and adjudication were such as would maximize "the greatest good for the greatest number."⁹⁹ Strictly speaking, of course, that formulation is incoherent; absent one particular happy accident that I shall in a moment specify, it cannot guide. For it imports two analytically distinct optimanda while providing no instruction as to how we are to rank-order in circumstances – if any – where they cannot *both* be optimized. As it happens, however, the divergence between optimanda is more stark where wealth rather than welfare is what would be maximized.

Where welfare, not wealth, is maximandum, it often has been thought that a fair degree of *equalization* among persons' *consumptions* is consistent with the *maximization* of aggregate "welfare," "satisfaction," "happiness" or "utility." Bentham and his immediate followers evidently believed so. The guiding thought is that the more or less familiar phenomenon of diminishing marginal utility implies that "total happiness" is maximized if all consume a gracious plenty of consumables rather than if some consume a great deal while others consume little.¹⁰⁰ "Fairness," then, in at least a simple-minded, equal-holdings sense, could be efficient in a pre-Paretian or Paretian, welfare-maximizing sense.¹⁰¹ Hence some English PC-predecessor advocates – including Bentham in the 19th Century, Pigou and Lerner in the early- to mid-20th Century – as well as some exponents of the "optimal taxation" movement in the later 20th

Century have advocated some degree of income-equalization as a means to utility-maximization.¹⁰² But of course not everyone has agreed upon the implicit definitions here of “fairness” and “efficiency.” Nor have all agreed upon the empirical question of the shapes of our utility functions.

As it happens there has not proved much enduring occasion to sort these matters out for purposes of mainstream American public policy, at least not in connection with utility-maximization. For more fundamental difficulties attending utility-measurement and interpersonal comparison – difficulties we shall treat of more in Part III – themselves resulted in rapid movement, by the early middle 20th Century, on the part of consequentialists from Utilitarian to another form of aggregation – that of “wealth” – and thus to a new criterion of efficiency – so-called Kaldor-Hicks efficiency.¹⁰³ Roughly, the idea here was that dollar (or pound sterling) value is a close enough proxy for happiness, while being more readily measurable both in aggregate and as between persons in the holding, as to constitute a more appropriate maximandum for purposes of policy.

For a number of reasons and in a number of ways, this shift from welfare to wealth has proved ethically and indeed conceptually unsatisfactory, though that has not deterred some PC advocates. First, the continued focus upon aggregate-maximization subjects’ wealth-maximization to the same potential distributive fairness and ethical intelligibility problems that plague strict Utilitarianism.¹⁰⁴ But second, the shift to wealth as maximand severs the link between equality and efficiency that Utilitarianism could boast at least given certain properties of utility functions. For while diminishing marginal utility might mean that more equitable distribution yields higher aggregate utility, it does not mean that more equitable distribution yields higher wealth. Relatedly, the shift from welfare-maximization to wealth-maximization renders maximization more overtly fetishistic; we’re maximizing a physical substance, not a spuriously personified “society”’s purported “pleasure”. And it invites analytic incoherence, as manifest in the notorious proof that two distributions can be Kaldor-Hicks superior to one another.¹⁰⁵ We’ll address such problems squarely, with a view to solving them for the American

OS, in the next Part. For present, American tradition-mapping purposes it suffices simply to highlight this fact: that a conspicuous strand of the American PC tradition in legal and policy discussion is what we can call the “wealth-maximizing,” or “GDP-max” strand. Lawyers of course will recognize the prominence of this strand in the “law and economics” movement.¹⁰⁶ Followers of policy debate more generally will recognize the presence of such thinking in the oft-encountered justifications of policies or proposals in terms of their effects upon aggregated “economic growth”. And they will find it implicit in constant recitations of GDP, DJI, “productivity” and other aggregate-related figures in both policy debates and daily news reports.

The second PC focal point in the American legal and policy tradition is fairness. Even aggregationists often seek to justify, or mitigate, their maximizing prescriptions by reference to fairness-importing or other distribution-germane observations. We saw this just above in connection with egalitarian utility-maximizers. Examples in the realm of wealth-maximization include such wearying adages as that “a rising tide lifts all boats”; that maximized wealth “trickles down”; that “the poor are lazy” or otherwise fault-worthy; that those who are paid most are those who contribute most (i.e., that they are paid according to their marginal product); that all persons “would” consent to wealth-maximization as social choice rule were they selecting such rules from behind a veil of ignorance; and so on.¹⁰⁷ All of these familiar claims suggest that aggregationists are aware, however obliquely, of the ethically objectionable fetishism that characterizes maximization as a rule of thumb when stripped of distribution or fairness considerations as co-operative constitutive concerns.

But even apart from such fairness-hedging of the aggregationist position, we find fairness-oriented or prioritarian¹⁰⁸ legislation and jurisprudence *themselves* as principal kinds *additional* to those geared toward wealth-maximization. Indeed, probably the most long-remembered, epoch-making court-decisions and legislation of recent decades are of this type – or of the type that can be viewed as simultaneously maximizing and equalizing. The social insurance programs put into place during the New Deal, the Employment Act of 1946, the “War on Poverty” and “Great Society” legislation of the 1960s, and much of the civil rights and anti-

discrimination legislation of the 1940s through the 1990s are among the best-known cases in point.

We'll see in the next Part that maximization of any wealth that is conceptually cognizable – rather than simply labeled – as wealth is complementary with the equalization of – i.e., the fair distribution of – wealth-creating *opportunity*. That complementarity is central to showing PC's rules of thumb as CR- and CL-resonant norms.

III. DRAWING OUT THE COMMON CORE: OUR EFFICIENT EQUAL-OPPORTUNITY REPUBLIC

An ownership society that we can call our own should give expression, in so far as it is possible, to the three political traditions that constitute our national self-understanding. With a view to that end, this Part synthesizes a unified political self-understanding from the three traditions of American self-understanding laid out in Part II. It does not pretend to find agreement among the three traditions in respect of all points that matter to them. The claim is simply that the three traditions can be seen as one on the question of what an American “ownership society” (hereinafter “OS”) should be. What is needed is first to show that this is so, and second, for purposes of mutual intelligibility, to forge a neutral vocabulary, usable by all, which prevents misunderstanding and incorporates the synthesis.

The synthesis proceeds by attending carefully to three constitutive “variables” that any normative political tradition, if it is to be complete, must fill. In particular, a tradition must assign values to those three variables if it is to specify the basic contours of an *OS*. The variables that must be filled are the gaps opened by the questions (a) “who owns,” (b) “what is owned,” and (c) “by what general principle or principles are ownership rights determined”.¹⁰⁹

I claim that the three American political traditions adumbrated in Part II do in effect fill the gaps, albeit with differing degrees of explicitness, and that there is broad agreement among

them in respect of their filling. That means that the values assigned to the variables are effectively invariant among traditions – meaning in turn that my synthesis’s values are “our” – American – values where an OS is concerned. The *American* OS is in that sense the joint product of the three traditions. It is what we might call, borrowing from the language of all three of those political self-understandings, an “efficient equal-opportunity republic” (EEOR).

A. *Autonomy as Responsible Liberty*

All three American political self-understandings effectively construe citizens as autonomous, boundedly responsible agents.¹¹⁰ That is what “liberty,” when fully thought-through, connotes. Responsible agents effect or affect their own well-being. But they also are constrained, to indeterminate degree, in so doing by features of the environments into which they are born. Their inherited capacities – themselves features of those environments – permit them wide, but nonetheless limited, latitude in altering or exiting their environments.

As an empirical matter, this construal of citizens as agents is consonant with our own experience of action – of our “moral experience,” so to speak. We experience ourselves and others as free and as freely choosing. That experience itself is reflected in our familiar capacities to experience feelings of guilt, shame, frustration with self, resentment of others, and cognate emotions the reasonability of which presupposes the proposition that people often can choose other than as they do.¹¹¹ Yet we also know that we and others are bounded – constrained and affected – by our backgrounds and environments. Hence we also sometimes experience, again reasonably, feelings of mercy, forgiveness, and charity toward self and toward others.

As a conceptual matter, the view of citizens as agents underwrites, or is coordinate with, our belief that others are to be *respected*. It hangs together with our belief that others bear dignitary interests and certain fundamental rights – including that to liberty or autonomy – which

are coordinate with such interests. It is because we see others as agents, and respect them as such, that we hold them self-evidently endowed with rights not only to life, but to liberty and the pursuit of happiness – the rights to build “prosperous” or “meaningful” lives. That it is “their” pursuit stems from their *agency*.

It is critical to note in this connection, though it seems to be oft-overlooked at least in the CL tradition that respect for others’ agency entails more than respect for their freedom to choose and to act. It also, and equally, entails respect for their living with many of the *consequences* of their choices and actions. It entails, that is, our holding others – again, boundedly – *responsible*. To let others too often “off of the hook,” for example, with the observation that “they cannot help it,” would be to view them not as agents – active forgers of fate – but as patients or addicts – passive objects of fate.¹¹² To let them *never* off of the hook, of course, also would be unreasonable. Mercy or charity, in this connection, can be viewed as a kind of compromise, a reasonable compromise, which as agents we make with our recognition of the limitations of our own agency. In circumstances that we recognize to be beyond the agency of nearly any among us save heroes, we “cut” – or recognize – “some slack.” But to allow such exceptions to swallow the rule – the whole rope to go slack – would be to eschew the category of responsibility, hence of respect and of agency, altogether.

The appreciation of bounded, responsible agency ultimately underwrites the CR view of citizens as independent and acquiring but nonetheless corruptible and hyper-acquisitive beings whose corruptibility and hyper-acquisitiveness are modulated as they respond – and are thus rendered responsible – to others who are their rough equals in capacity and vulnerability. It also underlies the CL view of citizens as autonomous but potentially over-reaching selves who impermissibly externalize costs in so far as they take more than their legitimate shares of benefits

– selves who must therefore be held to account. Responsible agency does not, on the other hand, figure prominently into the PC tradition. But neither is there anything in that ad hoc and minimalist tradition that needs contradict agency.¹¹³ Indeed, it will be apparent below that the only intelligible accounts to be given the familiar PC fairness and efficiency must be understood *by reference* to responsible agency. Responsible agents are the only beings in connection with whom it makes sense to speak of “wealth” as bearing “value” and of “allocations” as being “fair.”

B. Responsible Liberty as Equal Opportunity

The consensus view of citizens as responsible agents suggests a view of ethically and politically salient assets – what we shall see in Part IV to constitute the stuff of ownership – as anything which citizens themselves autonomously value. Assets are what citizens use in seeking their self-chosen ends, in “pursuing happiness”. Salient liabilities, in turn, are just the converse. If citizens are agents whose autonomy in defining and pursuing happiness is to be respected, then the assets that will be of concern to the laws and policies of the CR, CL or PC polity – the EEOR – will be such distributable items as concern those citizens themselves.

For purposes of a shared civic vocabulary in the EEOR or American OS, the best way to designate such items of concern – at least the desired ones (assets) – so as both to denote them in agent-neutral terms and to render transparent the fact that their political cognizability is dependent upon their relevance to life-building agents, is as generic “resources,” or “opportunities”. Those are the stuff of which worthwhile lives – as judged by independent, valuing citizen-agents themselves – are made. Citizens do the life-making, and resources or opportunities are the materials with which they do that making. Resources or opportunities, then, are the material correlates of agency itself. Construing citizens as agents *commits* us to the

view that resources or opportunities are the “assets” that a political society of agents like the American EEOR must view as ethically or politically relevant. They are that in which ownership rights should inhere.¹¹⁴

It is critical – though again, seemingly oft-overlooked – in this connection that just as *agent-relevant* autonomy or liberty is *responsible*, accountable autonomy or liberty, so is *agent-relevant resource* or opportunity *equitable* resource or opportunity. Opportunity-equality is the material correlate of agent-responsibility, just as opportunity shorn of equality is liberty shorn of responsibility – is libertinism.¹¹⁵ One is not responsive to the agency of others – one does not think, opine or act responsibly toward or “account” to them – in so far as one, explicitly *or implicitly*, demands greater exogenously given opportunity than they. One does not respect them as agents, as one’s moral equals – one does not even recognize them as agents at all, rather than as resources themselves – in so far as one makes or effectively commits oneself to such demands.¹¹⁶ Call this the “equal opportunity principle” (EOP).

As abstract propositions, these claims, like the construal of citizens as agents, all are consonant with the constitutive valuations of the CR, CL and PC traditions, hence of the American tradition. CR is rooted, as observed at Part II.A, inchoately in an equilibrium of roughly equally empowered persons who would grab all the land that they physically could were they not constrained by others’ equal grabbing. CL in turn is rooted, as observed at Part II.B, ultimately in the notion of equilibrium of equal freedoms – practical, not just theoretic freedoms – held by equal agents. And PC, as noted at Part II.C, settles on the focal points of fairness and efficiency in its assessments of such public policies as effect distributions of benefit; while fairness and efficiency, we’ll see, in turn are best construed as properties of distributions that reflect equality of opportunity and differential result of differential responsible diligence. In

theory, then, all three American political self-understandings effectively commit themselves to equal “real” or “material” – not just formal – opportunity.

It might be thought that there *cannot* be a consensus view among CR, CL and PC on the matter of responsible liberty’s entailing equal opportunity, at least in so far as the latter term is taken to embrace material resources. For there does not appear to be an easy consensus even *within* each of these traditions on the appropriate distribution of the latter. Did not Part II, in fact, take explicit note of “ambivalence” in CR, CL and PC over equality? In fact, however, the appearance of disagreement within traditions is misleading. That appearance owes to two related factors.

The first, more easily dispatched factor is a semantic ambiguity in the term “resource” – an ambiguity that also can afflict the term “opportunity,” though it tends not to do so owing to the more common “default” understanding of the term. “Resource” or “opportunity” can be taken to denote anything that enters into a “production function,” irrespective of the circumstances under which the producer has acquired that “input”. Or it can be taken to denote only such inputs for the possession of which the producer is not actually responsible. We tend generally to understand “opportunity” in the latter sense, “resource” often in the former sense, though it is not strictly incorrect to understand either word in either sense.

In order to eliminate the semantic ambiguity, I generically employ – and hereby propose that the EEOR or American OS employ – the modifier “ethically endogenous” to designate resources and opportunities for the enjoyment or holding of which agents can reasonably be held responsible. I propose “ethically exogenous” to designate those for which they cannot. Ethically exogenous opportunities or resources are “windfalls,” deficits therein “hard luck.” Ethically endogenous opportunities, resources or deficits therein have been “earned,” or are “deserved.”

The ethically endogenous component of one's holdings, then, is that component for the holding of which the citizen, conceived as a responsible agent, is appropriately credited or debited – held ethically deserving or accountable. So far as we know or are led by our experience of agency to suppose, she could voluntarily have acted or felt, and thus held, differently. And it is profoundly to disrespect her fundamental agency – to treat her as a passive object of fate rather than as an active, fate-altering agent – to hold otherwise.

The ethically exogenous portion of one's holdings is that portion for which she is not responsible – that portion over the holding of which there is good reason to suppose, in view of our experience of agency that she bore no choice, or for which she deserves no credit or blame. And it is profoundly to disrespect her equal ethical standing, prior to acting, not to regard her unequal holdings, vis a vis other citizens, of this material as actionable absent some compelling countervailing consideration. It is disrespectful of citizens' responsible agency, then – their equal self-constitutive rights, their equal liberty, their equal worth, their equal moral autonomy and equal accountability – not to work to equalize, so far as this is possible, their ethically exogenous resources or opportunities. And it is equally disrespectful of citizens' responsible agency not to respect *variations* – *inequalities* – in their holdings of ethically *endogenous* opportunity or resource – i.e., opportunities or resources that they have opened or created or squandered for themselves, items that they have earned or forgone.¹¹⁷

The second, more difficult factor that sometimes gives rise to an appearance of disagreement within traditions over the matter of equal resource/opportunity as material correlate of responsible agency is implicit in the just-drawn endogeneity/exogeneity divide itself. And it is indeed implicit in the earlier characterization of agency itself as “bounded.” That factor is the difficulty, at least at the margins, of *drawing* the boundary. We might call this the “tracing”

problem – the problem of tracing portions of one’s holdings separately back to ethically endogenous choice and ethically exogenous circumstance. Where the problem gives rise to disagreement we might call it, borrowing the suggestive language of the American Homesteading era, the “boundary dispute”. (I shall employ both locutions.) It is, in fact, simply the difficulty noted above, at Part II.B, in connection with CL’s conundra over the private/public and autonomy/externality divides. The same difficulty, in fuzzier form, we observed in the CR and PC traditions. The EEOR or American OS must face it head-on.

The tracing problem bears both a conceptual and an empirical aspect, though both aspects intermeld. The conceptual aspect of the problem comes in part with our uncertainty, in “borderline” cases, over what it is appropriate to hold people responsible for. There is uncertainty first over whether responsibility should be understood by reference to choice or to what might be called “ratification.”¹¹⁸ And there is uncertainty second over, if the answer be choice, what choices truly are “freely” made. In so far as choice is made the touchstone, the conceptual aspect of the tracing problem mingles with the empirical aspect of the same. The problem is that there appear to be differing *degrees* of freedom inhering in differing choices. One is not simply free or unfree; one is *freer* or *less* free in making one’s choices. The concept of responsibility is thus subject to problems in the application familiar to students of the “logic of vagueness” since the time of the Sorites paradox at latest.¹¹⁹

Compounding the Sorites-side of the empirical aspect of the tracing problem is the fact that most resources or opportunities that one enjoys are the product of concatenated occurrences involving both chance *and* choice. Thus, even were it easy, in a binary manner, to describe any one choice simply as either freely made or forced, it nonetheless would be daunting to parse out, say, some fraction *f* of one’s holdings attributable solely to her responsible choices and a

complement $1-f$ of that fraction attributable simply to fortune. Add to this concern the fact that it might be difficult or even impossible, owing to interpersonal utility-comparability and inter-item commensurability difficulties of the sort flagged above at Part II.C and elaborated below at Part III.C, to attach a specific dollar value to such portions for purposes of determining adequate compensation for the exogenously underendowed, and it grows quickly unsurprising that there is at least some degree of surface disagreement not just in the American, but in *most* political traditions over who should own what.

Such difficulties should not, however, obscure the fact that there is broad agreement within and among the American political traditions over the basic principles here stated. As Americans, we are nearly if not fully unanimous in our belief that citizen-agents both should enjoy equal opportunity and should be entitled to keep what they legitimately earn. Our disagreements are, in significant if not in full measure, over the empirics of what actually *is* earned.¹²⁰ Immediately below I shall exploit that fact, on behalf of the American OS, in two ways: First I shall specify some classes of holdings that we broadly agree to be both measurable and ethically exogenous in the holding, and rest EEOR ownership prescriptions in part on that range.¹²¹ And second, I shall sketch a Walrasian market mechanism, set in motion within that range of agreement, which, by honoring citizens as agents and the EOP as allocation principle, further addresses the measurement difficulties that are in large measure responsible for the *magnitude* of the tracing problem as we currently find it.

C. Sidestepping the Boundary Dispute

This Subpart seeks to quarantine the boundary dispute. It does so by sidestepping the tracing problem that has afflicted each of the three American political traditions and that therefore threatens, by extension, our “core” tradition, the EEOR. Three intuitions guide the

effort. Each one is manifest in its own Subsubpart to this Subpart. The first intuition is that there is an overlapping consensus both within and among our three traditions not only that ethically exogenous opportunity endowments should ideally be allocated equitably, but also that several easily ascertained *classes* of readily measured endowment unambiguously *qualify* as ethically exogenous. Bracketing the more difficult cases, we can move ahead together on the ground that we share. The second intuition is that much of the magnitude of the tracing problem is attributable not only to chance- and choice-melding opportunities that we can bracket pursuant to the first intuition, but to three measurement difficulties that afflict efforts to quantify and compare, in an ethically salient way, disparate holdings of *all* of the heterogeneous benefits and burdens that can be held by separate persons in the EEOR. A market mechanism well known to economists of fairness but oddly ignored by economically oriented members of the legal academy thus far, I claim, enables us to sidestep those measurement difficulties not sidestepped by the first, bracketing strategy. It thereby enables us substantially to diminish the magnitude of the tracing problem. The third intuition is somewhat more technical in the vindicating, but is vindicated nonetheless in Subparts C.3 and D. It is that the ordered set of “second best” markets falling short in their completeness and neutrality of the ideal (“first best”) market sketched in Subpart C.2, is ordinally equivalent to the ordered set of “second best” opportunity allocations falling short in their fairness and efficiency of that ideal (“first best”) market. The upshot is that even incomplete progress in the direction here advocated is ethically appreciable progress.

