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ARTICLES

SOCIAL-REPUBLICAN PROPERTY

William H. Simon*

INTRODUCTION

Economic democracy is the idea that the norms of equality and participation that classical liberalism confines to a narrowly defined sphere of government should apply to the sphere of economic life. Economic democracy thus entails a challenge to the classical liberal notion of property. In classical liberalism, property defines a realm of private enjoyment. No particular property right is a prerogative of, or a prerequisite to, citizenship, and the exercise of property rights by those who have them is not assessed in political terms.

One alternative to classical liberalism responsive to the ideal of economic democracy is classical socialism. Classical socialism opposes to the liberal notion of private property the notion of state property—property controlled by the officials of a democratically constituted state. Another alternative to classical liberalism inspired in part by the ideal of economic democracy is social democracy or welfare-regulatory liberalism. Social democracy retains the classical liberal notion of private property rights, but it both qualifies them by regulatory restrictions on their exercise and supplements them with welfare rights to minimal subsistence funded and administered through a tax-transfer system.

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This essay is about aspects of a further alternative to classical liberalism inspired by the ideal of economic democracy. This alternative can be found in converging elements of the traditions of republicanism and market socialism. Like social democracy, the alternative rejects both state property and the unrestricted accumulation and exercise of private property rights. However, to a greater extent than social democracy, it pursues its concerns by encouraging a politically desirable *primary* organization of economic activity and distribution of income and wealth.

The distinctive notion of property in this alternative view is sometimes called social property in the market socialist tradition, but its simultaneous affinity with the republican tradition leads me to call it social-republican property. The distinctive feature of social-republican property is that it is held by private individuals subject to two types of conditions—one requiring that the holder bear a relation of potential active participation in a group or community constituted by the property, and another designed to limit inequality among the members of a group or community. Among the more familiar forms of social-republican property are interests in certain producer cooperatives and “limited equity” housing cooperatives.

In contemporary American society, the characteristics associated with social-republican property are routinely imputed to a narrow set of political or citizenship entitlements, such as voting rights, but these characteristics seem anomalous in private economic life. Nevertheless, there are some interesting examples of social-republican property in the private sphere, and there has recently been a variety of proposals that would increase its importance there.¹ Moreover, a variety of regulatory and welfare policies, such as certain forms of tax relief and rent control, create interests that resemble social-republican property and may be inspired by social-republican principles.

This essay has both historical and political purposes. One historical purpose is to clarify certain distinctive aspects of the republican and market socialist traditions and to emphasize an affinity that accounts for their frequent convergence in 19th century radicalism.

1. This essay has been influenced by the views on economic reform in R. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987), which is market socialist in tone, and M. PIORE & C. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1985), which appeals to republicanism. However, the idea of social-republican property is only implicit in Piore and Sabel and is in some tension with parts of Unger's argument.

Part I develops the notion of social-republican property as a heuristic designed to serve this purpose.

Another historical purpose is to illustrate that, while social-republican principles are usually treated as utopian and marginal in American public discourse, there is in fact a wide variety of property rights in the American economy that express such principles. Parts II through IV thus survey some contemporary examples of social-republican property in America (with some references to Europe for purposes of comparison).

The essay's political purpose is to contribute to contemporary debates about radical economic reform, in particular to debates over the possibility of a "third way" between capitalism (both its classical liberal and social democratic versions) and socialism. The social-republican vision may be the closest thing we have to a reform model that is both distinguishable from the capitalist and socialist models and at least moderately institutionally concrete.

To be sure, the sophisticated contemporary response to the question of the "third way" is to assert the indeterminacy of all general reform models, and to insist that any plausible program for a particular economy would have to be an amalgam of a diverse variety of forms of property. General models do not generate concrete programs by themselves, and no single general model could plausibly serve as a unique inspiration for the restructuring of an entire economy. Nevertheless, general models inescapably influence even the most contextual thinking about particular reforms. Enlarging our repertory of general models thus seems likely to enhance the flexibility of our thinking and the range of particular alternative possibilities we can summon in appraising particular practices and institutions.

Thus, the essay concludes in Part V with a tentative normative appraisal of the social-republican vision. It defends social-republican institutions against the charge that they have strong general tendencies toward economic inefficiency. On the other hand, it concedes that such institutions have a troubling tendency toward exclusiveness. The cultural exclusiveness attributed to republicanism in some recent critiques has a counterpart in the economic logic of social-republican property. Plausible applications of social-republican principles would have to confine or neutralize this tendency.

I. REPUBLICANISM, MARKET SOCIALISM, AND PROPERTY

There are myriad versions of republicanism and of market socialism.² The ones of concern here share a commitment to participation and equality in the economic sphere, and a sympathetic focus on small-scale, locally rooted enterprise. It would be a difficult task to disentangle republican from socialist rhetoric in the many political movements that invoked these themes in middle and late 19th century America and Europe. The themes were expressed in terms that mix republican and socialist rhetoric in the labor radicalism of this period, for example, in the programs associated in America with the Knights of Labor, in France with Pierre-Joseph Proudhon, in Germany with Ferdinand Lassalle, and in the agrarian counterparts of these movements, such as the Farmers' Alliance in America.³ Social-republican themes appear in more distinctly republican rhetoric in the tradition of political thought that J.G.A. Pocock has traced to James Harrington and which influenced the agrarian republicanism of the Jeffersonians and the petty bourgeois strands of Jacksonian democracy, Whig political economy, and the radical republicanism of the Civil War era.⁴ And one can find overlapping themes in a more distinctly socialist rhetoric in the market socialist theories and programs developed since the 1950s in Eastern Europe, especially in Yugoslavia.⁵

Both republicanism and market socialism express or imply critiques of classical liberalism and corporate capitalism. They both suggest that the ideal of democracy implicit in classical liberal social arrangements is implausible because it tolerates too high a degree of material inequality and too circumscribed a scope of participation in decisions of collective significance. Moreover, both traditions criticize classical liberalism for legitimating and fostering a narrow egoism, which they see as a threat both to mutually beneficial coop-

2. See generally J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); Brus, *Market Socialism*, in *THE NEW PALGRAVE* (J. Eatwell, M. Milgate & P. Newman eds. 1988).

3. See, e.g., E. BERNSTEIN, *FERDINAND LASSALLE AS A SOCIAL REFORMER* 134-65 (1969); L. GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978); J. JOLL, *THE ANARCHISTS* 61-83 (1964) (on Proudhon); B. LAURIE, *ARTISANS INTO WORKERS: LABOR IN NINETEENTH CENTURY AMERICA* 141-75 (1989) (on the Knights of Labor).

4. For a survey of American developments, see B. LAURIE, *supra* note 3, at 47-140.

5. See, e.g., B. HORVAT, *THE POLITICAL ECONOMY OF SOCIALISM: A MARKET SOCIAL THEORY* (1982); H. LYDALL, *YUGOSLAV SOCIALISM: THEORY AND PRACTICE* (1984); M. MARKOVIC, *DEMOCRATIC SOCIALISM: THEORY AND PRACTICE* (1982).

eration and to an ambitious conception of personal development and expression.

Nineteenth-century and many later versions of republicanism and market socialism converge on some specific points of political economy that today seem dogmatic or confused, including a vision of the macrodynamics of capitalism that asserts an inexorable tendency toward increased inequality and volatility, a precapitalist hostility to interest-taking, and a categorical denial of the productivity of economic intermediaries and many other white collar occupations.

They also, however, converge on some points that retain considerable force. One central point of convergence challenges the line classical liberalism draws between public and private spheres. The liberal public sphere is in principle a realm of equality and participation; the liberal private sphere is in principle a realm of contract in which people with unequal endowments exchange productive efforts for consumption benefits. To republicans and market socialists, this structure subverts democracy in two ways. The wealthy can translate the resources acquired in the private sphere into power in the public sphere in ways that undermine equality and participation. At the same time, in the private sphere of work (and to a more ambiguous extent, the sphere of consumption) the nonwealthy are forced into experiences of dependence (to use the republican term) and alienation (to use the socialist term) that preclude personal and political autonomy.

The subordination that these doctrines deplore has several dimensions. One dimension is simply the need of those who lack property to submit to the often pervasive direction of those who have it in order to earn their livings. Another is the degradation and stultification that result from the need to spend nearly all one's time focused anxiously on securing basic material subsistence, with the consequence that one lacks the time and security to develop broader capacities, including the capacity for effective political participation. Still a third dimension is the way in which workers experience the operation of labor and capital markets as natural processes beyond human control.⁶ This occurs both because important social decisions have been removed from the agenda of collective deliberation and because the workers' experience as passive

6. The classic socialist text is Marx's chapter on the "fetishism of commodities," K. MARX, *CAPITAL* 163-77 (Penguin ed. 1976); the analogous republican analysis is portrayed in J. POCOCK, *supra* note 2, at 423-505. Pocock notes the kinship of republican and Marxist analyses. *Id.* at 505.

objects of economic forces undermines their capacity for autonomous participation in social decisions.

This critique of the private sphere expresses, not only opposition to inequality, but a commitment to public collective decision-making over private individual decisionmaking. It tends to see public collective decisionmaking as an expression of virtue and solidarity and hence both intrinsically more satisfying and conducive to better decisions. It tends to see private individual decisionmaking as an expression of corruption and alienation. Although the relations between institutions and attitudes are complex and often obscure, there is one straightforward sense in which collective public decisionmaking is associated with civic virtue and solidarity: it compels the participants to address each other in terms that appeal to common interests.

A further point of convergence of the republican and market socialist critiques is the contention that a plausible conception of democracy requires that political autonomy be grounded in the control of property, or more specifically, a particular kind of property—productive resources, or capital. Classical liberalism seems to deny political significance to the distribution of property; social democratic liberalism seems to focus its concern on guaranteeing the citizen a minimum level of consumption. In contrast, republicans and market socialists see broadly distributed property as a safeguard against the subversion of democracy by either a wealthy oligarchy or an aggressive state.