1. Core Opportunity-Endowments

Here I begin the process of sidestepping the boundary dispute and thus moving farther away from ambivalence, and closer to univocality, on the matter equal opportunity. I list and briefly characterize four classes of basic opportunity endowment that all or nearly all Americans,

whether they consider themselves adherents primarily of the CR, CL or PC traditions, are likely to agree to be ethically exogenous in the holding.

The first such class is that of opportunities for early education. Agent-citizens begin their lives as children. The younger a child, the less responsible she is for her opportunities to learn, to develop her capacities to learn and do more, and to develop a sense of control over and responsibility for her own future. As a matter of unadulterated principle, such opportunity should be equitably enjoyed by all children. Inequalities of such opportunity are to be deplored or regretted, and so far as possible to be mitigated or eliminated. If *San Antonio Independent School District v. Rodriguez*¹²² was correctly decided as a matter of law, then the “law” applied there is not in keeping with American values. And if some parents believe that they bear a fundamental right to seek to advantage their children over others, then they are mistakenly interpreting fundamental right as not conferring equal agency rights upon either those other children or even their own.¹²³ Their preferences are preferences for externalities, for wrongs, and are inconsistent with the American tradition of responsible liberty. This is not to say that equity need – or even ought – to – be sought by “leveling down”. Rather, the guiding idea should be to maximize the level of provision that is providable to all.¹²⁴

The second class of exogenous opportunity endowment comprises genetic determinants, in so far as we are able to determine them, of successful life-planning, wealth-making and happiness-pursuit. Such determinants include all – but only – such aspects of basic human health and functioning as are not attributable to decisions for which we reasonably hold ourselves and others accountable. Birth with a handicap or predisposition to debilitating illness warrants everybody’s chipping-in to mitigate such handicaps’ or illnesses’ debilitating effects.¹²⁵ Debilitation wrought by smoking, drunken driving, etc., does not – though of course it may elicit

charitably provided assistance. This is not to advocate a “rescue policy” – another instance of “leveling down” – whereby all must sacrifice everything to attempt futilely to compensate “100%” those born severely underendowed, any more than the EOP dictates “leveling down” in connection with fair access to educational opportunity.¹²⁶ The amount with which to address such disadvantage should reflect the aggregated and averaged social valuation of contingent claims payable to self-insurers against such disadvantage; such is the amount entailed by our agency. That valuation in turn is determined either by simulating or by actually providing markets in such claims that bear the features laid out in Part III.C.2, markets in which uncertainty about such handicaps’ emergence in effect is shared.¹²⁷ For present purposes the point is simpler. It is simply that the American tradition of equal opportunity regards these resources as ethically exogenous. And the advance of medical knowledge can be expected to grant greater clarity as to which of our infirmities, and to what degree, are beyond control.¹²⁸

Health, basic functional capacity and education can be regarded as elements of “human capital.”¹²⁹ Equalizing early educational and basic health endowments is equalizing access to ethically exogenous human capital. A third range of broad American agreement as to what is ethically exogenous can be characterized as access to *non*-human capital. We can think of the right to equal access to such capital as the equal right to capitalize upon one’s own diligence, an equal right to wealth-creating opportunity.¹³⁰ An equal right to wealth-creating opportunity, to work diligently in satisfying others’ wants and to profit thereby, is, trivially, a right to *productive* capital. Human capital is of course productive in the requisite sense; that is the sense in which it is “capital.” But it is doubtful that individually held human capital constitutes the principal portion of capital with which individual agents produce and profit.¹³¹ Access to ownership of or participation in firms and networks – the varyingly integrated institutional arrangements in which

productive synergies of pooled and organized human and nonhuman capital result in wealth-production – surely is at least as important.¹³²

It is potentially more difficult to trace out the ethically exogenous and ethically endogenous elements of non-human than human capital holdings. For, unlike genetic endowments and early education, most non-human capital holdings are held by adults, and adults have lived and acted long enough for both responsible choice and non-responsible circumstance to concatenate and intermingle over time. Nevertheless, there are some elements of non-human capital holding that all can agree to be attributable to fortune not effort. Large non-human capital inheritances or bequests are an obvious example. They are non-human capital counterparts to genetic endowments. Moreover, to recognize that many large holdings of non-human capital are attributable to luck in the birth lottery need not commit us to attitudes of envy or even to plans of confiscation.¹³³ We can view the recognition instead as minimally committing us to channeling newly discovered, opened or openable pools of capital toward those who have not been born to large holdings already. Examples here would include, among others, newly usable segments of the electromagnetic spectrum, minerals found on the seabed or under public – even some private – lands, new resources eventually found off of the earth through publicly financed space exploration, and, once again closer to home, new social cost-saving and wealth-creating opportunities opened through the public facilitation of new forms of insurance against risks that antecedently impede enterprise- and wealth-development. Such opportunities are counterparts to the “new” resources distributed widely and equitably to the previously less resourced by, e.g., the Homestead Act and the National Housing Act.¹³⁴ The sequel to this Article elaborates on these and other precedents, some actually implemented others thus far but proposed. Part IV foreshadows that tactic by designing policy strategies that capitalize upon

endowment heuristics – in particular, our greater willingness to channel perceivedly “new” exogenous resources to the exogenously underendowed than to redistribute accumulated resources from the exogenously overendowed.

The fourth and final category of opportunity/resource that we all can agree to be ethically exogenous is the opportunity to share ethically exogenous risk – a manner of “backhanded,” or “negative” benefit. The idea here is that some misfortunes which strike after birth and that are not reasonably foreseeable during adulthood are misfortunes for which the victims are not responsible. Such misfortunes are regarded, under the EOP, as joint misfortunes, at least until there is opportunity for equally exogenously endowed agents voluntarily to *trade* their shares of such misfortunes in keeping with their differential disvaluations of them – or the differential valuations, *ex ante*, of claims to compensation contingent upon their occurrence. The intuition finds expression in the venerable American tradition of the neighbors’ sharing, before the widespread availability of farmers’ insurance, in “barn-raising” for one among them whose farm has been struck by lightning.

Such “all chip in” arrangements, it has been well observed, are in the nature of rudimentary insurance arrangements.¹³⁵ And a more fully developed and fine-grained insurance arrangement will reflect different participants’ *differing* valuations of the varying compensations that might be afforded in return for varying insurance contracts incorporating varying risk-assessments and varying premia-exactions. Collective political action to distribute risk-mitigation opportunity in keeping with the EOP in the present day, then, ought ideally to facilitate the development of actual or simulated markets in such risk.¹³⁶ But in doing so it must also, of course, impose or simulate ethically exogenous informational symmetry – fairness – among market participants. Such information – that which cannot be had simply by exercise of

diligence – is itself part of the ethically exogenous endowment that the EOP recommends be equitably shared.¹³⁷ Under these circumstances assessments and payouts will reflect, in effect, the averaged social valuation of the risks and payouts in which valuation process each citizen-agent has exercised an equal “vote.”

Among the core endowments just discussed, human capital presents least in the way of theoretic and practical intractability, at least where *early* education and unambiguously *genetic* incapacity are the focus. The non-human capital and risk-trading, as well as later education and mixed genetic-and-behavioral health outcomes, present somewhat more challenge in view of their involving adults, who have lived long enough to mix responsible choice with non-responsible circumstance in arriving at their present endowments. But we nonetheless can agree over portions even of these latter endowments which involve only non-responsible circumstance – e.g., inherited non-human capital or entirely unforeseeable accident. And we can expect advances in the medical sciences, particularly now that the human genome is mapped, to enable us to assign weights to comparative chance and choice factors in debility. The same can be said of other forms of chance disadvantage which the physical sciences and refined statistical techniques increasingly will enable us to foresee and thus both head-off and attribute to the information accounts of our citizens.¹³⁸ And we likely shall be able to do so with no less precision than is attained even today in, for example, comparative fault determinations in courtrooms.

In so far as we work to equalize core endowments, we advance the cause of our own American EOP. We also facilitate the creation and operation of that complete and neutral market described in the next Subpart, which further diminishes the tracing problem and thus enables our opportunity-equalizing efforts to yield a “multiplier effect” in realizing the EOP and advancing

the cause of responsible agency. Such is the rough, practical goal that we all can agree to be in furtherance of the political-ethical consequences of our American commitment to equal opportunity.

2. Market, Measurement & Distribution Mechanism

The next step in our quest for univocality is to specify means of diminishing measurement difficulties that exacerbate the tracing problem, while doing justice to the EEOR's understanding of citizens and material opportunities. This Subpart accordingly describes an opportunity-allocation mechanism, readily constructible in theory and approximable in practice, by which to do so. We'll see in the next Subpart that the mechanism realizes the only ethically cognizable form of "efficiency" as well. It therefore serves as an engine for realizing a truly efficient, equal-opportunity republic.

Begin by distinguishing three measurement challenges that historically have constrained answers to the constitutive questions raised by the EEOR-valued "variables" enumerated at the beginning of this Part. Those questions, again, were the questions who is to own, what is to be owned, and according to what basic principles such ownable things should be allocated. For the generic purposes of this Subpart, which require that we consider what agents disvalue as well as what they value,¹³⁹ call that which is owned a desired "distribuendum" (plural "distribuenda"). Call the principles according to which such things are to be owned "distribution principles." (Our owners, recall, are responsible citizen-agents.) The American EEOR tradition views resources and opportunities as the appropriate desired distribuenda, and the EOP as the appropriate distribution principle. But it has not always been agreed that these should be the values filling those variables. And the reason is measurement. Three distinct measurement concerns historically have influenced at least CL's and PC's treatments of appropriate

distribuenda and distribution principles. Call them the simple quantifiability, interpersonal comparability, and commensurability concerns.¹⁴⁰

Simple quantifiability historically has stood in the way of settlement, in the CL and PC traditions, upon mutually agreeable distribuenda and distribution principles in the following way: On the one hand, resource, opportunity and the like are not intelligible *as* such apart from some person's actual or idealized preference for or valuation of these items – hence, apart from the items' yielding some manner of “satisfaction,” “value,” “happiness,” “utility,” “welfare” or “well-being,” conceived in some suitable manner, to the person who values them. Resources and opportunities must, that is to say, be understood as resources or opportunities *for* something, and for someone. To suppose otherwise is, in effect, to fetishize the distribuendum and render mysterious why citizen-agents, hence the polity, would or should be concerned with its ownership or distribution at all.¹⁴¹

On the other hand, these latter states – welfare, utility, happiness, etc. – as noted at Part I.C, do not lend themselves to cardinal measurement in the attainment, certainly not as a practical, and perhaps not even as a conceptual matter. Relatedly, they cannot be, so far as we appear to have reason to suppose, *directly distributed* to anyone. They are experienced only as subjective outputs of utility functions the inputs to which must be some objective item or items, rather than some subjective state or states.¹⁴² And while these objective inputs – resources or material opportunities – are, by and large, cardinally quantifiable, so long as the outputs that render them ethically significant are not it is difficult – even for a Utilitarian who views the utility-yield as the only relevant factor – to determine how much of any of them anyone ethically ought to have.

What is more – and now we move from Utilitarianism to more responsibility-concerned

CR and CL – *bounded* agents are in part *responsible* for, and in part *not* responsible for, their own utility functions. One can be innately more difficult to satisfy than others, but one can also in a manner *choose* to be more difficult – or expensive – to satisfy than others.¹⁴³ So the difficulty of cardinally measuring happiness intractably afflicts the already, independently difficult task of separately tracing the ethically endogenous (responsible) and the ethically exogenous (non-responsible) grounds of one’s utility function – of one’s translating objective inputs into subjective outputs.

Now consider the interpersonal comparability problem. Even were welfare cardinally quantifiable as a state of any given person, it is unclear whether it would be interpersonally comparable as a *state-type* enjoyed among *multiple* persons. For there can appear to be, intuitively, something radically distinct as between P1’s happiness and P2’s happiness, presumably owing in some manner to there seeming to be something radically separate, distinct, or unique about every sentient being’s subjectivity, or consciousness, itself.¹⁴⁴ One might reasonably feel hesitant, that is to say, about declaring P1 to be “as happy” as P2 even were one able, say by analogy to the operation of a pool of mercury in a capillary tube, to associate happiness with quanta of endorphins in P1’s or P2’s bloodstream and assign cardinal measures to P1’s or P2’s individual states of happiness. And this problem is not solved simply by moving to “objective” wealth, from “subjective” welfare, as *distribuendum*. For again, it is only the welfare-yield that renders wealth ethically intelligible as “wealth” rather than inert, insipid matter in the first place.¹⁴⁵ And differing persons, both responsibly in part and accidentally in part, can derive differing degrees of welfare from the same material items.

Now the commensuration problem: The fact that there are *multiple* material inputs – call them benefits and burdens for present purposes – that appear differentially to affect utility and

disutility, coupled with the difficulty attending cardinally measuring the utility and disutility afforded by such benefits and burdens, would render it difficult, even were interpersonal comparability somehow unproblematic, to determine how much of benefit B1 would compensate P1 for a shortage of, say, B2 relative to person P2. Unless the appropriate distribution formula were to mandate a distinct distribution of each good and ill over all agent-citizens independent of the distribution of the other goods and ills – a seemingly implausible suggestion¹⁴⁶ – we require “rates of exchange” between goods and ills themselves in order to derive a numéraire or index suitable to determining how much “good-or-ill-stuff in total” any citizen holds. But since utility or happiness-yield is the touchstone of some objective item’s beneficial or burdensome status to an agent, and since as we have observed said utility or happiness-yield is problematic in the measurement, it is not clear how we are to commensurate *disparate* benefits and burdens in a manner pertinent to distributive propriety. Our would-be numéraire – happiness-yield – is itself cardinally non-quantifiable.

Happily, however, as noted before there is one mechanism which simultaneously solves – or, better, circumvents – all three measurement problems. And it does so *while* – indeed, *by* – doing justice to the three constitutive values assigned by our synthesized EEOR political self-understanding to the three ownership-pertinent “variables” (viz., again, responsible citizen-agents, all benefits and burdens adjudged as such by such agents, EOP-consistent allocation). The same mechanism addresses, at least in part, the problem posed by bounded agents’ being responsible in part, while not in whole, for their own utility functions. To the degree that we can realize this mechanism “on the ground,” then, we can simultaneously realize the EEOR and facilitate the principal measure-theoretic problems’ “taking care of themselves,” so to speak. And in so doing we diminish the tracing problem and largely sidestep the boundary dispute.

Here, in idealized form, is the mechanism: Assume a “complete” market – a forum in which all and only desired, voluntary trading occurs.¹⁴⁷ Assume that that trading is in, first, all goods and services that can practically be made available and that anyone values – hence, that are politically cognizable as ethically interesting *distribuenda*. Assume that the trading is in, second, contingent claims to compensation upon the occurrence of any eventuality that anyone *disvalues*, payable by anyone willing to take the opposite sides of these, what amount to cautious “bets,” on the disvalued contingencies. Assume further that this market is “neutral.” It is neutral in the sense, first, that each participant enters it with an ethically exogenous initial endowment of – largely in the nature of ownership rights to – ethically exogenous desired assets equal to that with which everyone else enters it. It is neutral in the sense, second, that regulatory norms effectively prevent such collusively, strategically or expropriatively opportunistic behaviors as would effectively result in some participants’ coming to possess greater or lesser holdings or “price-affecting effective demand powers” than would be traceable to such ethically exogenous initial endowments and their ethically endogenous transaction histories alone.¹⁴⁸ This mechanism strait-forwardly instantiates in broad outline the ownership régime prescribed by our synthesized American EEOR tradition. It satisfies the prescriptions entailed by the three above-offered fillings-in of the ownership-pertinent “variables,” and simultaneously addresses the three critical measurement concerns. Here, more precisely, is how:

The mechanism honors citizen-participants as responsible agents. They transact voluntarily pursuant to their own, autonomous relative valuations of items and contingencies that they prefer and disprefer in keeping with their pursuits of happiness. The mechanism treats as *distribuenda* what ever goods or services – which latter include risk-bearing services – those agents themselves value or disvalue. Those goods and services are the material resources or

opportunities from which citizen-agents' utilities, happinesses or lifeplan-satisfactions derive. And the mechanism, via the neutrality imposed upon it at the outset and retained throughout, equalizes what is ethically exogenous – that which is not traceable in the holding directly to a responsible choice – while allowing holdings over time nonetheless to vary with ethically endogenous responsible transactional decisions. Holdings at time T_n , that is to say, are traceable to equalized holdings at T_0 and voluntary choices thereafter.¹⁴⁹

The mechanism sidesteps, in an ethically satisfactory way, the problem of cardinal “happiness” or utility measurement. It does so by allowing citizen-agents, via voluntary trading activity, presumptively – by dint of the “first fundamental theorem of welfare economics”¹⁵⁰ – to “maximize” utility in a manner consistent with (a) ethically exogenous endowment equality among market participants, and (b) consequently equally shared scarcity of the exogenously given resources from which agents “produce” their own utility.¹⁵¹ It does not matter for OS purposes, that is to say, what sort of number – cardinal *or* ordinal – that we might assign to citizens' happinesses or utilities, or whether or how we manage to scale such numbers, so long as we know that the utilities are the “highest” possible consistent with the correct distribution principle – the EOP – and the consequently equally shouldered, exogenously given constraints posed by the material environment.

Similarly, the mechanism – again unobjectionably – sidesteps the problem of interpersonal happiness or utility comparison. For, so long as the resource-components – i.e., the ethically exogenous components – of “utility-manufacture” or “happiness-pursuit” itself – endorphins, C-fibers, what ever (sometimes called “personal,” or “internal” resources) – are themselves counted – in the form of drugs, supplements, or contingent claims to compensation – among the exogenous endowments that must be equalized over participants, then again, what

ever the absolute or comparative quanta of happiness or utility enjoyed by citizens, we shall know that these are the “highest” that they can be consistent with the appropriate distribution principle – again, the EOP – and the consequently equally shouldered constraints posed by the exogenously given environment.

Finally, the mechanism “automatically,” as it were commensurates distribuenda in the only way that ethically matters, via the autonomous implicit comparative valuations of autonomously transacting citizen-agents.¹⁵² We need not worry ourselves over how much of B2 “would” or will compensate P1 for a deficit of B1, let alone construct a “perfectionist” index of all goods and ills.¹⁵³ Our citizen-participants themselves will, in effect, autonomously and with equal voice construct the index – a spontaneously emergent *price* index – which amounts to an aggregated comparative “social” valuation of goods and ills, in the construction of which each participant has exercised an equal “vote.”¹⁵⁴ (Again, provided that there exists market completeness and neutrality in the senses explicated above.) And so yet again, in a manner that reflects the constraints both of relative environmental scarcities and of the appropriate distribution principle – equal allocation of all and only that which is ethically exogenous – we find the mechanism allowing the measurement question to “take care of itself” to precisely the degree that the EEOR itself demands that care be taken at all.

3. Measuring the Core Endowments & Realizing the Market

The mechanism, then, in so far as it can be realized – in part, precisely *by* equalizing the core opportunity-endowments enumerated in III.C.1 over its *participants* – simultaneously assists in realizing the EEOR that forms the three tradition-synthesizing, theoretic basis of the American OS and in large part quarantines the tracing problem. Three challenges, however,

might appear to stand in the way of that realization. Here I note and dispel them.

The first challenge is the matter of equalizing the aforelisted core endowments. If we have to equalize holdings of those, it might be thought we have to commensurate them. But how are we to do that prior to the operation of the equal-endowment grounded market mechanism, when it is that mechanism itself that affords ethically satisfactory commensuration – i.e., social valuation pursuant to a process in which each citizen bears an “equal vote” by dint of her entering that market with an equal initial endowment? Market neutrality might be rendered self-perpetuating once attained, but how is it to be attained when the market itself affords the measure of market-*antecedent* neutrality?

Were we able to “start all over,” of course, this problem would be diminished. We would simply give each citizen an equal allotment of coupons with which to bid on unowned resources.¹⁵⁵ But of course we are not able to start all over, and significant portions of what each of us already owns presumably are traceable, in theory, at least in part to our ethically endogenous efforts. Nonetheless, there is a plausible “second best” solution at hand. First, note that the core endowments enumerated at III.C.1 are limited in number, relatively easily quantified and equitably distributed, and in little need of commensuration. If we distinguish between “beneficial” and “burdensome” core assets, we see that this is particularly so of the beneficial ones – early education and inherited non-human capital. The burdensome ones, by contrast, are a bit more difficult, since they include “internal resources,” but still far from impossible. The hardest one is genetically poor health or handicap. Some such deficiencies can themselves be valued by reference to current prices affixed to their mitigation – prostheses, medicines, etc. There seems no harm in beginning to address such deficits with compensation equal to the going rates. Other such deficits are not so readily mitigated. There the best that we

can do is estimate the compensation that would be afforded by insurance policies that typically are or “would” be purchased against such contingencies if such are or were available.¹⁵⁶ Clearly there’s more guesswork here, but it need not be an arbitrary whistling in the dark. We do the best we can to repair the ship at sea. The more repairing that we do, the better able the mechanism will grow to fix itself.

The second challenge is rooted in “completeness” as the first was rooted in “neutrality”. It is this: Is it reasonable to require that “all and only desired trading” occur? Is that possible, and do we even want it? Wouldn’t we have to abandon our market-inalienability norms and “commodify” everything?¹⁵⁷ And if we don’t do that, can the mechanism do what has been charged to it?

This challenge is more easily addressed than that directed to neutrality. Again we look first to the core opportunity endowments of Part III.C.1. All of these are subject, in principle, to unobjectionable market-valuability already. Next we consider what else might be traded – “all that enters into agents’ happiness-pursuit”. It is easy enough simply to bracket out of market transactions such things as we should not wish to see commodified – babies or organs, for example.¹⁵⁸ There will of course be disagreement as to some of these. It might appear to be an affront to liberty, for example, to prohibit autonomous agents’ trading in what ever they wish to trade, at least when the trading really is consensual and uninfected by objectionable inequities in comparative bargaining power, and does not itself impinge upon any third party’s equal liberty. It might especially seem so against a more equitably spread opportunity backdrop, before which implicit exploitation fears are less likely to be operative. But the real point here is that we need not worry over these disputes at the margins of commodifiability. The mechanism does its work quite well through trade of those many *more* goods and services that all *agree* ought to be

tradable.

That's the desirability side of this challenge. The feasibility side comes in the transaction- and information-cost barriers to market-completion in the technical sense. Is it really reasonable to suppose that all parcelings of ownable and tradable goods, and that payment-claims defined in terms of all specifiable contingencies, can be tradable?¹⁵⁹ Here the problem, the guise of which is more technical than the alienability guise, can be handled in two ways. The first way is to note that it is by now a well established theorem of general equilibrium- and stochastic calculus-rooted financial theory that complete markets can be simulated through a comparatively small number of hedging strategies.¹⁶⁰ That fact is exploited in the present Article's more programmatic sequel, as well as in a predecessor article devoted to the subject of proposed global hedging markets.¹⁶¹ The second way is more immediately satisfying. It is to note that the problem has no real "bite" here, for as the answer to the third challenge shows, more complete and more neutral always means more consistent with the EEOR's constitutive values. There is, that is, an ordered set of "second bests" that is ordinally equivalent to the set of "more" complete and "more" neutral markets. So all we have to do is to move further – as far as we are able – in the right direction to become the best that we can be.

The third challenge, just presaged, is this: If you cannot achieve full completeness and neutrality of the sort that characterizes the mechanism that assists in realizing the EEOR, might it be that seeking more completeness and more neutrality than you presently have could, ironically, take you farther from the ideal goal? Hasn't Hart, for example, proved that such might be the case at least in respect of completeness?¹⁶² I'll reply here intuitively, reserving technical treatment for another venue. The intuitive reply is that the claim that there is no second best trades on an ethically uninteresting conception of efficiency. The only politically cognizable

conception of efficiency, by contrast, is one in respect of which it happens that any forward movement on the completeness or neutrality fronts results in forward movement on the only ethically intelligible “welfare” front. I complete the argument in the next Subpart, for it is best made in connection with a fuller treatment of the other value that is constitutive of our EEOR, efficiency.

D. *Equal Opportunity as Efficiency*

Parts III.A & B established, respectively, that CR and CL are committed, with differing degrees of explicitness, to the conception of citizens as responsible agents and of appropriate ownership as ownership consistent with the EOP. PC, in turn, was shown not to be committed to the contrary of either of those propositions. Part I.C, for its part, established that PC *does* commit itself more or less explicitly to two other propositions: First, that public policies ought generally either to promote or at least not to offend fairness. And second, that such policies ought generally either to promote, or not unnecessarily to inhibit, “efficiency” or economic “growth.” Part I.C also noted that these two desiderata can appear, superficially, in some circumstances to be at odds. And it noted that CR and CL for their parts do not, at least on the surface, take positions contrary to the PC rules of thumb. This Subpart shows that PC fairness and efficiency, *non-superficially* understood, are *not* at odds. Moreover, PC fairness properly construed is a rule of thumb to which CR and CL themselves are committed by dint of their commitment to the EOP. And efficiency properly understood is a material entailment of success in the pursuit of fairness properly understood. One upshot is that CR, CL and PC readily reduce to one political understanding – our EEOR – at least where ownership is concerned. Another upshot is that ordered sets of variably complete and neutral markets, and the ordered set of variably efficient markets, are ordinally equivalent.

First, CR and CL are committed to PC fairness. “Fairness,” both in its everyday connotation and in its denotation of the salient attributes of “fairness-promoting” PC legislation, means impartiality or even-handedness. To render circumstances fair is to “level the playing field,” to remove barriers that people face through no fault of their own. Common synonyms of “fair” in this sense are “equitable,” “just,” “equivalent,” and so on.¹⁶³ But “fairness” in this sense, then, means nothing more and nothing less than conformity with the equal opportunity principle. To treat parties impartially is to treat them as equals for purposes of the treatment – i.e., to eliminate inequities that are exogenous to the purposes of the treatment. And to be even-handed with people is to treat them impartially.

Second, fairness in the equal opportunity sense is efficient in the only sense in which “efficiency” bears ethical significance. The argument here bears both a negative and a positive aspect. First we’ll explicate the term “efficiency,” then we’ll consider the negative and positive sides of the argument that efficiency on any understanding, if stripped of fairness considerations, is ethically uninteresting.

“Efficiency,” in the everyday sense of the word, connotes the maximization of output given a stipulated input, or the minimization of input given a stipulated output. It means “more” for “less”. The more technical understandings of “efficiency” familiar to welfare economists are reducible to variations on that theme. Pareto-efficient distributions of goods or ills to persons are best understood, intuitively, as distributions the aggregate utility deriving from which cannot be raised without lowering the individual utility of at least one person.¹⁶⁴ Pareto efficiency is utility-maximization as constrained by, thus consistent with, the “veto” power wielded by anyone who stands to suffer a utility loss in the event of some departure from some status quo. It is this intuition, at any rate, that renders the Pareto criterion ethically salient. Kaldor-Hicks efficiency

is yet closer to the workaday understanding of “efficiency”. Distributions are efficient in the Kaldor-Hicks sense if there is no departure from them that would render some parties’ aggregated gains greater than other parties’ aggregated losses.¹⁶⁵ The guiding intuition, then, again is that the welfare output of a given distributive input is, given the welfare functions that we have to work with, the “highest” that it can be.¹⁶⁶

Now efficiency on any of these understandings is normatively uninteresting unless it is understood by irreducible reference to fairness. This is absolutely crucial, yet surprisingly oft-ignored. First, from the “negative” side, it is well established – though still, mysteriously, insufficiently observed – that mere maximization of an aggregate, be it of welfare or of wealth, shorn of attention paid the fairness of the means by which that aggregate is maximized is fetishism.¹⁶⁷ The claim here is not that maximization shorn of fairness is not good enough. It is that it is not good at all; it is not so much as *cognizable* as “good”. Nobody – CR, CL, PC or otherwise – would maintain that to render all save one inhabitant of the world miserable in order to render that one remaining inhabitant, possessed of an eccentric utility function, so ecstatically happy as to exceed the aggregated happiness of all others under some other distribution, would be to “maximize” anything cognizable to normative concern.¹⁶⁸ To do so would be ethically on all fours with an argument that all public policy should be framed with a view to maximizing the amount of blue-colored surface space in the universe. It just is not “good,” in any sense, to enlarge something that has nothing to do with anybody’s equal moral agency. Wealth and welfare, then, must be understood by reference to principles of fair opportunity to *engage* in wealth- or welfare-creation before they can be intelligible as values at all. They *are* “wealth” or “welfare,” as distinguished from a large endorphin count or a vast blue-colored surface space – an insipid and lifeless material substance – only in so far as such is the case.¹⁶⁹

Second, from the “positive” side, recall that the EOP requires not only that ethically *exogenous* holdings of that from which satisfactions are derived – opportunities – be *equalized*, but also that ethically *endogenous* such holdings are permitted to *vary* with responsible effort. But this means that “satisfaction,” “welfare,” or “wealth” will be “maximized” in the only ethically intelligible sense of those words *precisely* in so far as the inputs of “satisfaction-*functions*” are distributed in accordance with the equal opportunity principle. Agent-citizens are permitted to, and face all incentive to, “produce” and indeed “maximize” their own satisfactions under the EOP, which requires that they be permitted to retain that which they produce by their own efforts out of exogenously given resources. So “aggregate” satisfaction will be “maximized” in the only sense in which satisfaction-maximization is ethically noteworthy. Every agent’s satisfaction will be the highest that it can be consistent with the EOP. That is all that is intelligible as “efficient” where it is satisfaction that would be efficiently or inefficiently “produced”. Ethically intelligible efficiency just is what results from distribution of happiness-inputs in accordance with the EOP.

Once we see this, we see that the third challenge raised to Part III.C.2 is dissipated. Proofs that sets of markets which are rank-ordered in terms of degrees of completeness falling short of full completeness are not ordinally equivalent to sets of markets rank-ordered in terms of their welfare-optimality trade on a conception of welfare-optimality that is ethically uninteresting. The only welfare that matters – indeed, that can be viewed as well-faring (by agents capable of faring well) rather than inert substance-growing – is that produced by equally exogenously endowed agents who consume or trade that with which they are endowed and/or that which they receive through trading when they are so endowed. There is no reason to suppose that offering more such trading opportunities to all, or effecting greater equity among

the holdings of ethically exogenous opportunities to all, would result in any ethically interesting diminution of the happiness of any.¹⁷⁰ Formal proof can be had elsewhere. I trust that for the present the intuition is clear enough.

E. *The Efficient Equal-Opportunity Republic is the Template of Our “Ownership Society”*

It should be at least roughly apparent already that the EEOR which is our American political self-understanding is, in effect, *some* kind of OS. Independent and responsible citizens, as agents whose autonomy in fashioning their lives and pursuing happiness with exogenous opportunities and resources is to be honored, are owners. They own their own lives, so to speak, in that they hold exclusive rights to control and develop those lives, as consistent with the equal such self-owning rights of others.¹⁷¹ And those agents must be recognized to own – rightfully to control the disposition of – the material correlates of, the opportunities and resources that go into building, those lives as well. The fruits of those resource and opportunity inputs, in turn – what we have called the ethically endogenous element – also must be owned. Such are what our agent-citizens bring to, and take from, the idealized market sketched above. All of these are entailments of the construal of citizens as responsible agents whose holdings can be ethically assessed in keeping with the EOP.

But this is of course only to begin to explicate the sense in which the EEOR is an OS. For ownership is more than holding and controlling. It is psychologically experienced, and legally protected, holding and controlling. And there are many differing forms and gradations – many variations on the themes of – holding and controlling, and experiencing and legally vindicating such holding controlling, in American psychology and law. Putting flesh on the bare-bones of ownership in an *American OS*, then, requires more than simply saying that

ownership and what is owned are to be understood by reference to responsible agency, efficiency and equal opportunity. Those are the broad features of our ownership society. Filling-in the more specific details requires that we take into account both the more detailed material entailments of those conceptions, and the “path-dependent” features of American sensibility and law themselves.

IV. OWNING AT THE CORE: ASSETS, OPTIONS & ENDOWMENTS IN THE EFFICIENT EQUAL-OPPORTUNITY REPUBLIC

Part III of this Article might be said to constitute the theoretic “engine” meant to drive concerted and coherent effort toward an American OS. Part II supplied that engine’s parts, showing that the engine’s content is domestic, so to speak. The sequel to this Article provides the “wheels” which get that OS “rolling” on the ground. If these similes are fair, then this Part might be called the “clutch” or “drive” through which the theory must specifically engage with what it ultimately recommends. The law of ownership and the psychology of owners mediate between articulated policy and effectively implemented program. They thus require care in their own right if an OS is realistically to be instantiated. This Part is intended to supply that care. It translates the Part III notion of a “resource” or “material opportunity” into a legally and psychologically cognizable “asset” whose “ownership” is defined, delimited and vindicated by an “ownership society” of responsible agents who cooperatively promote and protect their free pursuits of happiness through the rule of law.

Three particularly noteworthy upshots emerge below. The first is that many more items, abstract and concrete, can in principle and should be legally cognized as “assets” and ownable in the contemporary American OS than could have been in an earlier CR, CL or PC polity. Call this the “abstraction effect”. It yields both (a) specific consequences pertinent to policy, and (b) additional political salience to the market mechanism sketched above in Part III.C. The second noteworthy upshot is that in view of the much broader range of resources that should count as assets in the contemporary American OS, assets’ autonomy-conferring attributes are in

significant and complex measure dependent upon both the independent tastes and the cooperative action of agents other than the agent who holds the asset in question. That too yields additional political salience to the market mechanism sketched in Part III.C, and bears consequences for the delineation of *responsible* ownership below at IV.B. The third noteworthy upshot is that there is a real, practical distinction to be drawn between perceivedly “hard-owned” and “accumulated” assets on the one hand, “merely entitled,” “income”-streams on the other. That distinction, of course, does not register at the higher level of theoretical abstraction encountered in orthodox financial economics, and thus might well surprise practitioners who practice solely in that orthodox tradition. But the distinction will not surprise heuristics psychologists or theorists of “behavioral” finance. And it likely will not surprise many lawyers. Indeed the distinction appears to be rooted in the “endowment effect” and cognate heuristics familiar to behavioral economists, thus to be rooted in the empirical psychologies of persons not just in the US, but in other jurisdictions as well. In the US, however, the effect might also be grounded partly in the doctrines and the path-dependence of American law, in this case constitutional and property law – to pun a bit, a manner of “endowment effect” in its own right. Once again, this bears policy and programmatic consequences that I shall attempt to trace.

Before elaborating upon these results, we must prepare the way by taking notice of several broad parameters constraining legal ownership in any OS. “Ownership,” of course, is more than mere possession, even if the latter really be “nine-tenths of the law”. An asset is “owned” precisely to the degree that a society through its law *vindicates* the asset’s possession and disposition. And “vindication,” of course, takes not only varying degrees, but varying forms. The law, in turn, will be reflective of its enacting society’s constitutive “substantive” values as to what rights and responsibilities its citizens hold for themselves and in relation to one another. But the law also will reflect its society’s more “procedurally” oriented values as to how the law should be fashioned, changed and enforced.

The “substantive” guidance that the American EEOR’s core values afford to the law of an American OS will ring familiar in light of Part III. “Ownership” of an “asset” should, for purposes of delimitation and instantiation in keeping with the constitutive values of the EEOR, conduce to citizen-agents’ or households of such agents’ capacities freely to make life-planning or happiness-pursuing choices. They should conduce to citizen-agents’ capacities to make such choices both independently and in keeping with the EOP, which latter equilibrates the independence of all ethically equal agents. Owned assets should conduce to citizens’ capacities to make such choices without undue subordination to the preferences of others, but not without due regard for the equal agency rights of others. “Undue” subordination and “due” regard, of course, are understood by reference to the EOP honored by the EEOR as described in Part III. Once the sphere of legitimate independent agency is delimited in keeping with the equal opportunity principle, an *asset* – an ownable resource – will be something the possession of which realizes, enhances or secures that legitimate sphere of choice as a practical reality.

Those general substantive principles direct us toward a number of more particular, “procedurally” oriented features of what should count as ownable assets in the American OS. We draw those features out first by examining the variety of ways in which asset-holding realizes practical autonomy. That is the focus of Subpart A, in which the stress is on liberty. Subpart B then focuses upon autonomy’s delimitation by the EOP; the stress there is on that form of liberty which is valued in the *American OS* – *responsible* liberty.

A. Ownership & Liberty

First, then, on liberty. We’ll begin with formal legal liberty – simple legally permissible action – then see how asset-holding enhances the sphere of autonomy beyond mere legal permissibility. For purposes of policy we’ll emphasize in particular how both the law and

ownership-psychology appear to manifest the endowment heuristic familiar to theorists of behavioral economics and behavioral finance. And we'll draw some programmatic consequences from this in anticipation of the sequel's detailed blueprint of the full American OS.

1. In Theory & In Law

Begin with a simple hypothetical. Mr. A might as a formal legal matter be free to till or not to till the soil of Ms. B, his neighbor. He might, that is, face no penalty imposed or recognized by any formally constituted authority for *not* so tilling. He is not, legally, a chattel slave or an indentured servant. If B is the only possible source from whom or which A might acquire a basic livelihood – minimal caloric intake, shelter from the elements, etc. – however, he will of course not as a practical matter be free not to work for B for food or shelter. He will not “really,” or “pragmatically” be free. If by contrast A holds substantial livelihood-conferring assets, he will not be practically required to till for B, though of course he might contract to do so nonetheless for additional income. And presumably that will be for more income than he could have held out for had he not held any livelihood-conferring assets other than his labor. An asset, then, first and most simply is something that will practically widen an agent-citizen's sphere of politically or legally – “formally” – permitted choice. It will be a resource or material opportunity, in Part III's terms – the material correlate of agency itself. Ideally it will afford the owner some degree of ongoing material self-sufficiency, by generating a *continuous stream* of sustenance or “income.” It will prove useful to single out this latter quality – call it the “fecundity” or “generativity,” perhaps the productivity, of an asset.

A's right to his own labor in the previous example is itself an asset in as much as it permits A at least to choose to work for B rather than to starve or steal. But A might also hold more specialized or well developed talents – skills, or human capital, per the terms of III.C.1 – as

well as other resources – e.g., land or nonhuman capital, savings, etc. In so far as, given environmental, technological, cultural and market – hence, social – conditions, these enable A to achieve a greater number of desired aims in a greater variety of ways, they too will be assets. And they will augment A’s holding of that more basic and less generative asset that is just his “unskilled” labor. Assets, then, clearly come in many shapes, and with varying degrees of “assetness,” as conferrers of practical autonomy. And they seem to come in many more shapes and gradations today than they did in the past. The modern EEOR or American OS is capable in principle of affording its citizens a great deal more practical independence than the CR or the CL polities of the past were able to afford.¹⁷²

One distinctive quality of modern assets is that many of them provide the means of generating not just income, as did assets in the past, but more assets – more “hard,” or accumulated assets.¹⁷³ Call this, echoing the penultimate paragraph up, the “generativity” of some assets. In general, the more *kinds* or *quantities* of *additional* asset that a particular form of asset can produce, the more “generative” it is. A machine tool, for example, used in the production of other tools – a sort of “second order,” “ur-” or “meta-tool” – will in this sense be more generative than a non-machine tool, at least if we hold the generated income constant. Land, which ultimately yields many kinds of asset indeed, might be called the most generative of – “the mother of all” – assets. But in light of possible market and liquidity restraints as well as other factors we’ll discuss below, this thought must be ringed with caveats.

We can define “wealth” in the EEOR along the lines just sketched as either of *two magnitudes* of assets. More *kinds* or *qualities* of assets translate into more wealth and so does a greater *quantity* of any *particular* kind of asset. Wealth, then – the total of accumulated assets – will by definition be the fungible or portative, as it were “fluidic,” material correlate of EEOR

agency itself. More wealth means more options means more agency. And wealth that markets or other mechanisms diffuse throughout the polity in keeping with the EOP is wealth that realizes *responsible* agency.¹⁷⁴

But there is more to be said about wealth: Wealth, at the level of abstraction adopted by some economists, is either what can be expected with reasonable certainty in future to be, or is already accumulated. At the lower level of abstraction employed by other economists, however, a level which proves to be salient for OS purposes, wealth is only that which *is* – not what in future might be – accumulated. Pursuant to the endowment effect and cognate heuristics documented by experimental economists, wealth that one holds appears to be “worth” more than wealth that one “might” or “will” hold.¹⁷⁵ And that effect seems to be rooted in more than risk-aversion or diminishing marginal utility.¹⁷⁶ The distinction, as thus far stated, of course remains very crude. For, like the behavioralists themselves, we’ve not yet defined “holding,” which in turn we shall see to be inflected both by physical characteristics and by legal protection. We’ll do that inflecting below. Suffice it for the moment simply to have flagged the broad distinction. More accumulated wealth is more wealth.