The critical norm of republican political economy is propertied independence—civic competence grounded in ownership of capital.⁷ The critical norm in market socialism is “social property”—productive resources controlled by workers in a participatory workplace but subject to important obligations to the larger society.⁸

In addition to providing material security and protecting against subordination to either wealthy individuals or an impersonal market, social-republican property functions to promote political responsibility. Since the value of property is affected by collective decisions, property is a medium through which the consequences of such decisions are transmitted to individual citizens.

7. See, e.g., J. POCOCK, *supra* note 2, at 407–09.

8. See B. HORVAT, *supra* note 5, at 235–59. My notion of the relation of republicanism and market socialism and the role of property in them is especially indebted to W. SEWELL, *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848* (1980).

Property thus serves as an inducement both to participate and to avoid reckless or opportunistic behavior.

Social-republican property can be distinguished from the more conventional notion of capital ownership, which might be called "liberal private" property, by two features: first, transfer or alienation restraints that confine control of the property to active or potentially active participants in a community constituted by the property, and second, accumulation restraints designed to limit inequality among members of such a community. These core features of social-republican property operate as restraints on the commodification and capitalization of relationships. They restrict the ability of the owner/citizen to fully monetize or liquidate her interest or to convert anticipated future benefits into present lump sums. They thus encourage the owner to view her interest as a stake in a particular long-term relationship.

Alienation restraints may contribute to the maintenance of a politically desirable distribution of wealth by preventing presumptively imprudent transfers likely to exacerbate disadvantage. They also serve as safeguards of the propertied independence essential to civic competence. We often think of alienation restraints on welfare benefits like Social Security⁹ as purely paternalistic, but from a social-republican point of view they have a more complex character. Like the prohibition against selling yourself into slavery, such restraints preclude individual choices, but they do so in the interest of preserving the individual's capacity for choice. Transfer restrictions also impede the formation of broad ranging markets that increase economic volatility and hence undermine the security essential to political autonomy. In addition, alienation restraints help confine control rights to active participants in the community, and preclude transfers that might threaten the social-republican character of the community—notably transfers to absentee owners or "speculators."

An explicit, exacting alienation restraint would entirely preclude individual members of the relevant community from transferring their property interests; a looser one would require the consent of the other members. In Yugoslav market socialism, capital is considered "social property," a category that differs from Soviet-style state property in that it contemplates that the possessors have broad discretion over the employment of the capital and some claim to the proceeds from it, but also differs from liberal private property partly

9. 42 U.S.C. § 407(a) (1988) (precluding assignment of future Social Security benefits).

in being more or less categorically nontransferable.¹⁰ In America, memberships in partnerships and cooperatives are typically not unilaterally transferable.¹¹ Small businesses of many varieties often require the consent of remaining owners for transfers of ownership interests.

Another form of transfer restriction is a residency or usage requirement that conditions property rights on the owner residing on the property, making some productive use of it, or both. The law of some of the American Colonies made extensive use of conditions of occupation, settlement, and cultivation in defining both the acquisition *and maintenance* of land ownership; the Homestead Act of 1862 imposed settlement conditions on property interests in federal grants of western lands; the "prior appropriation" system of water law that predominates in the American West conditions ownership of water rights on continued use.¹² In all these cases, the conditions appear to have been influenced by republican notions. (But this is not to say that they effectively implemented republican values; the Homestead restrictions were weak and weakly enforced; in the water law case, the recognition of corporate and absentee owners permits the conditions to be satisfied in ways that subvert republican goals.)

As either a substitute for or a complement of explicit transfer restrictions, both republicans and market socialists have often favored investments in resources that are relatively immobile. Harrington considered land the resource most appropriate for republican property:

Tho Riches in general have Wings and be apt to bate; yet those in land are the most hooded, and ty'd to the Perch, whereas those in Mony have the least hold, and are the swiftest of flight.¹³

10. C. PROUT, MARKET SOCIALISM IN YUGOSLAVIA 85-121 (1985).

11. See, e.g., CAL. CORP. CODE § 12410(a) (West 1991); UNIF. PARTNERSHIP ACT § 27 (1969).

12. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 362-65 (1973); J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 329-33, 399-405 (1986); Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635, 660-91 (1982). Transfer (and accumulation) restraints on property are often found in preindustrial settings, and they survive in the legal regimes of indigenous tribal groups in nations forcibly settled by westerners. See, e.g., McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, 19 J. LEGAL STUD. 297, 312-15 (1990). Such restraints are also prominent in twentieth century third world land reform programs. See, e.g., S. KLEIN, THE PATTERN OF LAND TENURE REFORM IN EAST ASIA AFTER WORLD WAR II 20-21 (1958); S. SANDERSON, LAND REFORM IN MEXICO 1910-1980 (1984).

13. J. HARRINGTON, *The Prerogative of Popular Government*, in THE POLITICAL WORKS OF JAMES HARRINGTON 404 (J.G.A. Pocock ed. 1977).

The preference for immobile property is based partly on its tendency to be relatively stable in value, but more importantly on its tendency to give the owner a stake in the community likely to motivate political activity. Landowners, the French republican Anne Robert Jacques Turgot wrote, "are attached to the land by virtue of their property; they cannot cease to take an interest in the district where it is placed It is the possession of land . . . which, linking the possessor to the State, constitutes true citizenship" By contrast, proprietors of liquid, mobile capital "belong to no place."¹⁴

Nineteenth century theorists expanded the category of republican property, first to artisanal tools (and, inferentially, to skills) and then to small-scale industrial capital held by owner-operators. The theorists emphasized the politically significant qualities these forms of property shared with agricultural land¹⁵—they were equally compatible with production by owners working at their own direction, and they were rooted in face-to-face local economic relations.¹⁶ Their immobility arose from the fact that their value depended heavily on the local presence of collaborators and customers. Thus, in addition to providing the material security needed for political independence, this type of property encouraged cooperation and fostered trust in a way that enhanced the people's capacities as citizens.

The two types of property most prominently condemned as incompatible with republican politics were financial property (securities) and slaves. Aside from the fact that they explicitly constituted subordination (of the wage-earner to the distant capitalist in the one case, of the slave to the master in the other), what these types of property had in common was their relative mobility. The traditional socialist and republican hostility to financiers, as well as to speculators and other intermediaries, is grounded in part on the notion that they introduce a degree of liquidity into economic rela-

14. Quoted in W. SEWELL, *supra* note 8, at 127–28.

15. See D. MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862–1872*, at 14–25 (1967); S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK AND THE RISE OF THE AMERICAN WORKING CLASS 1788–1850*, at 93–94 (1984).

16. Hired workers in artisanal workshops or small businesses might be considered independent to the extent that their status was transitional or was mitigated by strong informal bonds of mutual duty and respect. See, e.g., S. WILENTZ, *supra* note 15, at 94 ("the dependence of journeymen and apprentices — in principle a temporary condition — was tempered by their possession of a skill and graced with the affection and respect of the masters, in . . . a web of 'reciprocal' obligation").

tions that threatens the political structure of the community. Socialists and republicans attributed an astonishing range of morally corrosive effects to engagement in far-flung financial markets, including fraud and sexual licentiousness, most of which they explained at least in part by the failure of such property to anchor the individual in a local political community.¹⁷

And one reason why republicans considered black slavery a threat to the independence of whites was that the comparative mobility of slaves as opposed to landed property discouraged slaveholders from making material or personal investments in local communities, and encouraged them to oppose politically the types of public investments necessary to a vital public culture. With their wealth in slave property, owners tended to treat land as a variable cost, cultivate extensively, and then move on as soil productivity declined, without developing local attachments.¹⁸

Here the republican perspective resembles a notion contemporary economists associate with Albert Hirschman—that impediments to easy exit from a community create inducements for internal participation in efforts to improve the community.¹⁹ Fixed, locally rooted investments create such impediments (without directly or categorically infringing liberty of personal movement).

The second distinctive feature of social-republican property involves restraints on accumulation designed to preserve equality. The classical republican instance of such restraints is the "agrarian law" of the Roman Republic that constrained (to a limited and disputed extent) the amount of land that a citizen could acquire.²⁰ A central part of the constitution of Harrington's utopian Oceana was an agrarian law requiring the equal division of property among heirs at death and precluding citizens from acquiring during their

17. See, e.g., H. CAREY, *THE HARMONY OF INTERESTS, AGRICULTURAL, MANUFACTURING, AND COMMERCIAL* 202-09 (1872). See generally P. CONKIN, *PROPHETS OF PROSPERITY: AMERICA'S FIRST ECONOMISTS* 171-307 (1980).

18. H. CAREY, *THE SLAVE TRADE: DOMESTIC AND FOREIGN, WHY IT EXISTS, AND HOW IT MAY BE EXTINGUISHED* 35-43, 52-74 (1853). This analysis proved prescient. After the Civil War, when landholding replaced slaveholding as the preeminent economic activity, investment in towns and associated economic infrastructure increased dramatically. "Since land was fixed in place," the economist Gavin Wright concludes, "what occurred was a pronounced *localization* of economic life." G. WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* 34 (1986).