There are two metrics additional – though nonetheless related – to the simple partative-magnitudinal along which wealth can vary that are of particular interest to citizens of the EEOR or American OS: Wealth can be more or less *secure*, and it can be more or less *liquid*. The former, we soon shall see, bears upon accumulation. The latter, “liquidity,” refers to the rapidity with which an asset of one form can be transformed, through trading activity, into an asset of another form – most commonly the “purest,” most abstract form of “pure purchasing power,” money – without diminishing the rate of exchange at which it can be so transformed by dint of the transformative transaction itself.¹⁷⁷ The less liquid an asset is, the smaller the number of

exchange transactions in which it can be employed within a given span of time, hence the more restricted the sphere of choice opened by the asset to its owner. Greater liquidity means greater disposability at greater rate of time and greater rate of exchange. And greater disposability at greater such rates in effect means more asset, more choice. The more liquid an asset, then, the more “generative,” in a sense, it will be. For liquidity is an asset’s capacity to bring – to exchange for – other assets. It should be noted in this connection, however, that the relation between liquidity and generativity entails that land and real estate are not always as generative as they might be thought to be. They might be generative in their yields of additional resources that spring from or are buried within them, while not being so generative of such resources as might be, in a more liquid market, exchangeable for them. This proves significant to the sequel’s treatment of “homesteading” and “capital homesteading”.

It is also salutary to note in this connection that the less “deep” or “thick” is the market for a particular asset – that is, the fewer parties there are who desire and are willing to exchange for the asset (hence, who *regard* it *as* an asset) – the less liquid (thus less generative) it will be. We therefore find that the wealth represented by, or again as it were the “degree of assetness” of, an asset – hence, the increment of autonomy that the asset confers – will generally ride in significant measure upon the desires of persons other than the asset’s owner. And it will ride upon other factors – legal, physical, etc. – that affect the rate of transformability of one asset into another. Thus, although assets free one person partly from the wills of other individuals who might “unduly” coerce her in the absence of her asset-owning, they do not free persons altogether from the desires of those who make up the community. Rather, just as would have been expected in view of the discussion at Part III, they conduce to *responsible* liberty – liberty that takes account of the liberty of others – not unchecked libertinism.

Turning from liquidity to security, the “security” of an asset refers to its durability and reliability through time as an expander of choice for its owner.¹⁷⁸ Security is therefore both a legal and a physical-cum-financial category. The physical-financial aspect of security requires little comment. An asset that rapidly depreciates is less “asset-like.” It confers less autonomy. Along the physical-financial durability metric, then, land might again be thought the “mother of all assets,” not only owing to its earlier noted generativity, but owing to its *regenerativity* or *value-retentivity*. Real estate is one of the comparatively small number of assets which in most localities does not unambiguously and inexorably depreciate, at least not for protracted periods, but tends rather in most cases to appreciate over time.¹⁷⁹ As will be discussed presently, it happens that real estate and buried stores enjoy, at least within the American legal tradition, a special form of *legal* security as well.

The legal aspect of assets’ security is more interesting and practically variable than the physical. My assets are secure only to the extent, not merely that they do not rapidly depreciate, but also to the extent that the law protects – and thus my fellow citizens protect – me from uncompensated seizures.¹⁸⁰ In so far as the law “entitles” me to possession and to disposition of an asset, the latter is more secure, and thus more solidly or reliably “asset-like,” more valuable, conferring of more wealth and more autonomy as the EEOR understands such terms. And of course such entitlement, to be a practical rather than merely a formal reality, must be practically vindicable and enforceable.

It of course cannot be said, in view of the foregoing, that entitlement is an all-or-nothing affair – either as a practical *or* as a formal matter. The variability of legal security as a practical matter is a function of that aforementioned vindicability and enforceability. The degree to which the law secures the possession and disposition of assets as a formal matter is more complicated.

To begin with, there is the familiar observation that legal ownership constitutes a “bundle of rights.” The owner of property under American law generally, though not exceptionlessly, holds the right to exclusive use and enjoyment thereof, to alienate the property freely, and to considerable extent to subdivide it both spatially and temporally. On the one hand, bundling bears directly upon choice and autonomy – more sticks, more choices – but the matter of subdivision in particular reveals that the bundling of property rights is bound up also with transformability and liquidity as discussed above.

In the civil law tradition, for example, where property types and relations are strictly limited by the *numerus clausus* principle and unamendable by contract, entitlements are limited to certain coarse-grained forms. One cannot easily, if at all, sell a “watch for a day” or a “half-ownership of a home.”¹⁸¹ What we above called the “abstraction effect,” then, is by definition less developed and less honored in such jurisdictions. Asset *types* are thereby limited, asset markets therefore less complete, and autonomy – the sphere of choice – accordingly is limited as well, at least in theory.¹⁸² In common law jurisdictions, where contract, property and tort are more fluidic and thought to be more jointly vindicative and facilitative of private ordering, and where assets therefore may be subdivided into more finely grained spatio-temporal “slices,” assets are in principle more liquid, asset markets more complete, and choices and autonomy – as well, therefore, at least in theory, as wealth and welfare – are for that reason greater.¹⁸³ The legal security of an asset’s liquidity itself, then, is in part a function of the legal system’s degree, optimal or suboptimal, of *flexibility* or accommodatingness – the degree to which the law honors the abstraction effect by recognizing, facilitating and protecting autonomous asset-delimiting and exchange decisions and private ordering, consistent with the need to economize on information costs.¹⁸⁴ The same observation, duly modified, will hold of the law’s role in facilitating

securitization and contingent claims transactions, more on which below.

We therefore see that law secures autonomy in at least two ways, both mediated through the parceling of and transacting around assets: first, by protecting autonomy-enhancing asset-ownership itself; and second, by recognizing, facilitating and enforcing autonomously agreed parcelings and delimitings of assets and transactions that derive in part from title to them. The latter is not only to protect the choices involved in those parcelings and transactions themselves. It is also to enhance or optimize asset-*liquidity*, which *itself* increases the degree to which asset-ownership enhances autonomy.¹⁸⁵ The law, then, as public facilitation of private ordering pursuant to the abstraction effect, can by optimizing the security and liquidity of asset-holding, yet again be seen to amount to public action facilitative of private EEOR liberty. That, of course, once again is how the EEOR itself, and hence the American OS, should be viewed – public action in support of private liberty.

Beyond the abstraction effect – the legal bundling and parceling of entitlements – and consequent liquidity considerations, the law’s formal securing of effective ownership must be viewed along a simpler metric. This one might be called the basic “hardness” of entitlement, in both property and contract form, within the doctrines and protections of the law. “Hardness,” like the notions of “accumulation” and “wealth” mentioned above, is a rather open-ended and elusive concept, bearing no distinct or singulary status in either legal or financial theory. But it nonetheless appears to capture something now well documented in the literature of behavioral and experimental economics. What we are after here is reminiscent of, though analytically distinguishable from, both material durability and practical legal enforceability. It is the formal legal analogue to these, and even reminiscent in a manner of liquidity (again). The fact is that American law traditionally has recognized and protected some forms of property and other

entitlements (e.g., contract rights) longer than, and continues to treat some as in a puzzling sense “more fundamental” than, certain others. It also offers differing forms of protection – differing forms and degrees of entitlement – with variable implications for autonomy. And these differing forms and degrees appear both to reflect and to perpetuate certain psychological *attitudes* toward these differing forms of entitlement.

A few examples familiar to lawyers help flesh the point out and give it concrete expression. In a still celebrated article,¹⁸⁶ Professor Reich suggested years ago that the welfare state had ushered in a “new [form of] property” which should be recognized as such both in order to maintain citizens’ independence from government and to vindicate constitutional values. Entitlements conferred by statute, Reich argued, even if entitlements to nothing more than conditional income-streams, were entitlements conferred by law. Such entitlements accordingly warranted the status of property – protected by constitutional due process rights against state-expropriation or encroachment. They were owned, just like anything else to which the law attached title. The US Supreme Court of course soon agreed in large measure, in effect constitutionalizing Reich’s argument in *Goldberg v. Kelly*.¹⁸⁷ “Entitlement” could be like title.

Even in the Reich and *Goldberg* era, however, there were limits on the linkages between the ownership of “older” and of “newer” property.¹⁸⁸ Due process protected *individuals* against capricious case-by-case denials by administrative bodies of legislatively conferred entitlements. But it did not protect the *entire class* of such recipients from wholesale repeal of the entitling program itself. Nor were welfare or social security checks, like title to land or other “old” property, assignable.¹⁸⁹ As if to underscore the point, all it took was a new appointment or two to the Court and a few short months before the new property came once again to look like less than property at all.¹⁹⁰ Moreover, a few appointments more and another fifteen years saw even

non-welfare check government entitlements looking less secure, while more traditional entitlements grew even more secure than they had been in previous decades. The allusion here, of course, is to Supreme Court justiciability doctrine since the later 1980s. It has almost come to seem that only very “old” – traditional common law – property can actually be owned so far as the federal courts are concerned.¹⁹¹ One might have thought that an Article III “case” would be presented any time that a cause of action had accrued, that causes of action in turn accrued with injuries, and that injuries in turn were defined by law – including, then, by statute. Yet by requiring that a very special and ill-defined *kind* of injury – “concrete and particularized”¹⁹² – be suffered before access could be had to the federal courts, the Supreme Court appears now to hold that only those forms of injury, thus only those forms of right or entitlement cognizable in 1787, can be vindicated in the federal courts today. In so far as this is the case, assets of long American-legal pedigree – ideally, traceable to ancient common law vindicability – might be expected to be more formal-legally secure than others. They are more “owned,” precisely *because* they are more “concrete,” or “hard”.¹⁹³

Another example is a bit less dramatic but no less important. In another celebrated article a decade less venerable than Reich’s, Professors Calabresi and Melamed seminally distinguished between “property rules” and “liability rules”.¹⁹⁴ The distinction is drawn in terms of the form of specific legal vindication afforded a legal entitlement. Property protection, of course, is such as requires any taker of another’s entitlement to pay a price set by the holder. Liability protection is such as requires the taker to pay a price determined by the law itself, broadly conceived – e.g., by legal doctrine or by a trial court’s application of a broadly stated legal standard, which might but need not incorporate a market’s valuation of the entitlement in question. Assets that are “property,” in this sense, accordingly are more “asset-like” – conferring of more choice – than

are assets, such as contractual rights, that are vindicated by “mere” liability rules. For they permit the holder to determine price. But both, of course, are assets to a greater degree than are “mere” government “entitlements” per Reich, at least legally speaking.¹⁹⁵

A critical fact, in this connection, is that the law affords most protection – confers most “assetness” – upon precisely those assets that we’ll see tend to be appreciated by holders as more asset-like – “hard,” “accumulated” assets. Property rules, for example, typically protect holders of physical or otherwise accumulated objects and capital, even though of course such objects might be variously divided along spatio-temporal lines. Liability rules, in turn, protect rights to performance – contract – or rights to be *free* of “performance” – tort. And due process rights, so far as entitlement is concerned, at best protect rights to be free of certain forms of *state* expropriation of originally state-conferred or commonlaw-recognized entitlement. The more venerable the provenance and traditional the form of an entitlement, then, the “harder” and more protected by the law it seems to be. The “endowment effect,” in a sense, appears to be enshrined in as well as enhanced or perpetuated by the law itself.

2. In Citizen-Psychology

Responsible liberty is not merely a theoretical ideal or legal value. It is a lived reality, a reality in relation to which the EEOR’s ideals and laws are understood. The American OS as EEOR, then, will take account of real citizen-psychology in legally defining, fostering the spread and vindicating the ownership of autonomy-conferring assets.

As it happens, a vast amount of recent empirical research supports the long-held American intuition that asset-owning, in the senses elaborated in Part IV.A.1, conduces to the rich form of responsible agency elaborated in Part III. Owning spawns thoughtful, hopeful, forward-looking, active, participative, healthy, educated, confident, secure-feeling, achieving, creative, civically and familially engaged, productive and responsible citizens. The same

research might partly explain, and in turn be explained by, the law's affording greater protection to "old," "hard" property than to "new" property, and to property than to contractual and other entitlements. For it seems that "accumulated" and "hard-owned" – i.e., fully property-law-protected – wealth produces the autonomy-enriching effects more starkly than does unaccumulated "income" – either of the liability rule-protected, the "government entitlement" or any other form. Assets in the EEOR or American OS, that is to say, are more like "stocks" than "flows".

One dramatic, though perhaps, in view of the endowment heuristic, ironic effect of accumulated wealth-holding on individual psychology is its inducing an orientation toward the future, and a consequent attitude of control thereover. Those who hold accumulated assets take present choices specifically with an eye toward affecting their long-term future environments. They "invest". They take responsibility for the future, and they regard the future as in a sense more real, more concrete. Those who do not hold wealth tend to orient choices only to the present or very near future.¹⁹⁶ These effects have been observed even when controlling for differential income-flows as between those who have accumulated and those who have not, and when controlling for the obvious causative role that an antecedent propensity to save presumably would have played in accumulating in the first place.¹⁹⁷ Asset-holding carries with it an investing, future-affecting and caretaking mentality, which in turn fosters an attitude of autonomy – the sense that one is not merely a passive object of fate and future, but a part-controller of the same.¹⁹⁸

Asset-holding also broadens the range of choices that people actually do make – and over time, therefore, that they actively seek out or work to ensure that they will face. One illustrative example here is a long-observed difference in behavior between participants in defined benefit and defined contribution pension plans.¹⁹⁹ Both are well settled legal entitlements that enjoy due process protection, though defined contribution plans technically enjoy property protection while defined benefit plans enjoy more contract-like protection.²⁰⁰ The latter also, through vesting and drawing rules (forms of contingency), more tightly constrain rights of action. They also, by

definition, entitle their owners merely to “flows,” not to “stocks.” And accumulated funds are controlled by fiduciaries rather than by the merely passive, “beneficially” owning pensioners.

Such defined benefit pensioners, it has (unsurprisingly) been established, report feeling more dependent upon the firms for which they labor. And they retire at a single prescribed age.²⁰¹ Participants in defined contribution plans, by contrast, are both more likely to retire before the age of 60 *and*, perhaps more surprisingly, *after the age of 65* than are participants in defined benefit plans.²⁰² And they report stronger perceptions of control and autonomy. Once again, there is nothing particularly shocking in this. Those who legally possess more – and less conditioned – individual control over assets simply face, trivially, more options that others do not. And they tend to exercise those options. This in turn develops a more broadly-sweeping “menu mentality,” which in turn assists in developing an autonomous – discriminating and evaluating – *personality*, the personality of an American EEOR citizen-agent.²⁰³

One particularly salient type of choice-making and choice-seeking attitude that asset-holding tends to support, a type especially valued by the CR tradition, is that of civic engagement and political and economic participation. Social scientists and political theorists alike repeatedly have observed that materially independent people, because they need not obey the naked, non-reason-mediated wills of others for their sustenance, must be *persuaded* by those others to do what those others wish. They thus come to be treated as rational, autonomous deciders,²⁰⁴ and not surprisingly come to regard themselves as such. In consequence, empirical work confirms, they become more involved in their communities, in clubs and boards and organizations than do non-owners – in effect transforming their physical capital into social capital.²⁰⁵ (They “bowl alone” less than do others.²⁰⁶) Relatedly, owners are more energetically approached for support by those who seek positions of political and other forms of leadership, a variation on the “need to persuade” theme noted just above.²⁰⁷ Commensurately, owners are more active participants in democratic political processes.²⁰⁸ This tendency is reinforced, of course, by the owners’ holding of intelligible *stakes* in the socioeconomic-cum-political system and in society at large as community leaders, etc. Owners accordingly perceive themselves both as more influential and

as more called upon to *wield* influence as responsible “owners” of their polities, economies and social systems.²⁰⁹ They become precisely those responsible, autonomous, politically and socially participative freeholders envisioned by CR ideology from the time of its earliest formulations. They also tend, of course, to become responsibly autonomous life-planners and life-builders of the kind envisaged by CL.²¹⁰ In doing so, they act productively in the way valued by PC.

Beyond economic, political and civic engagement, asset-holding also has been found empirically to correlate with *familial* engagement and cohesion. This correlation could have been anticipated after earlier studies linking family strife and dissolution with the pressures wrought by poverty.²¹¹ But what newer studies show is that owned and accumulated assets bear a more pronounced countervailing effect than do income-flows, even when controlling for income-differentials between those who hold accumulated assets and those who do not.²¹² In light of the observations made just above, again this will not surprise. In so far as accumulated assets conduce to engagement and a sense of responsibility, and in so far as they conduce to a sense of security and general well being, they can be expected to foster healthy relations with intimates.

Telescoping from political, civic and familial well being to individual well being, accumulated asset-owning correlates with superior cognitive function, academic achievement, emotional adjustment and physical health among both adults and children.²¹³ Again, these findings are robust when controlling for differential income-flows among those who do and those who do not hold accumulated assets.²¹⁴ And of course, where children are the subjects of study, superior cognitive function cannot be claimed to be the *cause* of the familial asset-holding.²¹⁵ Asset-owning in the senses limned in Part IV.A.1, then, appears from quite an early stage, at quite a “micro”-oriented level of observation, to conduce to the development of healthy citizen-agents of the kind extolled by the American EEOR.

It bears notice in this connection that the effects here observed to correlate with asset-holding are empirically observed in other jurisdictions, outside of the US, as well as in the US. The endowment effect is not confined to American holding. What we should expect of

ownership in the American OS, then, might not be entirely contingent upon that OS's being American. There might be "universal" appeal to an OS, or at least universal "Western" appeal.²¹⁶ Studies of attitudes and self-reported welfare in Sweden, for example, where all have been entitled to impressive magnitudes of state-provided welfare payment streams for many decades,²¹⁷ indicate that many people suffer from a sense of disempowerment and childlike dependence upon choices made by others – in this case, state functionaries.²¹⁸ The source of these feelings is said to be the lack of personal control over the expenditures made upon each subject's behalf – even with the payment streams quite customarily secure, and *even when more or less the same expenditure choices would have been made by the subjects themselves* had they directed them.²¹⁹ Also at work here, evidently, is the implicit knowledge that those who give – in this case, state functionaries – could in theory take away, both corroborating Reich's claims and suggesting that pre-welfare state forms of property rights are such forms as most conduce to an independent EEOR citizenry.

Cross-national studies also suggest that, even after controlling for income and education levels, citizens who own and control accumulated assets tend more highly to value initiative and self-directedness on the part of themselves and their children, to be more flexible and creative, and to be more chance- or risk-welcoming intellectually – corroborating a "wealth effect," cognate with the endowment effect, oft-observed by behavioral economists.²²⁰ This suggests, again, that owner-citizens are likely ultimately to prove more productive, hence more of the PC-appreciable type. It might, again, be thought that causality here could run the other way – that people with such attributes simply tend to become the owners of accumulated and legally protected assets in the relatively developed countries where they reside. There is strong evidence, however, that at least in certain environments such attitudes do not themselves alone bring differences in income or in wealth.²²¹

Much, of course, remains to be done in empirically mapping these correlations and their causal directions. But the substantial results that we find confirm our intuitions. And as a matter of "common sense" it would seem reasonable to hypothesize a symbiosis in any event: Secure,

accumulated, and personally controlled – owned – assets encourage a sense of independence and capacity to choose and change the future, while such attitudes in turn prove in large part to be self-fulfilling, resulting in accumulations of yet further wealth. With actual responsibility comes a “responsible personality.”²²² And responsible persons make for agent-citizens of the sort envisaged by and celebrated in American self-understanding – the self-understanding of inhabitants of the productive equal-rights republic – the EEOR or American OS.

3. In Sum, Working with the Abstraction & Endowment Effects

The observations elaborated in Parts IV.A.1 and IV.A.2 recommends some basic policy parameters, or what might be called strategic considerations bearing upon how best to implement an American OS. The EEOR which is the American OS is interested in ownership as a means of facilitating the successful and responsible happiness-pursuit of independent, though also interdependent, citizen-agents. That, along with exogenously given citizen-psychology and the only gradually, incrementally changing nature of the exogenously given American legal tradition, suggests that some pathways are clearer than others in delimiting assets and optimally promoting their widespread ownership.

First, an American OS will recognize and foster ownership of the greatest variety of choice-enhancing resources and opportunities possible.²²³ Innovative parcelings of assets along material, temporal, and even contingency lines (so as to handle risk in addition to opportunity) – generally effected now by contract – should be facilitated. These are rooted in the “abstraction effect” noted above. And they have the effect of enhancing asset-generativity hence agent autonomy. Where possible, such privately ordered asset-determination should be more fully secured by law. This might counsel affording something more like property protection even to contractual rights, e.g. by permitting liquidated damages clauses in contract, at least where

contracting parties do not manifest unequal bargaining power.

Second and relatedly, the American OS will facilitate and foster the spread of *markets* in which such spatio-temporal and contingency parceling and trading of parcels is effected. Such is one aspect of facilitating such parceling itself, and additionally is one aspect of “completing” that critically important market mechanism serving at the heart of the EEOR/American OS described at Part III.C. But it also, more directly to the point of this Part, has the effect of enhancing asset-liquidity per the terms of IV.A.1, which again enhances agent-citizen autonomy.

Third, the American OS will do such as it can to foster the spread of “durable,” “accumulated” and *legally secure* assets among its citizenry. For those assets are, as we saw, in a sense determined both by law and by owner-psychology “more owned” than other assets. And they therefore conduce more strongly toward that practical and experienced autonomy that characterizes the American EEOR’s agent-citizens. Those three features – durability, accumulatedness and legal security – are for their parts, as discussed at IV.A.1, not practically orthogonal, even if analytically distinct. For legal security in the American legal tradition appears to ride pragmatically in part upon durability itself – the vintage form of property, so to speak. And the empirical correlations between citizens’ agent-psychology on the one hand and “accumulated” asset-holding on the other might in turn stem partly from the implicit knowledge that one owns more legally-securely what one physically possesses. In any event, these interrelations themselves yield a provisional policy prescription: First, as advised per the first strategic counsel per the abstraction effect, “propertize” even liability-rule-protected and government entitlements. But second, to the degree that we do not believe that we can do that, owing to the “endowment effect” that is the only gradually changing American law itself, we should work to foster the spread of “hard” and “accumulable” assets – the kind already enjoying

property rule protection. Such are those as will foster the ongoing mentality of EEOR agent-citizens.

We shall recur to these broad policy guidelines, in this consolidated and catalogued form, when we turn in the sequel to fully elaborated *programs* by which more fully to *realize* the American OS. What is yet more interesting for immediate purposes is how these very general American OS-prescribed policy directions interact with the constraints placed upon the EEOR's understanding of asset and ownership by its *other* guiding value. For the EEOR, recall, extols not merely liberty, but liberty understood by reference to the equal opportunity principle.

B. Ownership & Responsibility

It is the qualifier “responsible” prefixed to “liberty” that occasions most challenge for the law's fortifying agency by delimiting, vindicating and promoting asset-ownership. In particular, the problem arises between vindicating and promoting. Theoretically, the problem is readily surmountable. Such was one upshot of Part III.B's elaboration of responsible liberty as equal opportunity. To “vindicate” just *is* to “promote” ownership no more and no less than recommended by the EOP. Even practically the problem is containable and largely soluble. Such was one upshot of Parts III.B through III.D. Part III as a whole, then, was in part the working of a theoretic and in part the working of a practical, workable “settlement” of the autonomy/externality “boundary dispute” that we observed at Part II in earlier times to have plagued the three American political traditions' attempts to settle upon workable principles of ownership delimitation and vindication.

This Subpart traces the implications which that settlement bears for *American law's* delimiting and vindicating ownership. As in the previous Subpart, we find here that endowment effects – again, both in the path-dependent features of the American legal tradition and as aspects

of empirical ownership-psychology – delimit the boundaries of the practicable. Or at any rate they recommend some means of vindicating ownership in keeping with the EOP as more frictionless than others.

1. *Once Again in Theory*

The general ends entailed by the EEOR's aim to vindicate responsible ownership are easiest to characterize. At the highest level of abstraction, the goal is to realize ownership in keeping with the EOP. That is the principle of ownership spread recommended by the American CR, CL and PC traditions, all now synthesized into that overlapping consensus here called the EEOR – the “ideal type” of a distinctively American OS.

Realizing the EOP, we saw in Part III.B, in turn requires that we work to equalize holdings of ethically exogenous opportunity across owner-citizens, and that we honor *unequal* holdings of ethically *endogenous* opportunities and resources – holdings traceable to responsible choice. That goal, in turn, sometimes gives rise to a “tracing problem,” in turn resulting at times in a “boundary dispute,” both also discussed in Part III. Those difficulties, for their parts, we saw to be recalcitrant to “complete,” “definitive” solution. On the other hand, however, we also saw that it is possible to confine the problem to a much narrower sphere of “hard cases” – Sorites-reminiscent cases in which we are uncertain as to how free the will was, and how much of the end product of will's exercise is attributable to it, how much to mere luck – than has hitherto been thought. One reason is that there is a broad terrain of readily measurable opportunity and resource endowment that we all can agree to be ethically exogenous. The other reason is that a properly constructed market mechanism enables us to sidestep the comparability and commensurability challenges that render the tracing problem in non-market circumstances less tractable.

But all of this has been at the level of theory. What remains to do is to draw a preliminary bead on what it will be to *realize* the theory in policy. It is here that the matter of exogenous opportunity spreading becomes poignant, for boosting the holdings of the EOP-unjustifiably underendowed requires that we diminish holdings – either *present* or *future* holdings – of the EOP-unjustifiably overendowed. And that sets the stage for conflict, even after we have agreed upon a practicable range of unambiguously exogenous endowments and a fair and efficient asset-distribution mechanism per Parts III.C and D, above. For self-interest, on the parts both of those who stand to gain and of those who stand to lose through a reapportionment, has a way of clouding over the clarity with which we perceive even the most clear-cut of cases.

In order to deal with this problem, I once again endeavor to grapple in a bit more detail with the constraints within which our efforts to realize theory in policy must operate. As in the previous Subpart, those constraints are both psychological and legal in nature. But happily, we shall see, the endowment heuristics observed in IV.A offer *opportunity* as well as *constraint* here. We can exploit, that is, the present/future divide noted several subsections up. And the “endowment” which is our law offers a great deal of leeway as well.

2. Using the Heuristics Wisely

Qualifying the nouns “liberty,” “agency,” “autonomy” and “ownership” with the adjective “responsible” finds policy and legal expression in two practically related but distinct sides of the opportunity and resource allocation process. Call them the “endowing” (or “giving”) and the “delimiting” (or “taking”) sides. In so far as we circumscribe the prerogatives of ownership in keeping with the equal liberty or equal opportunity principles, we work from the “delimiting” side, and might superficially appear to be interfering with *liberty* or objectionably confiscating what is owned. In so far as we act collectively to promote wider ownership of

ethically exogenous resource and opportunity by more agent-citizens in keeping with the EOP, we work from the “endowing” side and might superficially appear to be interfering with *responsibility*, simply giving unearned “handouts”. When the “unearned handouts” appear to be subsidized by the (superficially) seeming “takings,” dangers to the perceived legitimacy of ownership-promoting action are at their most pronounced.

Public delimitation and promoting of ownership in keeping with the EOP will do well, then, as a strategic matter to take account of ownership psychology in defining and fostering responsible ownership, just as we noted at IV.A.2 that it should do in defining that which is owned. This is simply a matter of prudence, or, say, avoidable-cost avoidance. Law and policy that accommodate owner-psychology are law and policy that are likely to enjoy the widest possible and longest enduring public support. Such support or its lack are experienced at all “levels” of the policy-making and –implementing process – the public deliberating, legislating, agency-implementing, adjudicating, and private-conforming levels.

The principal feature of ownership-psychology that operates here has already been encountered. It is the endowment effect seen at IV.A to result in a perceived difference between “hard,” “accumulated” wealth on the one hand, “soft,” “merely entitled” or liability-rule-protected future “income” on the other.²²⁴ Moreover, when attention turns from ownership to responsible ownership, the endowment effect appears to interact in “feedback” fashion with the Part IV.A abstraction effect as well. Limitations upon the use and enjoyment or alienability of what one already owns, that is – removing sticks from the bundle, so to speak – is itself seen as a “taking” of the endowment.

The practical and strategic consequence of the endowment heuristic, both standing alone and in infusing the abstraction effect, is two-fold. And again it operates at both the “taking” and

the “endowing” sides of the opportunity-allocation process. From the “taking” side, limitations on future growth in or bundling of asset-holdings by those who are over-endowed by EOP lights are likely to face less opposition than “confiscations” of what already is held. From the “endowing” side, endowing that takes the form of “refraining from [perceived] taking,” or of conferring more abstraction rights, is likely to face less opposition – appear less like a “handout” or “giveaway” – than will endowing that looks on the surface more like an out and out grant. The policy-optimal strategy, then, in view of owner-psychology, will be the opposite of that earlier-noted least optimal – the “taking and giving”. It will be the “channeling of new [and perceivedly exogenous] wealth” to, and the “refraining from taking or restricting of wealth” from, those who by EOP lights are presently opportunity-underendowed.

A classic case of “refraining” in recent years is the earned income tax credit, or “EITC,” a program that has enjoyed widespread support even among “conservatives”.²²⁵ Its success stands in instructive contrast to the unpopularity of “negative income tax” (NIT) proposals of the past, surprisingly proposed by other “conservatives” of a Friedmanite cast, which were perceived more as “givings” than is EITC notwithstanding their orthodox finance-theoretic equivalence.²²⁶ Suggested cases of the “channeling of the new,” for their part, were noted at IV.B.1. And such programs are further elaborated in considerable detail in the sequel. For present purposes it suffices simply to flag these two strategies. To some extent, they already find expression, from time to time, both in law and in policy. But there is much more room here for policy-design, a fact which the sequel exploits.

We should take note of a manner of “paradox” here, however. Apart from the endowment heuristic, one other psychological effect wrought by asset-holding that we noted at IV.A.2 is its tendency to induce in the holder a tendency to view the future as more concrete –

the future itself, then, as more “endowed”. Might it be, then, that “taking from the future” rather than from what is already accumulated, per the previous paragraph, faces some manner of “natural limit” induced by the success of ownership-promotion itself?

Two considerations would seem to mitigate any such challenge as might arise in this connection. The first consideration is that the endowment effect still presumably would dominate – the “hardness” of accumulated *assets* would be greater than that of the “hardening” future – in light both (a) of those accumulated assets’ causal role in that “hardening” of the future and (b) of the greater degree of certainty, as a matter of law, of risk-attitude and perhaps metaphysics, attaching to what is had than to what is expected. The second consideration, dovetailing with the just noted matter of risk-attitude, is that the diminishing marginal utility of wealth also presumably would continue to operate here, meaning that prospective future gains would continue, as it were by definition, to be less salient to those who do not realize those gains than are presently possessed increments of the same amount.

Two other strategies are more incremental in nature than the “rechannelling” and “refraining” strategies. Again they fall one each on the “endowing” and “delimiting” sides of asset-allocation. On the endowing side, the strategy is to condition collective endowing of the underendowed upon recipients’ acting in some manner easily characterizable either as “earning” the perceived “handouts” or as being otherwise deserving of them on some ground explicitly tied to the endowed item’s ethical exogeneity. Requiring some manner of service – e.g., military or community service – as consideration for receipt then, or requiring that recipients use endowed funds only for education or medicine or productive investment, is a strategy that both should be and increasingly already can be seen at work. We find it, e.g., in IRA, IDA, proposed tax-favored “private health accounts,” “education accounts,” and other programs that the sequel

considers under the rubric of “Piecemeal Asset-Accumulation Programs”. In essence, the endowment itself is delimited in these cases in a manner commensurate with delimitation of the prerogatives of the already endowed by the “responsible” – hence, equal exogeneity, unequal endogeneity – qualifier.

On the “taking” side, the incremental approach is simply to refrain from “confiscating” *all* of the attributes of the overage held by the overendowed, and to skim what *is* skimmed from the overage off of the *less tactile* “sticks” in that “bundle” of rights which is ownership. Hence, one does not confiscate the property, but restricts its use or alienability, or taxes its use or alienability, or guaranties others some rights – easements – in its use. Familiar examples are the estate tax, the imposition of public access rights to the electromagnetic spectrum, and community reinvestment requirements placed upon depository institutions. This line of strategy takes us more squarely to the other, non-psychological parameters within which ownership-facilitation must operate. Those are the legal ones.

3. Using the Legal Endowment

As with “asset”-defining, ownership-delimiting subjects policy to some of the path-dependent features of American law. As it happens, however, path-dependence here proves rather helpful for purposes of ownership-promotion in vindication of the EOP. For the law appears to incorporate within its constitutional and property doctrines the same heuristics, rational or irrational, that characterize the psychology of ownership. That means that the law permits precisely those strategies of ownership-delimitation in keeping with responsible agency that were just observed in IV.B.2 to be prudent. Barring any radical departures from established precedent by an activist bench or extremist legislature, then, the facilitation of responsible ownership in keeping with the values of the American OS should be legally free to proceed along

the lines sketched just above in IV.B.2.

The standard forms that ownership-delimitation takes in American law are, of course, essentially of three types – restrictions on use and enjoyment, restrictions on alienability, and limited expropriation, the latter generally in the form of licensing fees or taxes.²²⁷ The courts impose few if any limitations upon legislatures' powers to employ these methods.

Restrictions on use and enjoyment are widely accepted, with some limited exceptions to be noted below. And few citizens seem to regard them as threatening the US's status as a property-protecting polity. That acceptance probably reflects implicit acceptance of the responsible ownership principle and with it recognition of the danger of illegitimate cost-externalization by owners.

Restrictions upon alienability similarly appear to be widely upheld by the courts and accepted by the public, though we'll see that there is sometimes more controversy here. Prohibitions on vote-selling, self-indenture, prostitution, organ-sale and child-sale are familiar, and scarcely controversial, cases in point. Few seem to regard them as serious threats to US status as a property-protective polity.²²⁸

One long-standing form of restriction upon asset-alienability in the US dovetails with the other principal form of ownership-delimitation, taxation: the taxation of one form of wealth-alienation itself. Like other forms of limited and incremental expropriation – e.g., property-, income-, and sales-taxation – estate and gift taxation has not tended to be seen as threatening the US's status as a property-protecting polity, although there are of course some fringe elements who continue to argue that the income tax, since its 1913 inception, has been “unconstitutional”. Indeed, estate-taxation and progressive income-taxation have widely been viewed and justified, in CL terms, as means of partly rectifying perceived injustices in the distribution of ethically

exogenous endowments. And they have been seen in CR terms as means of preserving the long-term health of the republic by preventing republic-threatening aggregations of financial and consequent political power. Such arguments are still regarded as mainstream. Taxation also has, of course, long enjoyed a special degree of deference by courts.²²⁹

Two relatively recent exceptions to these long American traditions of ownership-delimitation warrant special notice, however. The first such departure is the so-called “regulatory takings” doctrine, which represents a potential – though only a potential – threat to the incrementalist form of ownership-delimitation in keeping with the responsible ownership principle recommended above. The familiar foundational idea here is that since the Takings Clause of the Fifth Amendment to the US Constitution requires that public authorities award just compensation to those from whom property is fully expropriated pursuant to the power of eminent domain, regulations which have the effect of merely diminishing the *market value* of property – public access rights or easements, for example – should be regarded as *partial* takings *also* giving rise to a duty to compensate at market value. Initially the courts were less than hospitable to this orthodox-financially fair argument, perhaps again revealing that the law is more concerned for “hard” accumulated assets than for “speculative” future value, or perhaps simply recognizing that the underlying assets – the airwaves, access to the ocean, etc. – are ethically exogenous endowments belonging residually to the public. But in recent years some courts have shown greater receptivity to the doctrine.²³⁰

That the argument is orthodox-financially fair of course does not entail that the regulatory takings doctrine promotes fairness. For example, applied so as to dictate “compensation” to one who purchases land in full knowledge either that the underlying asset is unambiguously ethically exogenous hence public, or that a regulation is impending, and who thus presumptively

purchases the land at a discount in view of that common knowledge, the regulatory takings doctrine would in fact dictate a “giving”.

But the real ethical threat posed by the regulatory takings doctrine is distinct from that. The doctrine as currently articulated and evolved by the courts does not seem to have any purchase on the sorts of ownership-delimitation strategies in keeping with the EOP advocated in the previous few Subparts. The principle underlying the doctrine, however, which is simply that, heuristics notwithstanding, an incremental delimitation of ownership is a diminishment of ownership, is of course generalizable. And it *has* been generalized by some advocates, even to the point of declaring many forms of taxation itself to constitute unconstitutional “takings.”²³¹ And here the problem is that what is trivially true as a matter of rudimentary finance nonetheless is deeply out of synch with the American value of equal opportunity. For it entirely – entirely – ignores the ethical exogeneity, fairness or otherwise of the *baseline* wealth-distribution from which taxation *proceeds*.²³² Even taxation of what all would agree to be an overage held by one person by way of ethically exogenous opportunity endowment therefore is viewed, by this argument, as prohibited by the US Constitution. The polity is thus constitutionally debarred from living up to its own equal opportunity ideals, themselves enshrined in the Constitution.²³³ That means that the longstanding American tradition of valuing and vindicating equal opportunity is inimical to America’s own Constitution. Even to state this proposition is, of course, in effect to refute it. And happily the courts have agreed. But the argument has gained some purchase in some fringe policy circles, from who also has emanated the second rudimentary departure from the American tradition of responsible ownership.

The second exception to the American tradition of responsible ownership has made its appearance not in the courts, but in the legislatures and in policy debates. Both for this reason

and by virtue of its even shakier ethical foundations, this movement is more easily dispatched than was the first. It is the movement, on the part of some self-described “conservative” pundits and politicians, to curtail or even eliminate estate and gift taxation, which they label “death” taxation, and to lessen the degree of progressivity found in the income tax – a change that they call “simplification”. This movement simply has no basis in fairness or in any other American value – CR, CL or PC. It is nothing more than a naked grab for the long end of ethically exogenous opportunity inequity by those who have fared well in the birth lottery, i.e., who have benefited by injustice. By exploiting the degree to which the US now falls short of its original republican, deliberative democratic ideals – deciding matters of public import as it currently does by crude Pavlovian association via relentlessly repetitive and reinforcing televisual images, slogans and soundbites – the proponents of these changes deceive those who are too time-taxed by their wage-occupations or numbed by vulgar Imperial Rome-reminiscent entertainments to conduct their own investigations, into thinking that the changes will enable these same people to “keep [their] own money.”²³⁴ And so they enjoy some success in the short term. But as publicly provided public goods are scaled-back in the wake of consequent public fiscal deficits, it appears unlikely that this conjure will continue to succeed. It is nonetheless up to all of us, however, to ensure that it does not. That takes us to the present Article’s conclusion and sequel.

V. CONCLUSION: FROM THEORETIC COHERENCE TO IMPLEMENTARY COHERENCE

This Article has covered a fair bit of territory, though more remains to be covered before a coherent American OS can be implemented. We have identified three political traditions – three broad national self-understandings – that mutually exhaust the normative space of American public policy-making. We have identified a broad intersection of overlapping consensus among the three traditions, at least where ownership is concerned, synthesizing one self-understanding that affords a normative conceptual coherence to our coming efforts to realize

an “ownership society”. And we have translated this self-understanding – the efficient equal-opportunity republic, constituted by agent-citizens endowed with equal opportunity, pursuing happiness responsibly and freely – into distinctively American legal and psychological terms of ownership and ownership-promotion.

What remains to be done is to translate those legal and psychological terms of ownership and ownership-promotion, in turn, into detailed programs – programs that promote and programs that protect ownership in keeping both (a) with the values of the EEOR, and (b) with the law and ownership psychology of American citizens. Such is the task of the present Article’s sequel. That sequel first reinterprets, under the aspect of the “core” vision distilled in Parts III and IV of the present Article, past “ownership society” programs and proposals. It shows a uniform ideological and financial engineering trajectory at work in all of them – a trajectory that is more readily distilled now that the present Article’s work is completed. The sequel then works to consummate that trajectory. It does so by forging a cohesive package of proposals that is informed by the successes and failures of past programs and proposals as interpreted under the aspect of the theory worked out in the present Article. It is a package that makes strategic use of the behavioral finance (endowment effect) and derivative finance (abstraction effect) lessons highlighted in Part IV of the present Article, as well as of securitization finance lessons highlighted in the historical portions of the sequel itself. The upshot is a fully specified and designed American OS that makes liberal use of the market mechanism described above in Part III and amounts to a practical realization of the EEOR sketched in that same Part.