19. A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

20. See J. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* 154-58 (1990).

lifetimes more land than the amount that would generate income of 2000 pounds per year.²¹

Accumulation restraints figured commonly in 19th century reform models. To take one of the more radical examples, Thomas Skidmore, who influenced labor activists in New York in the 1830s, proposed a system under which property could be held privately only as a life estate, would revert to the state upon the holder's death, and would be redistributed each generation to young people in roughly equal allotments.²² A comparatively moderate instance was the provision (ineffectively enforced) of the Homestead Act of 1862 limiting the amount of public lands that might be acquired to a quarter section per claimant.²³ The Federal Reclamation Act of 1902 imposed a limitation (much evaded and recently liberalized) of 160 acres on the size of individual holdings that might benefit from federally subsidized water.²⁴

A different type of accumulation restraint is expressed in the market socialist notion of "social property." Under this notion, individuals have claims on the income of the enterprise in which they work, but they cannot either individually or collectively sell the enterprise or its assets. I mentioned this above as a transfer restraint, but it can also be seen as an accumulation constraint. It prevents worker/owners from capitalizing the anticipated future income of the enterprise. As in Skidmore's conception, their ownership interest is in the nature of a life estate—here the "life" being their membership tenure in the enterprise—though in market socialism the remainder interest is typically ascribed to the enterprise and its future members rather than, as Skidmore proposed, to the state.²⁵

A further type of accumulation restraint limits the degree of inequality within an enterprise. A strict constraint would provide equal rights of control and income for each member of the enterprise. Contemporary American partnership law presumes this in the absence of contrary agreement for members of a partnership.²⁶

21. J. HARRINGTON, *The Commonwealth of Oceana*, in *THE POLITICAL WORKS OF JAMES HARRINGTON*, *supra* note 13, at 231.

22. P. CONKIN, *supra* note 17, at 237–40.

23. L. FRIEDMAN, *supra* note 12, at 363.

24. J. SAX & R. ABRAMS, *supra* note 12, at 628–29.

25. Social property is often analogized to the Roman civil-law concept of *ususfructus*: "The right to use (*uti, ius utendi*) another's property and to take produce (*fructus*) therefrom (*ius fruendi*), without impairing (i.e., destroying, diminishing, or deteriorating) its substance. . . . As a strictly personal right the *ususfructus* is neither transferable nor alienable." A. BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 755 (1953).

26. UNIF. PARTNERSHIP ACT §§ 18(a), 18(e) (1969).

Early American corporate charters commonly limited inequality by capping the number of votes a single shareholder could exercise.²⁷ Some republican and market socialist programs mandate equal control and severely limit income inequality.²⁸

Yet another type of accumulation restraint common to many social-republican programs works indirectly and prospectively. This type includes arrangements involving insurance or cross-collateralization. Nineteenth century labor organizations, for example, often sought to provide health and unemployment insurance to their members. Many such programs were not funded on an actuarial basis and contemplated future charges on the more successful members to meet the needs of the others.²⁹ Analogous accumulation constraints were imposed by arrangements in which groups of worker-entrepreneurs would jointly guarantee or collateralize credit. The legendary Farmer's Alliance program provided for cooperatives to purchase farm supplies with "joint notes" secured by mortgages of members' farms. Each farmer's wealth was thus made subject to creditor claims in the event that any of them should default.³⁰

In the small-firm industrial districts of the "Third Italy" that achieved dramatic success in the 1970s, among the various types of interfirm cooperatives—many of them sponsored by the Communist and Socialist parties—are credit cooperatives based on the cross-collateralization idea. The cooperatives, which are funded by membership fees and public subsidies, issue loan guarantees to their members that enable them to secure otherwise unavailable commer-

27. E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860, WITH SPECIAL REFERENCE TO MASSACHUSETTS* 250, 259-60 (1954) (Middlesex Canal charter of 1795 provided for 800 shares and voting "by shares with a 25 vote maximum"; Franklin Railroad Company charter of 1830 provided for 5000 shares with no shareholder to have more than 10 votes).

28. See *infra* text accompanying notes 121-126.

29. I J. COMMONS, *HISTORY OF LABOR IN THE UNITED STATES* 83-85, 578-80 (1918); M. KELLER, *THE LIFE INSURANCE ENTERPRISE 1885-1910*, at 10 (1962).

30. L. GOODWYN, *supra* note 3, at 74-80.

The cross-collateralization idea has recently become prominent in discussions of economic development in poor countries, in part as a result of its successful use by the Grameen Bank in Bangladesh. The bank makes individual "micro-enterprise" loans sequentially to members of small support groups who are jointly responsible for repayment. See M. HOSSAIN, *CREDIT FOR ALLEVIATION OF RURAL POVERTY* (1988). Albert Hirschman recounts how a series of jointly guaranteed loans to members of groups of bicycle-riding delivery workers in the Dominican Republic led to the creation of a substantial organized social movement. A. HIRSCHMAN, *GETTING AHEAD COLLECTIVELY: GRASSROOTS EXPERIENCES IN LATIN AMERICA* 14-16 (1984).

cial bank financing.³¹ Another area in which the cross-collateralization approach appears today is cooperative (as opposed to condominium) housing, where individual owners typically pledge their ownership interests as security for their neighbors', as well as their own, debts.³²

Finally, the hostility in social-republican discourse to the corporate form of economic organization reflects in part the equality concerns underlying accumulation constraints. A central objection is that the corporation's ability to aggregate resources of far-flung absentee owners gives it political and economic advantages over local worker-owners. It can bring its outside resources to bear in the local political community in ways that give it disproportionate power. And because corporate owners are typically "absentees," they largely escape the local social externalities of their economic conduct (for example, unemployment and pollution), and thus are inclined to engage in activities that are inefficient in terms of the larger interests of the community. And social-republican rhetoric associates the corporate form with monopolistic market power that unfairly stifles local competition and exploits local business customers and suppliers.³³ Thus, limitations and prohibitions of corporate business and political activity may be seen as social-republican accumulation restraints.³⁴

The equality commitment creates an important tension within republicanism. Historically, republicans have been ambivalent as to

31. M. BEST, *THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING* 214-16 (1990).

32. J. DUKEMINER & J. KRIER, *PROPERTY* 401-02 (1981).

33. For social-republican accounts of the success of large-scale corporate capital in gaining disproportionate influence in state and local political processes, see C. WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913* (1951); J. GAVENTA, *POWER AND POWERLESSNESS* (1980). Gaventa's book also illustrates the theme that associates negative social externalities such as pollution and degraded working conditions with corporate economic activity. The railroad companies were the most prominent protagonists in the social-republican conception of predatory competition. See, e.g., Frank Norris's novel, *The Octopus* (published in 1901), and for a contemporary perspective critical of the social-republican approach, Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017 (1988).

34. At various times since the late nineteenth century several states have prohibited farming or ownership of farm land by corporations, and several such provisions have been enacted in recent years. Such prohibitions are generally understood to reflect a social-republican aversion to "absentee owners." *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991) (sustaining Nebraska prohibition against due process and equal protection challenges). These laws sometimes make exceptions for, among others, corporations whose owners satisfy residency requirements. E.g., *MINN. STAT. §§ 500.24(2)(d), (3)(b)* (1990) (prohibition not applicable to corporation, where, among other requirements, holder of majority of shares resides on farm or is actually engaged in farming).

whether just distribution of property should be treated as a subject of politics or as a prerequisite to it. The prominence of equality in the republican vision suggests that it should be a focus of ongoing political debate and action. But to many republicans, fundamental distributive struggles entail an aggressive factionalism inimical to the spirit of civic virtue that republican politics requires, and strong equality commitments pose the threat of requiring an excessively powerful state. Thus, some have argued that republican politics is possible only *after* fundamental distributive issues have been settled, so that *redistributive* claims can be excluded from the political agenda. Many republicans, even some as radical as Tom Paine, have opposed ambitious redistribution schemes.³⁵

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 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.³⁶ Today, explicit accumulation restraints on capital arise most com-

See K. MEYER, D. PEDERSON, N. THORSON & J. DAVIDSON, *AGRICULTURAL LAW* 44-48 (1985).

Another contemporary expression of wariness about corporations is the limitation in campaign finance laws on political contributions by corporations. See *First National Bank v. Bellotti*, 435 U.S. 765, 778-83 (1978). In the early nineteenth century, social-republican concerns fueled the ultimately unsuccessful opposition to "general" incorporation procedures that made the form liberally available. See J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 15-57 (1970).

35. E.g., H. ARENDT, *ON REVOLUTION* 53-110 (1965) (successful republicanism requires the removal of basic distributive issues from the political agenda); E. FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 249-52 (1976) (discussing Paine's ambivalent rejection of radical redistribution).

36. The strong emphasis on membership in republicanism gives it a simultaneous affinity with positions that seem more conservative and more radical than contemporary mainstream political discourse. The proposition that meaningful citizenship entails property could be interpreted to imply as readily that those who lack property should be excluded from citizenship as that all citizens are entitled to property. See Michelman, *Possession Versus Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1330-34 (1987) (discussing "exclusionary" and "inclusionary" republican appeals to equality).

Thus, in the antebellum era, republican rhetoric appealed both to slaveholders, who could argue (with ample classical precedent) that freeing citizens for politics required the relegation of mundane work to a permanently subservient noncitizen class, and radical agrarians, who argued for the expropriation and redistribution of land in a way that would guarantee each citizen a roughly equal freehold. In the Reconstruction era, the combination of a redistributive interpretation of propertied independence and universal citizenship generated the most radical (and quickly disappointed) visions of emancipation, those that held that the grant of citizenship to blacks should include

monly as conditions on government or charitable grants, or on exemptions from taxes or regulations.

The tension over redistribution has been avoided in the socialist tradition by a relatively unqualified commitment to equality, but this commitment has been made at the cost of the plausibility of the doctrine. The failure to recognize the political dangers of charging the state with a strong permanent mission of economic leveling, and of making leveling a preeminent focus of politics, are among the most important reasons for the increasingly widespread rejection of socialism.

Thus, a critical task of a plausible vision of social-republican property is to reconcile its commitment to equality with a decentralized institutional structure and a political culture that recognizes the importance of distribution without being obsessed with it.

The social-republican vision and its notion of property are not always distinguishable from social democratic notions that have played a prominent role in mainstream thought throughout most of this century. Social democracy also has ambitious aspirations for equality and democracy. Moreover, it has proposed conceptions of property, not only in welfare benefits and regulatory fairness, but in membership in public and private institutions, including the workplace, that overlap with social-republican property.³⁷ Nevertheless, the distinction between the social democratic and social-republican visions is worth drawing.

In contrast to social-republicans, social democrats tend to focus their egalitarian and democratic concerns on regulatory and tax-transfer structures rather than on the structure of the primary processes of production and exchange. Their efforts to limit inequality in the primary distribution of wealth tend to stop after the equitable provision of education and the limitation of inheritance. Social democrats tend to believe that the ownership of capital, once the powers of ownership have been shrunk by their transfer and regulatory apparatus, is of relatively slight political importance. They are less likely than social-republicans to see the sphere of production as a realm of political expression. When they do attempt to apply democratic and egalitarian norms to the workplace, they are likely to prefer models of unionization and collective bargaining in

something like General Sherman's "40 acres and a mule." See E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 233-36 (1988).

37. See Pound, *The New Feudalism*, 35 *COMM. L.J.* 397 (1930) (membership rights); Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) (welfare and regulatory rights).

investor-owned or state-owned firms to models of worker ownership.

Finally, social democrats tend to be relatively sympathetic to large-scale enterprise and concentrated capital (subject to regulatory restrictions and worker collective bargaining rights) and to find the social-republican vision of small-scale, owner-managed enterprise anachronistic and unattractive.³⁸ While there may be some room in the social democratic view for social-republican property, such property plays a more marginal role there.

II. SOCIAL-REPUBLICAN PROPERTY IN LIBERAL SOCIETY: RIGHTS OF CITIZENSHIP

Contemporary American legal and political culture is neither socialist nor republican. The prominent conceptions of property in the culture are classical liberal or social democratic rather than social-republican.

There is, however, an important core of rights where liberal culture tends both to impose alienation and accumulation restraints and to justify these restraints in the same political terms as republicanism and market socialism. These are the rights associated with "citizenship," understood in its popular rather than its technical legal meaning to denote the minimal rights of membership in the community. These rights include the right to remain in the country, the right to the protection of the laws, and the right to vote in elections to government office.³⁹

Many would add further rights, but this short list is not controversial as far as it goes, and it is not controversial that these core citizenship rights are constituted with strong alienation and ac-

38. For illustrations of the social democratic vision, see R. CROSMAN, *THE FUTURE OF SOCIALISM* (1956); J. RAWLS, *A THEORY OF JUSTICE* 274-84 (1972). The social democratic vision is in contrast to something like what I call the social-republican one in R. UNGER, *supra* note 1, at 585-86, and the distinction parallels Piore's and Sabel's contrast between "international Keynesianism" and "flexible specialization," M. PIORE & C. SABEL, *supra* note 1, at 251-80. For characteristic social democratic critiques of worker ownership, see H. CLEGG, *A NEW APPROACH TO INDUSTRIAL DEMOCRACY*, 19-30 (1960); S. PERLMAN, *A THEORY OF THE LABOR MOVEMENT*, ch. VI (1908).

39. Only the latter right is uniquely associated with the technical definition of citizenship; residence is accorded to lawful "permanent residents," and most of the elements of legal protection are accorded even to visiting aliens, but the lay and legal definition of citizenship connotes at least these three rights (plus some additional elements such as jury service and opportunities to hold public office). See Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *GEO. IMMIGR. L.J.* 1, 2-9 (1989).

cumulation restraints. Although the right to remain in the United States is notably scarce in the economic sense and would undoubtedly command a substantial price were it marketable, holders of the right cannot transfer it. (They can renounce or forfeit it, though this is not easy for citizen holders to do.) There is no way to acquire more than one American citizenship. And with a few exceptions, American citizenship requires forgoing citizenship rights in other nations.⁴⁰ The right of legal protection is also nontransferable and is defined in terms of equality—as a right to legal treatment on terms comparable to those on which other citizens are treated.⁴¹

Voting rights associated with citizenship are also strongly non-transferable (though not nonforfeitable). In general, voting rights must be exercised by the holder herself in person; proxies are precluded.⁴² The purchase and sale of votes is typically defined as criminal, often in distinctively republican rhetoric as “corruption of voters.”⁴³ And of course, voting rights typically must be allocated on the basis of “one man [sic], one vote,” a principle that requires within limits that the electoral process be structured so that voters have equal influence.⁴⁴

Citizenship rights are allocated through a political/legal process that emphasizes criteria of familial and geographical proximity. People can acquire citizenship automatically by being born within the territory of the country regardless of their family relationships, or by being born to citizen parents regardless of where. The naturalization criteria are more complex, but they too emphasize kinship and geographical proximity (prolonged residence).⁴⁵

40. 8 U.S.C. § 1448 (1988) (naturalization requires renunciation of foreign citizenship); 8 U.S.C. § 1481 (1988) (citizenship forfeited by, *inter alia*, foreign naturalization).

41. Schuck, *supra* note 39, at 2–9.

42. 26 AM. JUR. 2D *Elections* § 235 (1966); *see also* Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964) (suggesting that rights to a fairly apportioned legislature are inalienable by holding unconstitutional a malapportioned legislature despite approval by a majority of the disadvantaged voters).

43. *E.g.*, CAL. ELEC. CODE § 29620 (Deering 1977).

44. Baker v. Carr, 369 U.S. 186 (1962).

Citizenship also entails duties, notably of military service, that are typically defined as nontransferable and with a concern for equality of sacrifice. Social-republican concerns were prominent in the critique during the Civil War era of the provision allowing conscripts to pay a “substitute,” and in the contemporary critique of the volunteer army. At least in wartime, the idea of a nontransferable duty of military service seems to command a broad consensus. For an excellent discussion of this and related issues concerning inalienability, see Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 961–68 (1985).

45. *See* 8 U.S.C. §§ 1151–1182, 1429 (1988).

Another set of basic and uncontroversial rights associated with citizenship are rights of "free labor." These rights are reflected in the thirteenth amendment prohibition of "involuntary servitude," the statutory criminalization of "peonage," and the common law's refusal to specifically enforce "personal service" contracts.⁴⁶ The "free labor" idea is associated with notions of minimal equality, and it could be characterized as imposing an accumulation restraint that limits a person's powers of direct physical coercion to the labor of a single person, herself.

It also involves an indirect but quite pointed set of transfer restraints. The "free labor" norms do not simply prohibit the coercive imposition of slavery or peonage; they deny enforceability to these relations even where the worker has agreed to them. (Indeed that is the only point of the peonage doctrine, since in the absence of worker agreement the conduct it prohibits would violate general criminal law and tort law prohibitions.) The prohibition of "involuntary" servitude thus actually precludes ostensibly voluntary arrangements by making the worker's free labor rights inalienable.

Now consider rights to education. By statute or constitution, education is a universal entitlement in all states and an occasional subject of special federal constitutional solicitude.⁴⁷ Universal public education was a central plank of the nineteenth century social-republican platform, and it continues to be seen today as an element of civic capacity and political autonomy. Nevertheless, the rights structure of education only partly and ambivalently expresses social-republican concerns. On one hand, rights to public education are defined in terms of strong alienation and accumulation restraints. Residents of school age are entitled to public education in their communities; this entitlement cannot be transferred to outsiders, and is subject to constitutional and statutory equality requirements.⁴⁸

On the other hand, the practical significance of these transfer and accumulation restraints is reduced by a parallel system of private education operated in part on market principles. The private system is in tension with social-republican norms for two reasons. First, it facilitates the intergenerational transmission of privilege,

46. U.S. CONST. amend. XIII; 42 U.S.C. § 1994 (1988); A. FARNSWORTH, *CONTRACTS* § 836 (1982).

47. *E.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). *But see* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (denying that education is a "fundamental interest" for equal protection purposes).

48. *E.g.*, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

notably differential economic and political capacity, by allowing the well-off to purchase education for their children not available to the less advantaged. Second, it detaches the provision of education from the process of governance. This means that the provision of educational services does not act as a solvent of political community. High quality private education, unlike public education, does not tend to bond members to the community, and the availability of private alternatives undercuts incentives for citizens to respond to poor quality public education by the kind of political activity that improves the quality of the community generally. On the private educational market, citizens make inarticulate, low-visibility choices inspired by their conceptions of their children's private interests.