Both in summation of the present Article and in anticipation of the next, it is perhaps worth making explicit one fact that till now has been largely implicit. It is that an “ownership society” is not simply a society in which some people own. If that were the case, we would inhabit an OS already, and there would be no purpose save the purposes of chicanery in holding out “the ownership society” as an ideal. An ownership society is not a society in which we are all “on our own”. That would be, among other things, a society without law. Indeed it would indeed not be a “society” at all. Nor is an ownership society a society in which armed force

labeled public acts solely to protect the earlier expropriations exacted by select sectional interests that are private. That would be a banana republic. An American OS or EEOR, rather, is a community of citizen-agents who act jointly, under the rule of law, to promote and to protect the independence, equal liberties and equal opportunities, as manifest in ownership rights, of one another. Precisely that vision, we have seen, is what animates our three traditions of self-understanding, at least where ownership is concerned. And precisely that vision, we shall see, is what inchoately has animated American OS programs and proposals till now. That view now will animate, more choately, coherently and self-consciously than before, that package of programs laid out and proposed in the sequel as well.

ENDNOTES

¹ See Cameron W. Barr, *Vanguard of Brood X Marks Its Spot: All Over, Cicadas Come of Age, Right on Schedule*, WASH. POST, May 11, 2004, at A1. From time to time, however – particularly during periods of perceived national crisis – ownership-promoting proposals have grown noisy if nonetheless vague. See Todd S. Purdum, *The President's Speech Focuses on Ideals, Not Details*, N. Y. TIMES, Jan. 21, 2005, at A1; Kenneth T. Walsh, *Let the Horse Trading Begin*, U.S. NEWS & WORLD REP., Feb. 21, 2005, at 32.

² See JEFF GATES, *THE OWNERSHIP SOLUTION: TOWARD A SHARED CAPITALISM FOR THE 21ST CENTURY* (1998); also JEFF GATES, *DEMOCRACY AT RISK: RESCUING MAIN STREET FROM WALL STREET* (2001).

³ See the present Article's sequel: Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means* (working draft on file with author).

⁴ See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

⁵ See MICHAEL SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* (1991); and *ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP* (Thomas M. Shapiro & Edward N. Wolff eds., 2001). Also RICHARD FREEMAN, *THE NEW INEQUALITY: CREATING SOLUTIONS FOR POOR AMERICA* (1999).

⁶ Perhaps such fragmented appeal and valence account even for the idea's merely flickering appearance in one seminal work of political philosophy: See JOHN RAWLS, *A THEORY OF JUSTICE* 242, 245 (1999).

⁷ The Jeffersonian/Hamilton clash figures into the discussion *infra*, Part II.A as well as in this Article's sequel. The idea here, in brief, is that while Jeffersonians favored a republic of freeholders of agricultural assets and Hamiltonians a commercial and industrialized society wrought in part through modalities of public finance, it now appears possible, in a way that it was not before, financially to engineer a republic of freeholders of *commercial and industrial* assets.

⁸ In the legal literature, see, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); Frank Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). See also other articles in *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1453-1723 (1988). Recent philosophic work with a republican cast includes PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); PHILIP PETTIT, *THE COMMON MIND: AN ESSAY ON PSYCHOLOGY, SOCIETY, AND POLITICS* (1993); MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* (1994); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). See also cites to the burgeoning literature on "deliberative democracy," *infra* note 21.

⁹ See generally J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) ("MOMENT"); J.G.A. POCOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 80-147 (1960); J.G.A. POCOCK, *VIRTUE, COMMERCE AND HISTORY* (1985). An entertaining recent iteration of this idealization is the Ridley Scott film, *Gladiator*.

¹⁰ See, e.g., POLYBIUS, *ROMAN HISTORIES* (W.R. Paton trans. & ed., 1960); TACITUS, *ANNALS* (R.M. Ogilvie trans. & ed., 1980); VIRGIL, *ECLOGUES, GEORGICS* (G.P. Goold trans. & ed., 1999).

¹¹ See POCOCK, *supra* note 9 at 83-330. See generally NICCOLO MACHIAVELLI, *FLORENTINE HISTORIES* (Laura F. Banfield & Harvey C. Mansfield, Jr. trans. 1988); NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY* (Harvey C. Mansfield & Nathan Tarcov trans., 1996); FRANCESCO GUICCIARDINI, *DIALOGUE ON THE GOVERNMENT OF FLORENCE* (Alison Brown trans. & ed., 1994); FRANCESCO GUICCIARDINI, *THE HISTORY OF ITALY* (Sidney Alexander trans. & ed., 1969 [1561]). Also HARVEY C. MANSFIELD, *MACHIAVELLI'S VIRTUE* (1996) ("VIRTUE"); and MACHIAVELLI AND REPUBLICANISM (Gisela Bock, Quentin Skinner & Maurizio Viroli eds., 1990).

¹² See sources cited *infra*, note 14. On the centralization of political and financial power, see, e.g., NIAL FERGUSON, *THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700-2000* (2001); JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783* (1988).

¹³ Juries, in this sense, of course constituted a form of partial self-government.

¹⁴ See HENRY ST. JOHN, VISCOUNT BOLINGBROKE, *POLITICAL WRITINGS* (David Armitage ed., 1997); JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA [1656] and A SYSTEM OF POLITICS [1700]* (J.G.A. Pocock ed., 1992). Also ISAAC KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE* (1968); JOYCE OLDHAM APPLEBY, *ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND* (1978); J.C.D. CLARK, *ENGLISH SOCIETY 1660-1832: RELIGION, IDEOLOGY AND POLITICS DURING THE ANCIEN RÉGIME* (2d. ed. 2000); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1997). See generally POCOCK, *MOMENT*, *supra* note 8 at 333-505.

¹⁵ Addison, Gordon, Sidney and Trenchard probably best known among them. See JOSEPH ADDISON, *CATO* (William-Alen Landes ed., 1996); ALGERNON SIDNEY, *COURT MAXIMS* (Eco Haitisma-Mulier & Ronald Janse trans. & ed., 1996); JOHN TRENCHARD & THOMAS GORDON, *THE INDEPENDENT WHIG & CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* (Ronald Hamowy ed., 1995).

¹⁶ On self-conception in this context, see, e.g., STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC 1788-1800* 37(1994) (“The sum of what [George Washington] was could be plainly seen in the appearance he made and the acts he performed. And by the same token, ‘reputation’ had as much to do with his own judgment of himself as with that of his community.”)

¹⁷ The prominence of the name “Brutus” among the writings of the “Antifederalists” who opposed ratification of the U.S. Constitution, for example, is not fortuitous. As slayer of the Roman Republic-desecrator Julius Caesar, Brutus, like Cato, enjoyed iconic republican status. See generally HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981); CECILIA M. KENYON, *THE ANTIFEDERALISTS* (1966); and sources cited *infra*, note 18.

¹⁸ See generally POCOCK, *MOMENT*, *supra* note 9 at 506-52; GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* 1-124, 391-467 (1969) (“CREATION”); GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 95-225 (1991); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1-54 (1967) (“IDEOLOGICAL ORIGINS”); BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* (1970); JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); ELKINS & MCKITTRICK, *supra* NOTE 16. See also the nuanced accounts presented by DOUGLAS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* (1964); JOYCE OLDHAM APPLEBY, *ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND* (1978); JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992).

¹⁹ See BAILYN, *IDEOLOGICAL ORIGINS*, *id.* at 55-93; WOOD, *CREATION*, *id.* at 1-83.

²⁰ See POCOCK, *supra* note 9 at 462-505; WOOD, *CREATION*, *supra* note 18 at 46-65. On the importance of deliberation and community to contemporary CR, the title of one recent republican monograph is suggestive. See Pettit, *COMMON MIND*, *supra* note 8. The literature on “deliberative democracy,” its self- and society-constitutive roles, its political virtues and vices has grown prodigiously in recent years. See, e.g., *DEBATING DELIBERATIVE DEMOCRACY* (James S. Fishkin & Peter Laslett eds., 2003); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1998); *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); CARLOS NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1990). See also cites to SUNSTEIN, *infra* note 65. An interesting, if modest proposal aimed at bringing a greater degree of reasoned deliberation back to American electoral politics is BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004). In a similar though more ambitious vein, see ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004).

Probably the most influential precursor of and contributor to the revived interest in deliberative politics and rationality is Jürgen Habermas. *See, e.g.*, JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY* (1985); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (1985); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996).

²¹ *See, e.g.*, BOLINGBROKE, *supra* note 14 at 83-86; KRAMNICK, *supra* note 14 at 114-17; HARRINGTON, *supra* note 14 at 27-56; POCOCK, *supra* note 9 at 385-87, 539-45.

²² There is of course an anticipation here of the fictitious “social contract” more commonly associated with the Classical Liberal (CL) tradition adumbrated in the next Subpart. I suggest below that this is probably no accident.

²³ *See* William H. Simon, *Social-Republican Property*, 38 *UCLA L. REV.* 1335, 1343 (1991) (Quoting 19th Century French Republican Anne Robert Jacques Turgot: “It is the possession of land . . . which, linking the possessor to the State, constitutes true citizenship.”)

²⁴ *See* note 17, *supra*. Also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 18 at 23-26; WOOD, *CREATION*, *supra* note 18 at 35-36; POCOCK, *supra* note 9 at 52-54.

²⁵ There is an alternative take on Caesar, wherein he figures as the egalitarian hero. *See, e.g.*, MICHAEL PARENTI, *THE ASSASSINATION OF JULIUS CAESAR: A PEOPLE’S HISTORY OF ANCIENT ROME* (2003).

²⁶ The allusion is to Huey Long, the Louisiana Governor and presidential candidate whose egalitarian depression-era “Share Our Wealth” campaign so worried Roosevelt (and others) during the lead-up to the 1936 election. *See* FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 241-57 (1991); HUEY P. LONG, *EVERY MAN A KING: THE AUTOBIOGRAPHY OF HUEY P. LONG* (Harry Williams ed., 1996).

²⁷ *See, e.g.*, DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970); SEAN WILENTZ, *CHANTS DEMOCRATIQUES: NEW YORK AND THE RISE OF THE AMERICAN WORKING CLASS 1788-1850* (1984). Also ELKINS & MCKITTRICK, *supra* note 16 at 750-54.

²⁸ *See, e.g.*, ELKINS & MCKITTRICK, *supra* note 16 at 37; *see also* JOYCE APPLEBY, *NEW SOCIAL ORDER*, *supra* note 18 at 125 (discussing the “elitism” of many Federalist republicans).

²⁹ *See, e.g.*, ELKINS & MCKITTRICK, *supra* note 16 at 37.

³⁰ *Id.*

³¹ *See* WOOD, *CREATION*, *supra* note 18 at 70-75 for more on CR ambivalence over equality. *See also* Simon, *supra* note 22 at 1347-48 (“Historically, republicans have been ambivalent as to whether just distribution of property should be treated as a subject of politics or a prerequisite to it.”) Simon notes one common form of resolution: “A frequent republican strategy of compromise – common to ancient Rome, revolutionary France and America, and 19th Century America (as reflected in the minor land reform efforts of the Reconstruction and the Homestead Act) – has been to focus efforts to achieve economic equality on the distribution of land conquered from outsiders or confiscated from the losing side in civil wars.” *Id.* at 1348. This strategy reappears at Part IV, *infra*, as well as in the sequel.

³² *See* BERNARD BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION* (1975). Also BAILYN, *supra* note 18 at 1-54; WOOD, *CREATION*, *supra* note 18 at 1-124; WOOD, *RADICALISM*, *supra* note 18; POCOCK, *MOMENT*, *supra* note 9.

³³ *See, e.g.*, LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230-57 (1973); MORTON HORWITZ, *THE*

TRANSFORMATION OF AMERICAN LAW, 1788-1860 31-62 (1977); C. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1964).

³⁴ See, of course, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES ([1913] 1986). Also FORREST R. MACDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1992); ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION (2003).

³⁵ Those who wished to restrict the franchise to landowners justified their positions by reference to the need for voters to hold “stakes” in the republic in order to vote responsibly. See, e.g., MACDONALD, *id.* at 358-99. Many of the same people advocated easy land-credit policies in order to ensure that all who wished to work could acquire such stakes. See Hockett, *supra* note 3. Such people can be fairly described as both egalitarian and franchise-restricting.

³⁶ See MCCOY, *supra* note 27 at 185-208.

³⁷ *Id.* at 76-119.

³⁸ ELKINS & MCKITTRICK, *supra* note 16 at 133-62.

³⁹ *Id.* at 375-449; MCCOY, *supra* note 27 at 75-124.

⁴⁰ *Id.*

⁴¹ See ELKINS & MCKITTRICK, *supra* note 16 at 133-62, 357-302.

⁴² *Id.* at 750.

⁴³ See generally PAUL K. CONKIN, PROPHETS OF PROSPERITY: AMERICA’S FIRST POLITICAL ECONOMISTS 136-255 (1980). See also RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 (2000).

⁴⁴ See generally RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877 (1991).

⁴⁵ See CONKIN, *supra* note 43; BENSEL, *id.*

⁴⁶ *Id.*

⁴⁷ *Id.* On the significance of the source of the lands, see note 31, *supra*. Also Parts IV.A.3 & IV.B.2, *infra*.

⁴⁸ See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970); ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR (1980); BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA (1989). See also WILENTZ, *supra* note 27; CONKIN, *supra* note 43; MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF PUBLIC IDEOLOGY 168-249 (1996).

⁴⁹ *Id.* For more on how the ideology of the cooperative movement finds expression in enterprise-organizational form, see HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 66-226 (1996). For contemporary defenses and further economic analyses of cooperative and worker-owned firms, see, e.g., DAVID P. ELLERMAN, THE DEMOCRATIC WORKER-OWNED FIRM (1990); JAROSLAV VANEK, THE GENERAL THEORY OF LABOR-MANAGED ECONOMIES (1970).

⁵⁰ See sources cited *supra*, note 48.

⁵¹ See Abraham Lincoln, *Speech at Cooper Institute, New York City, Feb. 27, 1860*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865 111-29 (Don E. Fehrenbacher ed., 1989). Some Southern political economists, in an irony attributable to the strange bedfellow-making wrought by political disputation, found common cause with Northern advocates of free labor in their defenses of the life-conditions of southern chattel slaves as compared to those of northern wage laborers. See CONKIN, *supra* note 42 at 135-67. It is perhaps partly for this very reason that more purist northern abolitionists, anxious to broaden northern opposition to chattel slavery as widely as possible, sought to decouple chattel slavery from “wage slavery” as a national issue.

⁵² See sources cited *supra*, note 48.

⁵³ In the jargon of the time, “natural” business concentrations were integrated firms or conglomerates whose size could be accounted for on the basis of increasing returns, network effects or scale economies rather than collusion or predation alone.

⁵⁴ The thought was that while horizontal integration might result in higher prices, the gains in dispersed ownership that it facilitated were politically worth that cost. See generally THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS AND ALFRED E. KAHN 80-142 (1986).

⁵⁵ *Id.*

⁵⁶ See, e.g., Hubert Humphrey, Senate Debate, Cong. Rec., 82nd Cong., 2d Sess., 98 (July 1-2, 1952), 8741m 8823 (“Do we want an America where ... all we have is catalogue houses? ... Or do we want an America where there are thousands upon thousands of small entrepreneurs, independent businessmen, and landholders who can stand on their own feet and talk back to their government or to anyone else? ... [The small enterprise] produces good citizens, and good citizens are the only hope of freedom and democracy. So we pay a price for it. I am willing to pay that price.”); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 293, 315-16, 344 (1962) (“[W]e cannot fail to recognize Congress’s desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional high costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 540-43 (1973) (Justice Douglas, concurring in part) (“Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. ... A nation of clerks is anathema to the American antitrust dream.”).

⁵⁷ See generally JOEL SCHWARTZ, FIGHTING POVERTY WITH VIRTUE: MORAL REFORM AND AMERICA’S URBAN POOR, 1825-2000 (2000); and ALAN F. ZUNDEL, DECLARATIONS OF DEPENDENCY: THE CIVIC REPUBLICAN TRADITION IN UNITED STATES POVERTY POLICY (2000).

⁵⁸ See sources cited *supra*, note 20.

⁵⁹ See, e.g., ROBERT A. BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1993); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Carrie Mekel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

⁶⁰ See, e.g., JOHN MCCAIN, WORTH FIGHTING FOR (2002).

⁶¹ U.S. Const., art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”)

⁶² See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (“Madisonian First

Amendment” intended to foster a “deliberative democracy.”); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 156-319 (1993) (same). Also sources cited *supra*, note 20 – ACKERMAN & FISHKIN in particular.

⁶³ See Hockett, *supra* note 3.

⁶⁴ See, classically, LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION IN AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); also STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM AND THE AMERICAN REVOLUTION* (1990); JOHN PATRICK DIGGINGS, *THE LOST SOUL OF AMERICAN POLITICS* (1984); KRAMNICK, *supra* note 18; APPLEBY, *LIBERALISM AND REPUBLICANISM*, *supra* note 18.

⁶⁵ See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); NATURAL LAW, *LIBERALISM & MORALITY* (Robert George ed., 1996); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); SANDEL, *supra* note 8; ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (1990); JEREMY WALDRON, *LIBERAL RIGHTS* (1993).

⁶⁶ The problematic relations between CL and today’s pejorative use of “liberal” is mirrored by problematic relations between classical (Burkean) conservatism and today’s “conservatism”. See, e.g., KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* (2003); MICHAEL LIND, *UP FROM CONSERVATISM* (1997); GEORGE F. WILL, *STATECRAFT AS SOULCRAFT* (1986); PETER R. E. VIREECK, *CONSERVATISM REVISITED* (1978).

⁶⁷ See SANDEL, *supra* note 8 on this point.

⁶⁸ See sources cited *supra*, note 65.

⁶⁹ See, of course, *A Declaration by the Representatives of the United States of America, in General Congress Assembled, July 4, 1776*, in THOMAS JEFFERSON: *WRITINGS* 19 (Martin E. Segal ed., 1984); also JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Peter Laslett ed., 1960).

⁷⁰ See JOHN RAWLS, *A THEORY OF JUSTICE* 79-80, 358-65 (1999).

⁷¹ See, e.g., *id.* at 171-227 on “four stage sequence” for attainment of system of “equal liberty”.

⁷² Particularly illuminating mappings of the boundaries of self, responsibility and externality are Samuel Scheffler, *Responsibility, Reactive Attitudes and Liberalism in Philosophy and Politics*, 21 *PHIL. & PUB. AFF.* 299 (1992); Arthur Ripstein, *Equality, Luck, and Responsibility*, 23 *PHIL. & PUB. AFF.* 3 (1994); David O. Brink, *Utilitarian Morality and the Personal Point of View*, 83 *J. PHIL.* 417 (1986).

⁷³ Billie Holiday’s formulation is particularly compelling: “Ain’t nobody’s business if I do.” Compare to the CR counterpart referenced at Part II.A: “A man’s home [though only his home] is his castle.”)

⁷⁴ See Part III.C, *infra*. Also Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 *CARDOZO L. REV.* 101 (2005) (hereinafter “*Deep Grammar*”). The first liberal justice-theorist to have called attention to the utility of markets as metrics for purposes of just distribution appears to have been Dworkin. See RONALD DWORIN, *SOVEREIGN VIRTUE* 65-119 (2000). See also, of course, F. A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1948).

⁷⁵ See Parts III.C & D, *infra*; and Hockett, *id.*

⁷⁶ See, e.g., RAWLS, *supra* note 70 at 347-50.

⁷⁷ By “exogenous” here I mean what Part III.B, *infra*, defines as “ethically exogenous.” Roughly, that which is ethically exogenous is that for the holding or non-holding of which one is not responsible. Holdings of

such items are “windfalls,” not holding them “hard luck.”

⁷⁸ Those commonly classed as egalitarian liberals include ACKERMAN, *supra* note 65; DWORKIN, *supra* note 74; and RAWLS, *supra* note 70. There are of course many others. The best-known libertarian liberal is Nozick. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). Again there are others, including, on some understandings of “libertarian,” Epstein and Fried. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1992); CHARLES FRIED, RIGHT AND WRONG (1978).