Thus, proposals to further privatize public education through publicly funded vouchers redeemable at both public and private schools are troubling in social-republican terms. The least troubling voucher schemes retain accumulation constraints—by providing for vouchers of equal value, by requiring participating schools to accept them as full payment, and by prohibiting explicit or implicit discrimination against applicants on the basis of socioeconomic characteristics. The vouchers are also nontransferable in the sense that they cannot be redeemed for cash or anything other than education. However, by making the vouchers negotiable across political jurisdictions and in the private market, the system uncouples education from politics and the exercise of citizenship.⁴⁹

One analysis of alienation and accumulation restraints on citizenship rights associates them with paternalism. From this perspective, the restraints reflect the belief that individual decisions to alienate these rights are so likely to be mistaken and contrary to the interests of those making the decisions that they should be prophylactically precluded. However, this view ignores the really distinctive aspect of citizenship rights—that they define membership in the community. This means that the goods they protect are in part collective goods, elements of a common culture in which everyone has a stake. Moreover, it means that these rights are constitutive more than instrumental—that is, they are components of the background

49. See generally J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); for a republican critique, see B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 293–98 (1984). A different approach to the unresponsiveness of public educational bureaucracies that is more consistent with social-republican principles is the decentralization to the neighborhood level along lines recently tried in Miami and Chicago. Wilkerson, *New School Term Puts Parents in the Seat of Power*, N.Y. Times, Sept. 3, 1989, § 1, at 1, col. 1.

autonomy necessary to regard someone as capable of meaningful decisions.⁵⁰

Where mainstream liberal views differ from social-republican ones is over the scope of the appropriate sphere of rights of this kind. American legal culture tends to treat property ownership largely as a constraint on politics and not as a prerequisite to political participation. Constitutional law creates no rights of minimal access to capital or income for the nonwealthy; it imposes almost no constraints on the exercise of ownership powers by the wealthy, and it substantially restricts legislative efforts to limit such powers.⁵¹

In the realm of common-law and statutory interpretation, the legal culture tends to employ presumptions that legitimate and facilitate the political subordination of the propertyless to the propertied, as, for example, in the doctrines that presume that employees may be dismissed at will or that employers need not bargain with unions over matters "at the core of entrepreneurial control."⁵² Here too there is a commitment to freedom of transfer that takes the form sometimes of a presumption of transferability and sometimes of active hostility to restraints on transfer, notably in the doctrine that some broad but ill-defined set of "restraints on alienation" is void as against public policy.⁵³

Moreover, even when the culture accepts measures compatible with the social-republican approach, it tends to explain these measures in liberal or social democratic terms rather than social-republican ones. For example, when the Supreme Court upheld a Minnesota statute providing for a moratorium on mortgage foreclosures—a classic debtor-protection measure from the 19th century social-republican repertory—it justified the measure, not in terms of the preservation of propertied independence or the adjustment of power between individual freeholding debtors and large institutional creditors, but as a welfare measure designed to protect

50. Rose-Ackerman offers from a mainstream liberal perspective a related analysis of voting as a collective good. See Rose-Ackerman, *supra* note 44, at 966–67. However, the idea of a collective interest in voting seems to me to fit better in a social-republican perspective. See Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443, 483–86 (1989).

51. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

52. E.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

53. E.g., *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978); *Jacobs v. Klawans*, 225 Md. 147, 169 A.2d 677 (1961).

against homelessness.⁵⁴ When it upheld the National Labor Relations Act, it spoke not of the institutionalization of democratic values in the workplace, but of the promotion of productive efficiency through "industrial peace."⁵⁵

The anomaly of social-republican property in American legal culture is further reflected in the difficulty of securely establishing some of the stronger forms of it. In its classic form, as exemplified by the Yugoslav industrial sector, social-republican capital is subject to control by the members of the enterprise and to their rights to income derived with it, but not to private appropriation by the members. Efforts to create such interests on a permanent basis in America risk being struck down as "inconvenient fetterings of property" under the rule against perpetuities and under trust doctrines requiring that there be a definite beneficiary for interests such as the residual interest in enterprise capital.⁵⁶

Significantly, the major exemption from these obstacles is for charitable organizations; here the perpetuities rule is suspended and the attorney general is charged with enforcing the prohibition against private appropriation in the absence of a definite beneficiary. However, social-republican organizations are typically denied these exemptions on the ground that, since their economic benefits go primarily to their members, their purposes are insufficiently "public" to count as charitable.⁵⁷ Since there are legal techniques for circumventing the obstacles posed by these doctrines,⁵⁸ their importance is less practical than expressive. They reflect the culture's premise that the organization of productive relations is not a matter of "public" concern and its discomfort with property that is neither

54. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

55. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

56. II W. FRATCHER, *SCOTT ON TRUSTS* § 119 (4th ed. 1987); *RESTATEMENT OF PROPERTY* §§ 370, 371, 380 (1944); *RESTATEMENT OF TRUSTS* § 112 (1935).

57. IVa W. FRATCHER, *supra* note 56, § 375.2; *RESTATEMENT OF PROPERTY* § 398 (1944); and cases cited in IVa W. FRATCHER, *supra* note 56, § 375.2 n.69.

58. For example, the limitations on appropriation can be imposed by organizing as corporations both a private governmental or charitable enforcing entity and the beneficiary enterprise, and then either having the beneficiary contractually agree to limitations on distributions, or giving the enforcing entity voting rights in the beneficiary corporation that enable it to veto distributions. Since corporations are accorded presumptively perpetual life, and the perpetuities rule does not apply to contractual interests, these approaches avoid the perpetuities problem (though they do not create self-enforcing restrictions on specific property). As a practical matter, trusts, deed restrictions, and leases (which can create self-enforcing restrictions on specific property) that are subject to the perpetuities rule will often suffice, since restrictions limited to periods within the rule often adequately serve the grantor's social-republican purposes. The problem of structuring enforceable equity limitations is discussed further at *infra* note 78.

entirely subject to private appropriation nor held in trust for some general public.

Nevertheless, although social-republican property deviates from the core conceptions of property, there is a significant variety of examples of it in the culture. The next two sections give illustrations.

III. RIGHTS ASSOCIATED WITH RESIDENCE

Political communities are defined geographically in terms of residence. However, in a liberal polity, residence does not connote property ownership, even for citizens; legal residence has come to mean largely a state of mind—an “intention to remain” within the jurisdiction. This much is enough to entitle the citizen to exercise narrowly defined political rights of citizenship, but citizenship entitles the citizen to not much more than these rights.

Nevertheless, the social-republican argument that political participation without property cannot be fully meaningful to the individual or salutary for the society retains some strength. People still require property as a practical means for both effective participation and enjoyment of the fruits of participation. Consider an argument that Robert Ellickson has made recently in the very un-social-republican language of public choice theory.⁵⁹ If people succeed through political action in improving their communities then, to the extent outsiders share their values and local housing supply is inelastic, much of the value of the improvements will be capitalized into higher real estate prices. The housing market translates political success into private wealth.

From a social-republican perspective, this is troubling for a number of reasons. For one thing, there is a concern that the prospect of private gains will divert citizens' attention from the common good in political decisionmaking. For another, there is a concern that inequality will be exacerbated. Ellickson, however, focuses on a partly distinct and in some respects more central concern. To the extent that the market capitalizes civic improvements in real estate values, only owners will typically benefit from them in the long run. In particular, tenants will find that their rents increase by an amount representing some or all of the market value of their shares of civic improvements. They may in fact lose their membership in the community entirely because they can no longer pay the in-

59. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

creased rents. At best, they will find themselves paying their landlords for improvements that represent the fruits of their own political participation. On the other hand, since tenants have only minimal economic investments in their communities, a decline in the quality of community life affects them differently than owners. They are more likely to have the option of moving without suffering great loss.

The important implication is that citizens who lack the long-term property right associated with ownership may not need to participate politically to protect their interests and may not be able to benefit from such participation. Thus, arguably they lack strong incentive to participate responsibly or at all. Even on its own narrow economic terms the argument requires many qualifications,⁶⁰ but it contains an important measure of truth, as any longstanding tenant in a neighborhood undergoing gentrification knows.

Ellickson concludes, in effect, that the liberal view of property rights is in tension with the liberal commitment to universal political rights and suggests that the tension might be resolved by disenfranchising tenants. His argument about the capitalization of improvements in site values strongly resembles that of the American socialist Henry George, and his argument that nonowners lack reliable motivation to be civically responsible strongly resembles that of the French republican Anne-Marie Robert Turgot.⁶¹

Although there is ample republican precedent for the idea of restricting franchise to the propertied, there is an alternative republican response to this tension—extending property to the enfranchised. Universalizing ownership-type housing interests gives people security against inflationary economic pressures and channels economic incentives into the political process by making the entire class of citizens the “residual claimants” on communal wealth.⁶²

60. See Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982).

61. H. GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH THE REMEDY* (1879); W. SEWELL, *supra* note 8, at 129 (quoting Turgot). Actually, Turgot embraced a solution for which Ellickson expresses admiration but declines to adopt: allocating voting rights among owners in proportion to the values of their real estate. Ellickson's proposal to enfranchise *nonresident* owners, however, departs from republican precedent, which deems residence a condition of civic participation.

62. Brennan, *Rights, Market Failure, and Rent Control: A Comment on Radin*, 17 PHIL. & PUB. AFF. 66, 77 (1988).

The idea that citizens should have a property interest that gives them a secure and substantial stake in the community plays some role in mainstream American legal and political culture. Consider, first, the "homestead" provisions of laws governing the enforcement of creditors' rights, which connote nineteenth century republicanism by both their names and their substance. These laws exempt from execution by creditors some portion of the value of the debtor's home. Such laws typically have a built-in transfer and accumulation restraint in the requirement that the home be used as the debtor's primary residence to qualify for the exemption. Where the exemption cannot be waived, it acts as a transfer restraint by precluding the debtor/homeowner from putting his property at risk as security for credit. The exemption is sometimes limited to a maximum amount to prevent it from shielding great wealth.⁶³

Social-republican notions may also play some role in the advantages conferred on ownership as opposed to tenancy by the income tax exemptions for interest payments and in-kind housing income to owner-occupiers.⁶⁴ These notions also pertain to property tax practices that wholly or partially immunize homeowners from increases based on appreciation since the time of purchase.⁶⁵ Such practices protect citizens from being pushed out of the community by housing market forces.

Such benefits typically involve some alienation and accumulation restraints, albeit weak ones. The property tax regimes contain an implicit alienation restraint; the incumbent owner cannot transfer her advantageous assessment and a sale triggers reassessment at the market value. To the extent tax advantages are conditioned on owner occupancy, they involve a weak accumulation restraint. Although they are often available for multiple homes, tax breaks

63. See, e.g., CAL. CIV. PROC. CODE §§ 704.710-704.995 (West Supp. 1991), which creates an automatic homestead exemption up to \$50,000 that can be extended to the full value by recording a declaration. Homestead interests can generally be waived only to secure purchase money debts. See 11 U.S.C.A. § 522(f) (West 1979).