⁷⁹ Our written constitution and constitutional traditions themselves appear to have sprung from the contracts – or “compacts” – that were the early colonial charters. See, e.g., KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 10-23 (1991).

⁸⁰ See sources cited *supra*, note 64.

⁸¹ *Id.* See also sources cited *supra*, note 69.

⁸² See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506-513 (George Lawrence trans., 1969) (1848).

⁸³ See, e.g., SANDEL, *supra* note 8; GLENDON, *supra* note 59; ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001); JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST AND COMMITMENT IN AMERICA TODAY (2000).

⁸⁴ See, e.g., ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

⁸⁵ See *Schenck v. United States*, 249 U.S. 47, 50 (1919) (Justice Holmes) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic.”)

⁸⁶ See, e.g., KENT GREENAWALT, FIGHTING WORDS (1995); SUNSTEIN, sources cited *supra* note 62.

⁸⁷ See generally EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (1996).

⁸⁸ *Lochner v. New York*, 198 U.S. 45 (1905). See also PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

⁸⁹ See, e.g., *Hegeman Farms Corp. V. Baldwin*, 293 U.S. 163 (1934); *Schechter Poultry Corp. V. United States*, 295 U.S. 495 (1935); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See generally JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2D ED. 1998); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

⁹⁰ See generally WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY 1932-1968 (1970); KEYNES, *supra* note 86; also SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA (1998).

⁹¹ See KEYNES, *id.*, on the oddity.

⁹² *Roe v. Wade*, 410 U.S. 113 (1973).

⁹³ See, e.g., KEYNES, *supra* note 87; RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT

ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM (1994); LAWRENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1992); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1989).

⁹⁴ One argument in favor of campaign finance regulation, for example, distinct from the egalitarian-liberal (“level the playing field”) argument set against the libertarian-liberal (“more speech, not less”), is the more republican-ringing “foster deliberation by limiting sound bites” argument. *See, e.g.*, SUNSTEIN, *supra* note 62. Likewise, one finds not only CL (child’s right to life) arguments against CL (mother’s right to make reproductive choices) arguments, but some more CR-ringing (“culture of life”) arguments as well. *See* GLENDON, *id.* One might say, paraphrasing Jefferson again, “we are all classical liberals, we are all civic republicans.”

⁹⁵ *See* Part IV.B.3, *infra*.

⁹⁶ *See generally* PRAGMATISM: A READER (Louis Menand ed., 1997); *and*, somewhat more entertainingly, LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001).

⁹⁷ *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65-159 (1997); HORWITZ, *supra* note 33 at 1-30; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992); 169-212. Probably the most oft-quoted characterization of American law, Holmes’ “The life of the law has not been logic, but experience,” is both a classic expression of the pragmatic attitude and a perfect exemplar of the ultimate emptiness of pragmatism until it is filled-in with a criterion of value. On the need for such a criterion, *see infra*, this Subpart. The Holmesian quote of course is from Oliver W. Holmes, *The Path of the Law*, in OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 167 (1920). On Holmes’s relations with the early American pragmatists, *see* MENAND, *id.*

⁹⁸ For an articulation and defense of a contemporary legal pragmatism, *see* RICHARD A. POSNER, OVERCOMING LAW (1995). For celebrations of the Supreme Court’s own putative pragmatism, *see, e.g.*, JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995); BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990).

⁹⁹ *See* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, excerpted in JOHN STUART MILL & JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS 86-89 (Alan Ryan ed., 1987) (1789)

¹⁰⁰ *See, e.g.*, John Stuart Mill, *Utilitarianism*, in MILL & BENTHAM, UTILITARIANISM, *id.*, at 335-36; HENRY SIDGWICK, METHODS OF ETHICS 416f. (7th ed. 1907); R. M. HARE, FREEDOM & REASON 112-36 (1963).

¹⁰¹ *See* VILFREDO PARETO, THE MIND AND SOCIETY, VOL. 4: THE GENERAL FORM OF SOCIETY 1459-74 (Andrew Bongiorno et al. trans., 1935) (1907) (especially pages 1465 to 1469); VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (Ann.S. Schwier trans., 1971) (1906). Pareto-efficiency is considered at Part III.D, *infra*.

¹⁰² *See* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1952); ABBA P. LERNER, THE ECONOMICS OF CONTROL (1944); J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971); J.A. Mirrlees, *The Theory of Optimal Taxation*, in HANDBOOK OF MATHEMATICAL ECONOMICS (K.J. Arrow & M. Intriligator eds., 1981).

¹⁰³ *See* Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); John Hicks, *The Valuation of Social Income*, 7 ECONOMICA 105 (1940).

¹⁰⁴ More on this *infra*, Part III.D.

¹⁰⁵ *See* Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941); *also* HAL R. VARIAN, MICROECONOMIC ANALYSIS 405-07 (3d ed. 1992).

¹⁰⁶ *See* Richard Posner, *Utilitarianism, Economics and Social Theory*, 8 J. LEG. STUD. 487 (1980); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV.

487 (1980), in which Posner acknowledges that “wealth-maximization” is policy made pursuant to the Kaldor-Hicks criterion.

¹⁰⁷ See, e.g., Posner, *Ethical Basis*, *id.* The veiled-consent argument has of course appeared (rather earlier) in the writings of utility-maximizers as well. See John Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955); John Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953); William S. Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q. J. ECON. 507 (1960).

¹⁰⁸ “Prioritarian” policies are such as would benefit the perceivedly worst-off. Rawls’s “difference principle” is prioritarian in this sense, as are the US Internal Revenue Code and the Social Security system. See generally Derek Parfit, *Equality or Priority?*, The Lindley Lecture, University of Kansas, 1991. Rawls’s “difference principle,” pursuant to which only such departures from inequality of holdings as inure to the benefit of the “worst off” are to be permitted, is elaborated in RAWLS, *supra* note 70 at 65-73.

¹⁰⁹ The variable-filling approach to theory-mapping also figures into Hockett, *Deep Grammar*, *supra* note 74.

¹¹⁰ In this connection, the recent work of historian James Block is both interesting and corroborative. See JAMES E. BLOCK, *A NATION OF AGENTS: THE AMERICAN PATH TO A MODERN SELF AND SOCIETY* (2002). See also Hockett, *id.* at 138-41 (Construal of “distribuees” as agents said to be the modern trend in theories of distributive justice). We find the perceived value of agency reflected in popular culture via the increasingly common, though strictly speaking redundant, notion of the “free agent.” That term of course figures frequently in descriptions of sports figures, but also, increasingly, in the popular business literature. See, e.g., DANIEL H. PINK, *FREE AGENT NATION: THE FUTURE OF WORKING FOR YOURSELF* (2002).

¹¹¹ See, in this connection, BERNARD WILLIAMS, *SHAME AND NECESSITY* (1993); Peter F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962). Also Scheffler, *supra* note 71.

¹¹² See Hockett, *Deep Grammar*, *supra* note 74. Also Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion*, 37 METAPHIL. 93 (2005); DWORKIN, *supra* note 74 at 285-303; Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L. J. 2291 (2003).

¹¹³ Utilitarianism, on the other hand, at least in its non-veiled, non-Harsanyian form, would contradict it by treating citizens as patients or addicts. See Hockett, *Deep Grammar*, *supra* note 74 at 191-205; DWORKIN, *supra* note 74 at 11-64 (“addicts”). But PC merely borrows a maximizing imperative from Utilitarianism; it is not coextensive with it.

¹¹⁴ Part IV, *infra*, is devoted to the more precise legal contours and psychological significance of ownership in the EEOR or American OS.

¹¹⁵ “Libertarianism,” as articulated without regard to the pattern of exogenous endowments by such as NOZICK and EPSTEIN, *supra* note 78, is libertinism – irresponsible liberalism, attending to *liberty* while disregarding fully *responsible* liberty.

¹¹⁶ Nor of course does one respect one’s self, or act responsibly toward oneself or toward others, in so far as he does not honor his own equal right to equal opportunity as well.

¹¹⁷ See Hockett, *Deep Grammar*, *supra* note 74 at 155-90, for more on the trend among those there labeled “responsibility-tracing” justice-theorists to alight upon functional equivalents to this divide. Those functional equivalents take the form of (a) particular characterizations of distribuenda – that which is distributed – (b) particular characterizations of the appropriate distribution principle, or (c) both.

¹¹⁸ I adopt the term “ratification” here from the law for what I think will be obvious reasons. The choice versus ratification controversy is rooted in the perceived disrespect of agency entailed by not holding someone responsible for such conditions as she might not have chosen but with which she nonetheless identifies. Forcing an equal distribution upon an ascetically minded cripple, for example, notwithstanding his belief in the virtue of a life of self-denial, is thought by some to be disrespectful of the ascetic cripple’s agency even if he did not choose his handicap and even if his belief in the virtue of self-denial be in the nature of a “virtue made of necessity” – a convenient rationalization or endogenous preference. Dworkin and Scanlon probably are the best known adherents to what I am calling the ratification view. See, e.g., DWORKIN, *supra* note 74 at 285-303; T. M. Scanlon, *The Significance of Choice*, in 8 THE TANNER LECTURES ON HUMAN VALUES 149 (Sterling McMurrin ed., 1988); T. M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 665 (1975). Well-known anti-ratificationists include G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989); and AMARTYA SEN, THE STANDARD OF LIVING 11 (1987). We need not resolve the choice versus ratification dispute to get on with the EEOR. For one thing, the problem is restricted in scope. For another thing, it seems fair enough simply to regard ratification in most circumstances as itself a choice; certainly that would seem to be the view most in harmony with the construal of citizens as agents, though we might make allowances in marginal cases similar to those we make for addiction. For more on endogenous preferences, on which there is a vast amount of literature but about which I shall say no more in this Article, see, e.g., Hockett, *Deep Grammar*, *supra* note 74; GARY BECKER, ACCOUNTING FOR TASTES (1996); JON ELSTER, ULYSSES AND THE SIRENS (1979); JON ELSTER, SOUR GRAPES (1983); ROBERT FRANK, LUXURY FEVER (1999); DAVID GEORGE, PREFERENCE POLLUTION (2001).

¹¹⁹ The Sorites problem is the well-known conundrum concerning how many grains of sand it takes to constitute a beach, how few hairs Socrates must have on his pate before he will be considered bald, etc. Logicians have by now developed sophisticated techniques for handling predicates with vague contours, including so-called “fuzzy logics,” which now are proving fruitful in artificial intelligence and other cybernetic fields. For more on the usability of such non-standard logics for purposes of welfare economics and justice theory, see Robert Hockett, *Primary Goods, Interpersonal Comparisons and Nonstandard Logics* (unpublished manuscript, under revision for ECON. & PHIL.).

¹²⁰ There is significant empirical corroboration of this claim itself. See, e.g., NORMAN FROHLICH & JOE A. OPPENHEIMER, CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY (1992); TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997); ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE (1994); PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS (Barbara A. Mellers & Jonathan Baron eds., 1993); Kjell Törnblom, *The Social Psychology of Distributive Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES 177 (Klaus R. Scherer ed., 1992).

¹²¹ We can simply bracket those on which we disagree. A similar strategy is employed, to helpful effect, by John Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFF. 146 (1993); also JOHN E. ROEMER, EQUALITY OF OPPORTUNITY (1998).

¹²² *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that inequalities in school financing traceable to wealth disparities among municipalities, hence to differential wealths of the families domiciled in different school districts, does not violate Equal Protection Clause of 14th Amendment to the US Const.).

¹²³ This is not to say that such is the motivation prompting higher education expenditures in wealthier school districts. Moreover, as argued at Part III.B, the EOP does not condone equalization by “leveling-down.”

¹²⁴ Part III.D explains why this is the only ethically intelligible form of maximization.

¹²⁵ This value bears a venerable pedigree in the American self-understanding, as expressed, e.g., in the image of the Westward travelers’ allowing the old, the very young and the infirm to ride in the wagons while the able-bodied walked beside.

¹²⁶ The “rescue policy” idea figures in DWORKIN, *supra* note 74 at 307-50; Ronald Dworkin, *Sovereign Virtue Revisited*, 113 ETHICS 106, 123-25 (2002).

¹²⁷ See Part III.C.2, *infra*.

¹²⁸ For more on the opportunities, as well as some of the challenges, now being opened by genetic research, see generally FROM CHANCE TO CHOICE: GENETICS & JUSTICE (Allen Buchanan et al. eds., 2000).

¹²⁹ For a wide-ranging study of the importance of at least educational capital to agents' long-term earning prospects, see GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1993).

¹³⁰ "Wealth" in this context is characterized somewhat narrowly: The right to wealth-making opportunity would be the right to produce as to satisfy others' wants and to be remunerated therefore and thus profit thereby. "Wealth" could of course also be understood more broadly, such that a right to equal wealth-creating opportunity would be an equal right not only to produce remunerably for others, but also a right to produce the happiness in one's self that results from the exercise of one's capacities – a very "Greek" form of happiness. See generally JULIA ANNAS, THE MORALITY OF HAPPINESS (1995). I emphasize the remuneration understanding of wealth here pursuant to this Part's aim to identify an overlapping consensus among the three traditions of American political self-understanding. For that is the understanding of wealth that all three traditions share in common, while what I have labeled the "Greek" form figures more prominently in the CL than in the CR and PC traditions.

¹³¹ Assuming that such apportionment is possible. See Part III.C.2, *infra*, on measurement.

¹³² There is no need to resolve disputes between followers of the heterodox "economists" Simon on the one hand, Kelso on the other, as to whether "knowledge capital" or "machine capital" represents the "larger" portion of the value created through productive organization. See JULIAN L. SIMON, THE ULTIMATE RESOURCE (1996) ("human imagination" the "principal" productive factor); LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO 36 (1958) ("Technological improvements shift the burden of production from workers to capital instruments.") Obviously both are critical, and what matters most is access on equal terms ("equal" understood by reference to ethically exogenous endowments) to productive relations themselves.

¹³³ The envy charge is leveled in Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999).

¹³⁴ See Hockett, *supra* note 3, for detailed treatment of these and other programs.

¹³⁵ See, e.g., PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION 189-217 (1993); DEBRAJ RAY, DEVELOPMENT ECONOMICS 591-619 (1998); KAUSHIK BASU, ANALYTICAL DEVELOPMENT ECONOMICS: THE LESS DEVELOPED ECONOMY REVISITED 267-280 (2000).

¹³⁶ See Hockett, *supra* note 3 on programmatic means; also Robert Hockett, *Just Insurance Through Global Macrohedging*, 25 U. PA. J. INT'L ECON. L. 107, 203-57 (2004) ("*Macrohedge*"); Robert Hockett, *From "Mission-Creep" to Gestalt-Switch: Justice, Finance, the IFIs and Globalization's Intended Beneficiaries*, 98 PROC. AM. SOC. INT'L L. 69 (2004) ("*Gestalt-Switch*"); Robert Hockett, *From Macro to Micro to "Mission-Creep,"* 41 COLUM. J. TRANSNAT'L L. 153 (2003).

¹³⁷ See Hockett, *Macrohedge*, *id.* at 183-203.

¹³⁸ See Hockett, *Macrohedge*, *supra* note 136 at 212-57.

¹³⁹ Below we'll translate disvalued contingencies back into valued items: specifically, claims to compensation contingent upon those disvalued contingencies themselves – in effect, insurance policies.

¹⁴⁰ See Hockett, *Deep Grammar*, *supra* note 74 at 143-55 for fuller, including formal, treatment of the subjects of the next several paragraphs. See also Claude d'Aspremont, *Axioms for Social Welfare Orderings*, in

SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER 19-76 (Leonid Hurwicz et al. eds., 1985) (especially pages 42 to 43) [hereinafter “SOCIAL GOALS AND SOCIAL ORGANIZATION”]; JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 16f (1996); A.K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); A.K. Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 *ECONOMETRICA* 1539 (1979).

¹⁴¹ It would also, of course, be to fail to respect distributees as valuing agents. See Hockett, *Deep Grammar*, *supra* note 74 at 165-73; also Robert Hockett & Mathias Risse, *Primary Goods Revisited*, (under disaggregation and revision for ECON. & PHIL.).

¹⁴² *Id.*

¹⁴³ See Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls’s Theory of Justice*, 70 *J. PHIL.* 245 (1973); also Dworkin, *supra* note 74 at 48-59.

¹⁴⁴ See, e.g., DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* (1997); THOMAS NAGEL, *OTHER MINDS: CRITICAL ESSAYS 1969-1994* (1999); THOMAS NAGEL, *MORTAL QUESTIONS* (1991). Also Brink, *supra* note 72.

¹⁴⁵ See Hockett, *Deep Grammar*, *supra* note 74 at 155-73. The intuition receives particularly memorable expression in, of all places, a novel by Sartre. See JEAN-PAUL SARTRE, *NAUSEA* 127 (Lloyd Alexander trans., 1969) (“The diversity of things, their individuality, were only an appearance, a veneer. This veneer had melted, leaving soft, monstrous masses, all in disorder – naked, in a frightful, obscene nakedness.”).

¹⁴⁶ Implausible save in the case of the core endowments, as explained *infra*, Part IV.C.3.

¹⁴⁷ Market “completeness” in this sense – all and only desired trading – of course includes trading in contingent claims, more on which over the course of the next several paragraphs. The classic sources on the role of contingent claims in completing markets are JOHN R. HICKS, *VALUE AND CAPITAL* (1940); Maurice Allais, *Généralisation des Théories de L’Equilibre Economique Général et du Rendement Social au Cas du Risque* 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* 81(1953); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières par la Répartition la Meilleure des Risques*, 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* 41 (1953); GERARD DEBREU, *THEORY OF VALUE* (1954). Completeness is of course a technical concept, bearing many ramifications, only some of which are treated here. For fuller treatment, see Hockett, *Macrohedge*, *supra* note 136. For state of the art comprehensive treatment, see MICHAEL MAGILL & MARTINE QUINZII, *THEORY OF INCOMPLETE MARKETS I* (1996).

¹⁴⁸ Please set aside, for the moment, first the question of the means by which endowment-equalization would be effected, and second the “problem of future generations.” We’ll get to that in IV.C.3, *infra*.

¹⁴⁹ It should be borne in mind that those latter include labor-expending decisions.

¹⁵⁰ See, e.g., Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, *PROC. SECOND BERKELEY SYMP* 507 (1951).

¹⁵¹ In essence, we are describing an economy characterized by so-called “equal division Walrasian equilibria”. For more on such equilibria, their fairness and efficiency properties, and ethical interpretations thereof, see Hockett, *Deep Grammar*, *supra* note 74 at 217-39. The technical literature on the theory of fair allocations is vast, though oddly ignored by economically oriented legal academics. For a canonical sampling, see, e.g., T.E. Daniel, *A Revised Concept of Distributional Equity*, 11 *J. ECON. THEORY* 94 (1975); Duncan Foley, *Resource Allocation and the Public Sector*, *YALE ECONOMIC ESSAYS* 7, at 45-98 (1967); E.A. Pazner & David Schmeidler, *Egalitarian-Equivalent Allocations: A New Concept of Economic Equity*, 92 *Q.J. ECON.* 1 (1978); Elisha Pazner & David Schmeidler, *A Difficulty in the Concept of Fairness*, 41 *REV. OF ECON. STUD.* 441, 441-43 (1974); H.R. Varian, *Equity, Envy and Efficiency*, 9 *J. ECON. THEORY*, 63, 63-91 (1974); H.R. Varian, *Two Problems in the*

Theory of Fairness, 5 J. PUB. ECON. 249 (1976). See generally WILLIAM J. BAUMOL, *SUPERFAIRNESS: APPLICATIONS AND THEORY* (1986); W. Thomson & Hal Varian, *Theories of Justice Based on Symmetry*, in SOCIAL GOALS AND SOCIAL ORGANIZATION, *supra* note 140. A useful recent synthesis of these results is HERVÉ MOULIN, *FAIR DIVISION AND COLLECTIVE WELFARE* (2003). The work from which these studies take their departure is of course LEON WALRAS, *ELEMENTS OF PURE ECONOMICS* (William Jaffé trans., 1954) (1844). Walras appears to have anticipated, even inchoately to have intended, precisely such developments as these. See WILLIAM JAFFÉ'S *ESSAYS ON WALRAS* 17-52, 326-42 (Donald A. Walker ed., 1983).

¹⁵² See Hockett, *Deep Grammar*, *supra* note 74 at 143-55; Hockett & Risse, *supra* note 141.