The homeowner-mortgagor's typically nonwaivable "equity of redemption," which gives him the opportunity after default to redeem his home until late in the foreclosure process, plays an analogous role. See, e.g., G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 1.1-1.4 (2d ed. 1985).

For a discussion of several of the residence-related property interests mentioned here from a related perspective, see Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

64. See Goode, *Imputed Rent of Owner-Occupied Dwellings Under the Income Tax*, 15 J. FIN. 504, 518-19 (1960).

65. E.g., CAL. CONST. art. XIII A, § 2 (codifying "Proposition 13"); see also *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 n.4 (1989) (reserving the question of the constitutionality of such provisions).

often are not available for investment property. (Property tax *deferral* procedures that, instead of lowering taxes, postpone payment until the sale of the home or the death of the owner have stronger accumulation constraints, both because they recapture the tax subsidy and because they are typically conditioned on a showing of economic hardship or some status, typically old age, associated with economic hardship.⁶⁶)

The two types of property interests in residence that best approximate the social-republican ideal occupy a more marginal place than the tax subsidies. They are, first, tenant interests under rent control regimes, and second, "limited equity" ownership interests, especially those organized as housing cooperatives. Very few American jurisdictions have rent control, and only a tiny fraction of owner-occupied housing is subject to equity limitations, but both rent control and limited equity ownership have grown in recent years, and there has been increasing interest in both as possible responses to the low-income housing crisis of the past two decades. Outside the United States there are countries in which large sectors of the housing stock have been subject to such regimes.⁶⁷ A third type of property interest that is not usually explicitly linked to residence but often is in fact—interests in voluntary associations such as social clubs—also sometimes manifests social-republican qualities that can usefully be considered in this context.

A. Rent Control

Since the republican tradition has often equated the ownership necessary for political autonomy with freehold interests, rent-controlled tenancies may seem a poor approximation. However, rent control potentially gives tenants property interests that are nearly as adequate as the freehold for the purposes of security and political motivation, and it contains built-in alienation and accumulation restraints.

66. *E.g.*, CAL. REV. & TAX. CODE §§ 20503–20505, 20581–20586 (West 1983 & Supp. 1990).

67. For example, in Sweden rents are typically controlled, and the "cooperative sector" has produced a substantial portion of the postwar Swedish housing stock, though the social-republican features of this sector have been diluted by recent reforms. J. GILDERBLOOM & R. APPELBAUM, *RETHINKING RENTAL HOUSING* 163–80 (1988). On other European countries, see *id.* at 150–63; INTERNATIONAL LABOUR OFFICE, *HOUSING CO-OPERATIVES* (1964).

Typically, rent control statutes give the tenant security of tenure at a controlled rent.⁶⁸ The tenant cannot be evicted except for "cause," which of course includes nonpayment of the lawful rent. The rent usually is fixed in terms of a base rent negotiated in the past, which is then adjusted periodically to reflect increases in the landlord's costs. The regime is designed (with varying degrees of exactness) to allow the landlord to recover his costs, including a "fair" return on his capital, while excluding producer surplus and returns on the scarcity value of the site (or more generally, "rents" in the technical economic sense, "speculative" return in social-republican rhetoric). Thus, the regime provides some of the same security as ownership against dispossession due either to landlord whim or real estate appreciation.

Still, the security of the rent-controlled tenancy is in some respects weaker and in some respects stronger than the social-republican ideal. It is weaker because tenants can be evicted for disturbing or injurious conduct that owners might get away with and for reasons that have no analogy in the ownership situation—for example, when the landlord wants to recover the premises for her own use or that of a relative. It is stronger because the tenant is protected against losses in market value that the paradigmatic social-republican owner would have to bear.

However, in other respects, the rent-controlled tenancy satisfies social-republican norms better than ownership. It is subject to strong explicit alienation and accumulation restraints. The requirement that the benefited tenant be a resident (and sometimes that the premises be her primary residence) functions as both types of restraint, precluding both accumulation of protected occupancy rights and transfer to nonresidents. Moreover, a common restriction specifically precludes the tenant from transferring any of her rights for value, even to successor residents. (Landlords in rent-controlled jurisdictions sometimes permit departing tenants to select their replacements, but it is unlawful for the departing tenant to accept remuneration from the person she designates.) This means that the tenant cannot capitalize her rights as the "residual claimant" of the housing. She can enjoy, without cost, increases in the value of the premises due, for example, to improvements in the community, but she can enjoy them only in kind and must remain in place to do so. These property rights thus give her a positive inducement to work

68. See generally Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723 (1983).

for the improvement of the community through political means and impose costs on withdrawal from the community.⁶⁹

The social-republican view can be contrasted with an argument for rent control made by Margaret Radin based on the idea of property in housing as an expression of "personhood."⁷⁰ Radin emphasizes that people impress their personalities on their homes and view their homes as extensions of their selves. They experience dispossession as a diminution of or an assault on their persons. In her view, the value of rent control is to protect against such damage. This argument may mistake damage from loss of economic status and welfare for damage from loss of a particular home. People do need space in which to express themselves, but given adequate resources, can often quickly recreate a comfortable environment in a new home.

By contrast, the social-republican argument sees rent control as protecting against loss of membership in the community.⁷¹ It may be harder to assimilate into a new community than to recreate a comfortable home environment, and loss of membership in a community seems a more serious threat to identity than loss of a particular dwelling. Moreover, the social-republican argument explains rent control as a response, not just to individual loss, but to the collective action problems that arise because the creation and maintenance of community requires complex coordination among all the members.

B. *Limited Equity Ownership*

Another form of social-republican property in housing is limited equity ownership. Reformers have occasionally proposed that freehold owners voluntarily adopt equity limitations by conveying a portion of their equity to land or home trusts or that governments

69. Rent control is often accused of reducing housing supply by precluding price increases that would induce new investment. There is good reason to think that this effect may be quite small in many markets where tenants are most threatened by housing price inflation. See Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988). The ideal rent control program transfers the surplus above costs (including "reasonable" return on investment) of low-cost landlords to tenants, without reducing maintenance incentives or precluding efficient high-cost landlords from recovering their costs. It operates on the same principle as Henry George's social-republican land tax. See H. GEORGE, *supra* note 61.

70. Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986).

71. Radin considers connection to a local community an element of the "personhood" she would protect, *id.* at 368-71, so it may be that the difference between her view and the social-republican view is simply a matter of emphasis.

regulate the resale of homes to impose equity limitations. However, the most common source of equity limitations is through conditions on grants or loans by governments or nonprofit institutions or on permits or tax dispensations by governments.

Various government and nonprofit agencies operate programs that subsidize the construction, rehabilitation, or purchase of a dwelling and then confer limited equity ownership on the occupant. This approach has been tried, for instance, in connection with programs that rehabilitate dilapidated properties acquired by municipalities through condemnation under health and safety codes or through enforcement of tax liens. And limited equity interests are sometimes a component of "linkage" or "set aside" programs attached to the process of land use regulation; for example, regulatory permissions for a large commercial housing project may be conditioned on the developer's allocating a fraction of the dwellings to low-income residents.

Limited equity ownership interests are defined by at least one or the other of—and typically both—a transfer restraint and an accumulation restraint.⁷² If the dwelling is part of a cooperative association, the restraints will be enforceable by the cooperative. Whether or not a cooperative is involved, ultimate enforcement authority usually will be lodged in some governmental or nonprofit entity, perhaps the one funding the subsidy, or perhaps a land bank or community development corporation created for this purpose.

The transfer constraint, in addition to conditioning ownership on continued occupancy as a primary residence, will give the cooperative or enforcement agency control over the transfer of the equity interest. The constraint may require resale to the cooperative or agency (which can then decide on its own whom to retransfer it to), give the cooperative a right of first refusal, require its consent to sale, or require that the buyer satisfy stipulated conditions, especially with regard to income.

The principal accumulation restraint concerns the resale price. One sort of restraint merely requires sharing of gains with the subsidizer or enforcement authority. For example, one New York program permits the owner to sell to anyone at any price so long as he

72. See generally Massachusetts Government Land Bank, *Building for the Commonwealth: Materials on Limited Equity Housing Cooperatives* (1987); D. KIRKPATRICK, *LEGAL ISSUES IN THE DEVELOPMENT OF HOUSING COOPERATIVES* (National Economic Development and Law Center 1981).

pays forty percent of any capital gain to the city.⁷³ The more exacting restraints limit the sale price to the amounts of the purchase price, plus any capital improvements paid for by the owner, plus interest on amounts invested by the owner. A variety of intermediate standards have been used or proposed.⁷⁴

The more restrictive standards seem most consistent with social-republican principles. They provide security of tenure and enable the owner to recover his investment when he needs to leave, but deny him the opportunity to capitalize his surplus in the home or in the scarcity value of the site. Critics have argued for more generous standards on the ground that the departing owner may need more money to purchase on the market in the area to which he moves.⁷⁵ This seems unpersuasive. A market-level sales price may remove the home from the low-income housing stock (or require the diversion of subsidies that would have been available for other units to keep it there). It also enables the departing owner to take some of the subsidy out of the community. Moreover, it is a very overbroad way of dealing with the hypothesized problem, since the departing owner will not necessarily have a low income when he leaves and may not encounter high housing prices in the area to which he moves.⁷⁶

73. Roberts, *Owning a Co-op: Bid for Stability by Black Tenants*, N.Y. Times, July 6, 1987, § 1, at 33, col. 1.

74. Although state real property law can usually accommodate such limited equity interests, it often can do so only clumsily and without certain enforceability. Alienation and accumulation restraints expressed in deed restrictions may be vulnerable to challenge under rules against restraints on alienation, the rule against perpetuities, and usury laws. (The usury issue arises when an agency finances with a loan and reserves a share of appreciation on resale; if the appreciation were considered interest, the loan would often be usurious.) Having the agency retain title to the land and expressing restraints on the structure in a ground lease for the land is thought to be a more reliable approach in many jurisdictions. The unfamiliarity of limited equity arrangements to lenders (and their lack of negotiability in secondary markets) increases the difficulty of securing conventional financing. Buccino, *The Enforceability of Resale Controls: A Study of San Francisco's First-Time Homebuyer Program* (unpublished paper); D. KIRKPATRICK, *supra* note 72, at 91-95.

75. See D. KIRKPATRICK, *supra* note 72, at 77, 82 (describing the argument referred to in the text).

76. Reliable enforcement of equity limitations probably requires that the owner be obliged to resell to a public or nonprofit entity at a controlled price. Alternatively, they should at least prescribe both income limitations on purchasers and price controls.

Several limited equity programs in American municipalities appear to have quite weak equity limitations. This may be due to the administrators' lack of sympathy for

A further objection to strict price restraints is their inconsistency with the idea of "ownership."⁷⁷ This is true if the reference is to the classical liberal conception of ownership, but it seems doubtful that the subsidy program itself is justifiable in classical liberal terms. The restraints seem quite consistent with social-republican ownership notions. There, home ownership means a secure physical place in the community, not control of a commodity whose value is defined in an impersonal market.

Limited equity housing interests are often created as cooperatives. From a social-republican point of view, cooperatives have the virtue of creating a community within a community. Cooperatives usually take the form of a single multiunit building, but "scattered site" cooperatives sometimes unite dwellings in distinct buildings.

In a cooperative, ownership is held in common by a corporate entity of which the residents are members. In cooperatives inspired by social-republican ideals, voting rights are allocated to adult residents either on a one person-one vote—or more commonly, one household-one vote—basis. (By contrast, in other cooperatives, and typically in homeowners' associations, voting is allocated in proportion to the purchase price or market value of each dwelling.⁷⁸) Each household has membership and voting rights in the common corporate owner and a lease or occupancy agreement that gives it relatively exclusive possession and tenure of its dwelling.

The cooperative form adds two important features to limited equity housing. First, it creates an egalitarian mechanism for participation in the management of common facilities (or in the case of scattered site cooperatives, for the joint management of separate facilities). Second, it provides for the cross-collateralization of members' mortgage obligations. Since members own shares in the cooperative rather than their individual dwellings, and since the cooperative as a whole is the obligor on the mortgage debt, members share responsibility for defaults of their peers. This arrangement thus creates a fairly strong form of interdependence, as well as opportunities for collective action.

social-republican property notions, and perhaps to a tendency to view housing subsidies as a short-term patronage resource.

Resale controls were abolished in 1969 on a substantial segment of the Swedish cooperative housing stock, and there has been extensive debate over their desirability since then. J. GILDERBLOOM & R. APPELBAUM, *supra* note 67, at 175-77.

77. See D. KIRKPATRICK, *supra* note 72, at 82 (describing the argument referred to in the text).

78. Ellickson, *supra* note 59, at 1543.

We can get a further sense of the distinctive affinity of limited equity housing with social-republican ideals by contrasting it to two more common forms of subsidized housing: public or nonprofit-owned rental housing and vouchers. Public rental housing is comparable to rent-controlled private housing in giving the tenant security of tenure that amounts to a long-term, noncapitalizable stake in the dwelling. However, despite examples of tenant management and advisory counsels, public housing rarely gives tenants opportunities to participate in managing their housing comparable to those associated with ownership. This failing is a function of the further fact that public rental housing does not provide the inducement to participate that comes from the limited equity owner's equity stake and, in cooperatives, collective responsibility for the mortgage.

Voucher programs subsidize tenants who rent housing on the private market by providing for payment by the subsidizing agency of a fraction of the rent. The largest of such programs—the “section 8” program of the Housing and Community Development Act of 1974—sets the subsidy so that the tenant need pay no more than thirty percent of her income in rent.⁷⁹ It thus secures the tenant against dispossession because of insufficient income but provides only limited and ambiguous protection against dispossession for other reasons.⁸⁰ This otherwise typical rental relationship gives the tenant no responsibility or control over maintenance and improvements to the premises.

The most fundamental difference between the voucher and most other forms of subsidized, low-income housing is that the voucher subsidy is not attached to any particular dwelling. The transfer restraint on the subsidy is thus weaker: while the beneficiary cannot exchange the subsidy for cash or some good other than housing and cannot give it to another tenant, she can take it to any other dwelling in the jurisdiction that an owner is willing to rent to her. In theory, this should give her market power that mitigates dependence on the landlord and induces the landlord to maintain the premises in a fashion satisfactory to her.⁸¹ However, even when vouchers work as intended, they seem less satisfactory than limited equity ownership from a social-republican perspective. As a rental

79. 42 U.S.C. § 1437(f) (1988).

80. 24 C.F.R. § 882.215 (1990).

81. Legal aid housing lawyers tell me that, in practice, § 8 beneficiaries in some areas often find it difficult to find apartments at suitable rents, and are thus vulnerable to exploitation by the few landlords who will rent to them. The difficulty appears to reflect the inadequacy of the subsidies, landlord discrimination, or both.

arrangement, the subsidy does not give the beneficiary the sense of control and responsibility associated with ownership. And unlike cooperative ownership, it does not create a community of interdependent, jointly responsible members.

C. *Local Voluntary Associations*

During the nineteenth century and even recently, observers have often suggested that the comparative underdevelopment of the American state has been balanced by the extensive development of voluntary associations. "Americans of all ages, stations in life, and all types of disposition are forever forming associations," Alexis de Tocqueville wrote.⁸² The associations that are most interesting in the present context are often called mutual benefit organizations. They include consumer cooperatives, sports and social clubs, amateur learned societies, and churches. They should be distinguished on the one hand from mutual or cooperative enterprises, considered below, and on the other from nonprofit charitable organizations. Unlike cooperative enterprises, mutual benefit societies serve their members primarily as consumers rather than as workers, and they typically do not produce for outsiders. Unlike nonprofit charitable organizations, they are designed to benefit their members rather than the public at large or some larger, more indefinite group, and they are controlled by their members, while charitable organizations are typically organized in ways that preclude beneficiary control.

Mutual benefit voluntary associations often have a social-republican cast. The common law of voluntary associations and the more recent mutual benefit corporation statutes take a largely facilitative posture: members can define their relations more or less as they like. However, the default provisions of the common law and often the statutes express distinctly social-republican expectations. Presumptively, membership rights are nontransferable and governance is on a one person-one vote basis.⁸³

The preclusion of individual appropriation or capitalization of membership rights is emphasized: "By becoming a member of an association, a person ordinarily acquires, not a severable right to

82. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485 (J. Mayer & M. Lerner eds. 1966).

83. 7 C.J.S. *Associations* §§ 19, 20, 26, 27 (1990).

any of its property or funds, but merely a right to the joint use and enjoyment thereof as long as he continues to be a member."⁸⁴

While the law recognizes no individual right in association property, it does recognize a distinctive individual right in membership. Generally, members of voluntary associations cannot be expelled except for valid reasons and in accordance with fair procedures. The right protects, not a liquid property interest, but rather the "member's relation to the association," and for this reason it is often specifically enforceable.⁸⁵

Nevertheless, there is one respect in which the traditional law of voluntary associations seems ill-suited to social-republican purposes—it does not effectively constrain the private appropriation of associational capital. Although the default rules often preclude distributions to members during the life of the association, they typically permit the members to dissolve the association by majority vote and distribute the association's property among themselves.⁸⁶ (Former members have no claim on the property no matter how much they may have contributed to it.) Noting the apparent inconsistency between the prohibition of ongoing distributions to members and the tolerance of liquidating ones, Henry Hansmann proposes that the prohibition be abandoned.⁸⁷ However, a social-republican might prefer to extend the prohibition to liquidation. A social-republican regime for mutual benefit associations might adopt the common practice with respect to charitable corporations of providing that on dissolution the association's property be transferred to a comparable organization serving similar purposes.

Though the law does not apply such constraints to mutual benefit associations by default and even maintains obstacles to creating them expressly,⁸⁸ it appears that members often treat the capital of mutual benefit associations *as if* it were subject to such constraints and forego opportunities for individual appropriation in order to retain the social-republican character of the enterprise. Social,

84. *Id.* § 26; see *Lawson v. Hewell*, 118 Cal. 613, 50 P. 763 (1897); *De Bruyn v. Golden Age Club*, 399 P.2d 390 (Wyo. 1965).

85. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1007 (1930).

86. 7 C.J.S. *Associations* §§ 56, 59 (1990); Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 575-78 (1981).

87. Hansmann, *supra* note 86, at 587-95.

88. The traditional doctrine holds that a nondestructible, noncharitable trust for an unincorporated association that extends beyond the period of the rule against perpetuities is invalid unless "the unqualified power to expend the corpus thereof for one or more purposes of the association is given to the trustee, or to the members of the association, or to some other person or persons." RESTATEMENT OF PROPERTY § 380 (1944).

country, and athletic clubs organized as mutual associations often accumulate property, especially through real estate appreciation. Sometimes the members respond by permitting the creation of a limited market in membership or by terminating and selling to a commercial operator, but often they do not. Instead, the members retain collective control over the admission of new members and admit them on terms that disregard capital accumulation and appreciation. The participants simply do not commodify their memberships; they think of them as relations rather than as financial investments.⁸⁹

Another form of mutual benefit organization is the consumer cooperative of the sort occasionally found in the retail grocery business and more commonly in retail book sales at universities. Mutual savings banks and insurance companies are also forms of consumer cooperatives. Although consumer cooperatives and mutual benefit enterprises are typically organized under legal regimes distinct from voluntary associations, they bear a strong kinship to voluntary associations. They also typically manifest similar alienation and accumulation restraints. In particular, consumer cooperatives with substantial capital tend to preclude members from capitalizing their interests by limiting the amounts for which members' shares can be redeemed. There is a corresponding tendency to admit new members on terms that disregard the value of the organization's capital.⁹⁰

IV. INTERESTS ASSOCIATED WITH WORK

The American economy has generated a variety of enterprises designed along social-republican lines. Such enterprises have often been termed "cooperatives," though the term is both over- and under-inclusive. It is over-inclusive because many nominal cooperatives lack the strong alienation and accumulation restraints en-

89. I am unaware of any published documentation of this point, but it is supported by anecdotes from acquaintances about various social clubs.