¹⁵³ *Id.* The claim that the need to index disparate resources commits one to perfectionism – i.e., the position that some goods simply are inherently worth more than others – figures into a prominent criticism of Rawlsian primary goods leveled by Richard Arneson. See Richard Arneson, *Primary Goods Reconsidered*, 24 *NOÛS* 429 (1990). The criticism is addressed in Hockett & Risse, *id.*

¹⁵⁴ See *cites supra*, note 152.

¹⁵⁵ Such is envisaged in Dworkin's "clamshell" auction. See DWORKIN, *supra* note 74 at 65-71.

¹⁵⁶ See Hockett, *Deep Grammar*, *supra* note 74 at 217-37; DWORKIN, *supra* note 74 at 307-50. Real, rather than "hypothetical" such insurance is proposed in Hockett, *Macrohedge*, *supra* note 136; and in Alexander Tabarrok, *Trumping the Genetic Tarot Card*, 9 *CONTINGENCIES* 20 (1997). See also J.H. Cochrane, *Time-Consistent Health Insurance*, 103 *J. POL. ECON.* 445 (1995).

¹⁵⁷ The classic contemporary objection to "commodification" is of course Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987). See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). ALSO ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1997). Contemporary protests of commodification revive concerns raised repeatedly in the past. Two classic Victorian-era objections are THOMAS CARLYLE, *PAST AND PRESENT* (Robert Thorne ed., 1890); and JOHN RUSKIN, *UNTO THIS LAST AND OTHER WRITINGS* 155-228 (Clive Wilmer ed., 1985).

¹⁵⁸ The allusion is of course to Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 *J. LEGAL STUD.* 323 (1978), one of the bugbears that prompted Radin, *id.*

¹⁵⁹ This question reemerges below, in connection with Part IV's discussion of the legal dimensions of owning.

¹⁶⁰ See Robert C. Merton, *Lifetime Portfolio Selection Under Uncertainty: The Continuous-Time Case*, 51 *REV. ECON. & STAT.* 247 (1969); Robert C. Merton, *Optimum Consumption and Portfolio Rules in a Continuous-Time Model*, 3 *J. ECON. THEORY* 373 (1971); Robert C. Merton, *Continuous-Time Portfolio Theory and the Pricing of Contingent Claims*, Working Paper No. 881-76, A.P. Sloan School of Management, MIT (1976).

¹⁶¹ Hockett, *Macrohedge*, *supra* note 136.

¹⁶² See Oliver D. Hart, *On the Optimality of Equilibrium When the Market Structure is Incomplete*, 11 *J. ECON. THEORY* 418 (1975).

¹⁶³ See, e.g., *BLACK'S LAW DICTIONARY* 595 (6th ed. 1990).

¹⁶⁴ Of course the Pareto principle is intended to afford technical means of sidestepping interpersonal utility comparison and with it, therefore, the standard argument runs, aggregation. But leaving aside for present purposes the standard argument's running aggregation and comparison together, the Pareto criterion trades for its ethical salience upon an intuition which implicitly imports aggregation. There is no reason for "society" to be interested in a Pareto-efficient social choice rule dictating increases in the utilities of some so long as no one else's utilities are diminished thereby, unless "society" itself is seen as thereby benefiting in some sense. That sense, if such there be,

is the only sense in which the principle can be ethically interesting, and it is of course an aggregative sense – as indeed the terms “society” and “social choice” should indicate right from the start. On the analytic distinction between interpersonal comparison and aggregation, *see* sources cited *supra*, note 140.

¹⁶⁵ The aggregation – and assumed interpersonal comparability imported thereby – enter via the “compensation principle.” Note the shared root – “com,” i.e., “with” – shared by both “comparison” and “compensation.”

¹⁶⁶ One “produces” welfare, in the Pareto and the Kaldor-Hicks senses, by distribution operations. Those are the variable inputs, so to speak, while persons’ utility functions are the fixed inputs.

¹⁶⁷ *See* Hockett, *Deep Grammar*, *supra* note 74 at 198-205. A classic articulation of the argument is found in Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191 (1980); and Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980). *See also* Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 12 (S. McMurrin ed., 1980). I hope to render the claim more intuitively appreciable here than is the case in those sources, in hopes of thereby avoiding the incomprehension manifest, among other places, in Posner, *supra* note 106.

¹⁶⁸ Herewith of course a variation on Nozick’s “utility monster” objection to utilitarianism. *See* NOZICK, *supra* note 78 at 110 (“Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater sums of utility from any sacrifice of others than these others lose . . . the theory seems to require that we all be sacrificed in the monster’s maw, in order to increase total utility.”).

¹⁶⁹ Compare the inert matter considered above in connection with the measurement challenges, *supra* note 145. It is the same story here. It is agency – usefulness to valuing agents – that infuses any substance with value. (A variation here, perhaps, on the adage that “man is the measure of all things”.) And it is only equal agency that renders the valuation of such a substance a valuation effected legitimately by us all, hence “value” in a sense cognizable to “us” all and hence to ethics. The belief that at least aggregated *welfare*, as distinguished from wealth, is a value, since it is pleasure or some such humanly experienced magnitude rather than mere money, does not escape this stricture. For again, welfare, satisfaction, pleasure, etc. as such do not engage “us” as items to be valued apart from the propriety of their apportionments. The belief that “aggregated” such magnitudes constitute values results from a subconscious elision from thinking in terms of one agent experiencing welfare, to an “agential” *aggregation* of persons, conceived inchoately as one person, “experiencing” such welfare. Once one becomes conscious that one is doing this, one escapes the illusion. Much the same illusion, incidentally, underwrites Harsanyi’s aggregation and impartial observer theorems, cited *supra* note 107. These turn out to be representation theorems – representations of ordinal measures in cardinal form – rather than theorems “proving” utilitarianism to be a dictate of rationality itself. *See* ROEMER, *supra* note 140 at 138-50 on this point.

¹⁷⁰ This is not to say that such trading itself cannot bear third-party effects such that over time ethically exogenous resources come to be centralized in undeserving, overendowed hands. But that is why market-neutrality above is defined not only in initial endowment terms, but in ongoing regulatory terms as well.

¹⁷¹ The equal rights qualifier spares the thesis of self-ownership from such objections as Jerry Cohen raises against such as Nozick. *See* G.A. Cohen, *Self-Ownership, World-Ownership, and Equality*, in JUSTICE AND EQUALITY HERE AND NOW (Frank Lucash ed., 1986); G.A. Cohen, *Self-Ownership, World-Ownership, and Equality: Part II*, 3 SOC. PHIL. & POL’Y 1 (1986).

¹⁷² The critical role of assets in affording practical freedom is well laid out in, among other places, AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999). *See also* DASGUPTA, *supra* note 135. Sen’s and Dasgupta’s work focuses on “developing” economies, but the lessons are readily extended to “developed” economies – particularly to their less developed sectors.

¹⁷³ More on the problematic but nonetheless critical notion of “hardness” below.

¹⁷⁴ Again, please *see* Parts III.A through III.C, *supra*, on agency, responsible agency and the equal

opportunity principle. And see Part IV.B, *infra*, for more on the EOP's expression in law.

¹⁷⁵ I will not here distinguish between endowment effects, loss-aversion or willingness-to-accept/willingness-to-pay gaps. Nor will I distinguish between these and the more clearly conceptually distinct, though nonetheless empirically entangled, phenomena of status quo bias, commission/omission disparity or disposition effects. There is of course a vast and growing literature on these and cognate subjects. Useful surveys include Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Richard H. Thaler, *Mental Accounting Matters*, in ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer et al., eds., 2004); and Colin F. Camerer, *Endowment Effects and Buying-Selling Price Gaps*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 665-70 (John H. Kagel & Alvin E. Roth eds., 1995). Fuller collections of seminal work include JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); QUASI-RATIONAL ECONOMICS (Richard H. Thaler ed., 1991); ADVANCES IN BEHAVIORAL FINANCE (Richard H. Thaler ed., 1993); Camerer et al., *op. cit.*; Kagel & Roth, *op. cit.* A popular-audience-targeted treatment of these phenomena is RICHARD H. THALER, THE WINNER'S CURSE (1994).

¹⁷⁶ See Matthew Rabin, *Risk-Aversion and Expected-Utility Theory: A Calibration Theorem*, 86 ECONOMETRICA 11 (2001).

¹⁷⁷ See, e.g., MARTIN SHUBIK, 1 THE THEORY OF MONEY AND FINANCIAL INSTITUTIONS 399-427 (2000). See also JAMES TOBIN, MONEY, CREDIT, AND CAPITAL 12-14 (1998) (emphasizing, however, only the *temporal* rate at which the asset can be converted to *cash*.)

¹⁷⁸ Durability is related to, but nonetheless distinct from, Tobin's "predictability." See TOBIN, *supra* note 177 at 16-20, 23-26. "Predictability" refers to the degree to which an asset's cash value at future dates can be accurately anticipated. *Id.*

¹⁷⁹ See George Sternlieb & James W. Hughes, *The Evolution of Housing and Its Social Compact*, in FEDERAL HOUSING POLICY AND PROGRAMS 143 (J. Paul Mitchell ed., 1995) (emphasizing housing's role as "safe haven" against ravages of *inflation* as much as from "the elements").

¹⁸⁰ My fellow citizens might also protect me by agreeing to pool risk with me and thus insure. More on this form of joint-indemnification below.

¹⁸¹ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, Draft 10/28/00, on file with Yale Center for Law, Economics & Organization; Henry E. Smith, *Two Dimensions of Property Rights*, Draft 3/31/00, on file with Northwestern University School of Law.

¹⁸² *But see* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003), on the role that such limitations might, under some circumstances, play in *facilitating* liquidity and choice by economizing on the information costs that afflict markets in ownable goods. See also JON ELSTER, ULYSSES UNBOUND (2000); and ELSTER, ULYSSES AND THE SIRENS, *supra* note 118 on circumstances under which constraining choice might enhance autonomy.

Analogy with language seems particularly apt. The latter dramatically extends the range of thoughts and objects of thought that one can entertain, hence, in a sense, one's cognitive autonomy. More property types mean more autonomy just as more vocabulary means more thought. But some coherent set of *rules* bounding and governing these matters – the structuring of language by definitions and grammar, the delimitation and vindication of property-holding and -exchange by law – also are required lest autonomy degenerate into a cacophonous and incoherent heteronomy.

¹⁸³ With the caveat mentioned in the previous note. On the relations among such market completeness, choice, autonomy and welfare, see, again, Parts III.C-D, *supra*.

¹⁸⁴ See note 182, *supra*.

¹⁸⁵ Tobin also singles out what he terms an asset’s “divisibility” as a fundamental attribute. He limits his discussion, however, to fractional unit sizes, as it were along a single dimension – that of simple quantity. See TOBIN, *supra* note 177 at 15.

¹⁸⁶ Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1247 (1965); Frank Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

¹⁸⁷ 397 U.S. 254 (1970).

¹⁸⁸ See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (now the Burger Court, upholding a Maryland regulation having the effect of holding maximum AFDC grant below the established needs of some families) (observing that “here we deal with state regulation in the social and economic field, not affecting freedom guaranteed by the Bill of Rights”).

¹⁸⁹ [Cite]

¹⁹⁰ See note 188, *supra*.

¹⁹¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (“*Lujan II*”); *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871 (1990).

¹⁹² *Lujan II*, *id.* at 572.

¹⁹³ If we add to this consideration the fact that the US Supreme Court’s “takings” jurisprudence under the 5th Amendment appears to be bringing greater security to “old” property even against democratically decided actions by the state, *traditional* assets definitely look to be increasingly “asset-like” along the legal security metric relative to more newfangled entitlements. They are the assets that “nobody can take away from you.” Hence they are the assets most “owned.” More on this *infra*, Part IV.B.3.

¹⁹⁴ Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁹⁵ As a practical matter, of course, a government entitlement might nonetheless be more secure in some instances once we take into account the law’s other realms that bear upon the security of a contractual entitlement. The federal government – at least up to now – does not go bankrupt, for example.

¹⁹⁶ The causality, one might expect, should run both ways. An “investment mentality” would seem more likely to result in asset-accumulation than would a profligate, “live for the moment” mentality. Studies controlling for the bidirectional causal effect have found nonetheless that asset-holding itself fosters investment attitudes that lead to more asset-holding. See Gautam N. Yadama & Michael Sherraden, *Effects of Assets on Attitudes and Behaviors: Advance Test of a Social Policy Proposal*, Working Paper No. 95-2, Center for Social Development (1995); Deborah Page-Adams & Michael Sherraden, *What We Know About Effects of Asset Holding: Implications for Research on Asset-Based Anti-Poverty Initiatives*, Working Paper No. 96-1, Center for Social Development (1996); S. Beverly et al., *A Framework of Asset-Accumulation Stages and Strategies*, Working Paper No. 01-1, Center for Social Development (2001); A.M. McBride, *The Effects of Individual Development Account Programs: Perceptions of Participants*, Working Paper No. 03-06, Center for Social Development (2003); Michael Sherraden et al., *Overcoming Poverty: Supported Saving as a Household Development Strategy*, Working Paper No. 04-14, Center for Social Development (2004). See also Sherraden, *supra* note 3 at 151-57.

¹⁹⁷ See sources cited *supra*, note 196.

¹⁹⁸ *Id.*

¹⁹⁹ Defined benefit plans guarantee a payment stream to beneficiaries, while the assets from which those payments are derived remain under the control of the pension fund manager. Defined contribution plans involve facilitation and (in many but not all cases) supplementation of beneficiary savings in their own accounts. *See generally* JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 42-55 (3d ed. 2000); E. PHILIP DAVIS, *PENSION FUNDS: RETIREMENT INCOME SECURITY AND CAPITAL MARKETS, AN INTERNATIONAL PERSPECTIVE* 230-44 (1995); *PENSIONS IN THE U.S. ECONOMY* 139-60 (Zvi Bodie et al. ed., 1988).

²⁰⁰ It is not clear that property rules and liability rules diverge, however, when the property in question is monetary.

²⁰¹ *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 *YALE L. J.* 451 (2004); James Stock & David A. Wise, *The Pension Inducement to Retire: An Option Value Analysis*, NBER Working Paper No. 2660 (1988).

²⁰² *See* Stock & Wise, *id.*

²⁰³ *See* sources cited *supra*, note 196.

²⁰⁴ At any rate, as people who must be deceived or manipulated rather than simply ordered about.

²⁰⁵ *See, e.g.*, C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASSES* (1953); GABRIEL KOLKO, *WEALTH AND POWER IN AMERICA* (1962); G. WILLIAM DOMHOFF, *THE HIGHER CIRCLES: THE OWNING CLASS IN AMERICA* (1971); Anthony F. Shorrocks, *U.K. Wealth Distribution: Current Evidence and Future Prospects*, in *GROWTH, ACCUMULATION, AND UNPRODUCTIVE ACTIVITY* 29-50 (Edward Wolff ed., 1987); Denis Kessler & Andre Masson, *Personal Wealth Distribution in France: Cross-Sectional Evidence and Extensions*, in Wolf, *id.* at 141-76. *See also* sources cited *supra*, note 194.

²⁰⁶ The allusion is of course to PUTNAM, *supra* note 83. The claim, of course, is not that insufficient stakeholding is the only cause of “bowling alone”. It is only that stakeholding constitutes a countervailing influence.

²⁰⁷ *See* sources cited *supra*, notes 196 and 205.

²⁰⁸ *Id.*

²⁰⁹ *See* Simon, *supra* note 23 at 1350-1388, who makes a similar point as a conceptual rather than as a social-psychological matter. *See* sources cited *supra*, note 205. *Also* McBride, *supra* note 196.

²¹⁰ *See* sources cited *supra*, notes 196 and 205. *Also* A.M. McBride et al., *Civic Engagement Among Low-Income and Low-Wealth Families: In Their Words*, Working Paper No. 04-14, Center for Social Development (2004).

²¹¹ On that correlation, *see, e.g.*, ROBERT HOCKETT, *CHAKA’S WINDOWS: WORKS AND DAYS IN THE LIFE OF A HOMELESS ENTREPRENEUR* (unpublished MS on file with the author); ELLIOT LIEBOW, *TALLEY’S CORNER: A STUDY OF NEGRO STREETCORNER MEN* (1967); DANIEL PATRICK MOYNIHAN, *FAMILY AND NATION* (1965).

²¹² *See* McBride, *supra* note 196; Sherraden, *supra* note 196; McBride et al., *supra* note 210.

²¹³ *See* T.R. Williams, *The Impacts of Household Wealth on Childhood Development*, Working Paper No. 04-07, Center for Social Development (2004); A.M. McBride et al., *Asset Building: Increasing Capacity for Performance: Measurement and Effects*, Working Paper No. 04-12, Center for Social Development (2004); Deb Page-Adams et al., *Assets, Health, and Well Being: Neighborhoods, Families, Children and Youth*, Working Paper No. 01-02, Center for Social Development (2001); Sherraden et al., *supra* note 196; McBride et al., *supra* note 196.

²¹⁴ *Id.*

²¹⁵ Though of course it might be for parents. More study is required here, controlling for causation in the other direction. A reasonable working hypothesis would be that among adults causality proceeds in both directions.

²¹⁶ World Bank and other international civil servants speculate on the prospects of “ownership society”-like proposals in the developing economies in *CURING WORLD POVERTY: THE NEW ROLE OF PROPERTY* (John H. Miller ed., 1994).

²¹⁷ *See generally* JONAS PONTUSSON, *THE LIMITS OF SOCIAL DEMOCRACY: INVESTMENT POLITICS IN SWEDEN* (1992).

²¹⁸ *See* HUGH HECLIO & HENRIK MADSEN, *POLICY AND POLITICS IN SWEDEN* (1987); Tony Horwitz, *Welfare Stagnation Besets Smug Sweden*, *WALL ST. J.*, April 5, 1990, at A18.

²¹⁹ *Id.* The reports of defined benefit pensioners discussed *supra*, notes 199-202 and accompanying text, come back to mind.

²²⁰ *See* Melvin Kohn et al., *Position in the Class Structure and Psychological Functioning in the U.S., Japan, and Poland*, 95 *AM. J. SOC.* 964-1008 (1990).

²²¹ *Id.*

²²² *See* JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 310-13 (1988); Gregory S. Alexander, *Pensioners in America: The Economic Triumph and Political Limitations of Passive Ownership*, in *A FOURTH WAY?: PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES* 33, 42-43 (1994) in this connection.

²²³ “Possible” here of course presumably will be bounded by information and transacting costs. *See* notes 181-182, *supra*, and accompanying text.

²²⁴ *See* notes 175-176, *supra*, and accompanying text.

²²⁵ *See* Internal Revenue Code § 32.

²²⁶ *See* MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 75-85, 161-76 (1962); James Tobin et al., *Is a Negative Income Tax Practical?*, 77 *YALE L. J.* 6 (1967).

²²⁷ These are restrictions apart from limitations on security-provision of the sort observed at Part IV.A.1. The latter do not much come into play when we speak of ownership-delimiting in keeping with the EOP. They figure more into what sort should be increased among the underendowed.

²²⁸ Milton Friedman noted long ago that the ability to sell “shares” in one’s self or one’s future earnings would facilitate borrowing for education (human capital expansion projects). *See* FRIEDMAN, *supra* note 226 at 85-107 (1962). But fewer people appear to have taken that suggestion to heart even than have supported the proposal of Landes & Posner, *supra* note 158.

²²⁹ The classic decision holding legislatures’ taxing authority to be plenary is of course *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

²³⁰ *See* *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987); *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. Ct. Appeals), *cert. denied*, 110 S.Ct. 500 (1989). *But see* *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992).

²³¹ *See* EPSTEIN, *supra* note 78.

²³² Hence the market that it would rely upon to value the “taken” increment is not “neutral” in the terms of Part III.C. Even Nozick at least paid lip-service to the importance of the baseline question, in his Paretian version of the Lockean proviso. *See* NOZICK, *supra* note 78 at 178-82.

²³³ *See* U.S. Const., amend. V, cl. 2.

²³⁴ The claim that “it’s your money,” of course, is either flatly false or vacuous. It is false in so far as what’s “yours” is a function of legal entitlement and the law does not already entitle you to it. It is vacuous in so far as the law already confers title. What these people mean to say is that they want to *make* it your money. That is, they want to make \$300 your money, in return for your forgoing public services, if you belong to the middle class; and they want to make \$ thousands, millions or billions your money if you are antecedently wealthy.