90. R. HEFLEBOWER, *COOPERATIVES AND MUTUALS IN THE MARKET SYSTEM* 183-85 (1980).

Homeowners' associations are another species of association that might be viewed as social-republican. See Ellickson, *supra* note 59, at 1521-39. They are typically constituted with alienation restraints (deed restrictions) that require purchasers to adhere to association rules. Owners have voting rights in the association, and even when voting rights are allocated by investment rather than on a one per person (or unit) basis, disparities in voting power are often limited by the limited range of property values. However, the associations typically do not themselves own property (except in some cases, common areas), and typically there are no equity limitations on individual holdings. Members can cash out most or all of their interest on departure.

tailed by the social-republican vision. It is under-inclusive because some variations of enterprises with other designations—mutual companies, partnerships, and corporations with employee stock ownership plans—do have such characteristics.

Cooperative enterprise in the social-republican sense was at the core of some of the more important nineteenth century radical movements, including those associated with the Farmers' Alliance and the Knights of Labor.⁹¹ Such radical programs failed politically, but the social-republican vision has always had some power. A variety of modern laws and programs give symbolic and (usually small) material support for cooperatives. The Capper-Volstead Act exempts cooperatives from many strictures of the antitrust laws.⁹² Subchapter T of the Internal Revenue Code gives preferential tax treatment to cooperatives.⁹³ Congress has created a network of "Banks for Cooperatives" to afford credit to agricultural and rural utility cooperatives.⁹⁴ And it has created tax subsidies for Employee Stock Ownership Plans, a few of which have social-republican cooperative features.⁹⁵

Myriad experiments in cooperative enterprise have failed, and few have achieved long-term success, but there are some examples of successful, stable cooperative enterprises. Indeed, there are a few sectors of the American economy in which enterprises designed on cooperative principles have gained footholds over broad segments of an industry for long periods of time. In agriculture, mutual or cooperative enterprises that provide power and water, that market crops, and that purchase supplies and equipment continue to flourish, though they depart in many ways from social-republican principles. In professional services, especially legal services, partnerships conforming to a substantial measure to the social-republican model have been prominent. In the manufacturing sector long-term success stories are rarer, but there are some. Perhaps the best known is a group of plywood production companies in the Pacific Northwest that have operated successfully as cooperatives since the late 1940s.⁹⁶

91. See *supra* note 3 and accompanying text.

92. 7 U.S.C. §§ 291–292 (1988).

93. I.R.C. §§ 1381–1388 (1988); see also the additional provisions offering favorable treatment for agricultural cooperatives at I.R.C. § 521.

94. 12 U.S.C. §§ 2121–2149a (1988).

95. I.R.C. §§ 401(a), 409(e), 4975(e)(7) (1988).

96. See generally J. KNAPP, *THE RISE OF AMERICAN COOPERATIVE ENTERPRISE* (1969); R. RUSSELL, *SHARING OWNERSHIP IN THE WORKPLACE* (1985); *WORKER COOPERATIVES IN AMERICA* (R. Jackall & H. Levin eds. 1984); Gilson & Mnookin, *Shar-*

There are two well-known foreign models of cooperative enterprise, both of which date from the early 1950s. One is the Yugoslav self-management model, which was applied throughout most of the manufacturing sector of the Yugoslav economy with mixed success.⁹⁷ The other is the model of the Mondragon cooperatives in the Basque region of Spain, a network of cooperative enterprises with about 20,000 members that has enjoyed remarkable growth and profitability over four decades.⁹⁸ The Mondragon model has inspired a variety of reform and promotion efforts, such as those of the Industrial Cooperative Association of Somerville, Massachusetts, and is reflected in recent state legislation designed to facilitate cooperatives.⁹⁹

These various enterprise models have in common that they limit important ownership rights to people who have an independent participatory role in the organization other than as capital suppliers. In partnerships of this kind, these people are the partners. In cooperatives, they are typically referred to as "members" in their managerial capacity and "patrons" in their capacity as residual claimants on the organization's earnings.¹⁰⁰ In ESOPs, they are shareholders. The independent role may be as workers producing products within the cooperative enterprise, or as independent producers using supplies purchased by the enterprise or producing products marketed by it.

Most of these arrangements contemplate that the residual returns go to patrons, often in proportion to "patronage." This means that finance, whether internal or external, must take the form of fixed debt-like, rather than equity-like, claims.

The rest of this Part considers, from a social-republican point of view, partnerships, production cooperatives, and ESOPs. It then considers whether certain kinds of employment security might man-

ing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 STAN. L. REV. 313 (1985); Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749 (1990).

97. See H. LYDALL, *supra* note 5.

98. W. WHYTE & K. WHYTE, *MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX* (1988); David Ellerman, *The Mondragon Cooperative Experiment* (Harvard Business School n.d.).

99. See Ellerman & Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1983).

100. The use of the term "patron" in the cooperative context seems to derive from the consumer cooperative model, perhaps that of the Rochedale Pioneers in Britain, which had a great influence on 19th century American producer cooperative efforts. See J. KNAPP, *supra* note 96, at 30-31, 51-57.

ifest social-republican characteristics. Finally, it considers certain characteristics of institutions of interfirm coordination, such as trade associations, labor unions, and purchasing and supply cooperatives.

A. *Partnerships*

The widely enacted Uniform Partnership Act contains in its default provisions a vision of enterprise organization with strong social-republican features. Partners are presumed to share power and distribute profits equally.¹⁰¹ Moreover, the right to participate in the enterprise (though not the right to receive profits) is non-transferable.¹⁰² And the transfer of control to nonworkers is inhibited by the doctrines of inadvertent partnership and unlimited liability that often impose unlimited risks of enterprise loss on passive investors.¹⁰³ While many of the transfer and control features prescribed by the Act can be varied by contrary agreement, a few cannot, including the inadvertent partnership principle, the rule that any partner can bind the enterprise in ordinary business vis-à-vis third parties, and the option of any partner to dissolve the partnership at will (subject to damages for wrongfully doing so).¹⁰⁴

In the professions, the social-republican aspects of the partnership model have been complemented or reinforced by professional concerns. The control of work by absentee investors has been inhibited by professional norms limiting the extent to which professionals can practice under the control of nonprofessionals and imposing strong nonwaivable duties to clients on individual practitioners.¹⁰⁵

Moreover, the ideal of practice among elite professionals has often involved a substantial measure of solidaristic egalitarianism. For example, many elite corporate law firms have tended to be organized in relatively egalitarian ways, at least compared to comparable business organizations. Though there have been radical distinctions of compensation and power in these organizations between partners and nonpartners and professional and nonprofessional staff, such distinctions have been relaxed among partners. Partners traditionally have had security of membership in the part-

101. UNIF. PARTNERSHIP ACT § 18 (1969).

102. *Id.* §§ 25, 27.

103. *E.g.*, *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77 (1927).

104. UNIF. PARTNERSHIP ACT §§ 9, 31 (1969).

105. *E.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C) (lawyer not to practice in for-profit organization if nonlawyers are investors, directors, officers, or have the right to direct lawyer's judgment), DR 6-102 (1982) (lawyer's duty of care not waivable).

nership and a voice in management, though voting has often departed from one person-one vote in order to favor seniority or productivity. In some firms, compensation among partners has taken the form of a "lock step seniority system" in which every partner in each cohort receives the same amount without regard to estimates of productivity.¹⁰⁶

Moreover, the social-republican character of the professional firm is encouraged by professional norms designed to inhibit the commodification of client relations and the capitalization of returns to professional expertise. Like republicanism and market socialism—in part, *through* them—legal professionalism has been influenced by the labor theory of value. A traditional premise of legal professionalism has been that lawyers are paid for performing legal work for clients. This principle has in turn inhibited the charging of referral fees for simply putting the client in touch with another lawyer who then performs the work.¹⁰⁷ The restriction on referral fees can be seen as an objection to commodifying the client—treating his trust in the referring lawyer as an asset on which that lawyer might earn a return. The same premise is implied by the prohibition on the "sale" of a professional practice, which, of course, would amount basically to the sale of clients.¹⁰⁸

Social-republican and legal professional concerns also converge in the disfavoring of noncompetition covenants.¹⁰⁹ Such rules may have some relation to the "free labor" notion that a person's productive capacities are an inalienable component of her identity as a citizen-producer. In the professional context, the nonenforceability of such covenants further inhibits the commodification and capitalization of client relations. Since lawyers cannot make an enforceable promise not to take clients back, it is harder for them to demand compensation for transferring clients.

Perhaps because of such norms (and no doubt because of practical constraints), elite professional practice has often manifested a central hallmark of social-republican property—an economic interest contingent on active membership in the enterprise that cannot be capitalized fully or carried away on departure. The provisions governing compensation of departing partners in elite law firms

106. See Gilson & Mnookin, *supra* note 96.

107. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-22, DR 2-107 (1982).

108. Dwyer v. Jung, 133 N.J. Super. 343, 346, 336 A.2d 498, 499, *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (1975); ABA Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945); H. DRINKER, LEGAL ETHICS 189 (1953).

109. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1982).

have traditionally contemplated payment mainly of principal and interest on capital contributions, retained profits allocable to the partner, and receipts allocable to services performed by the partner. The opportunities for future earnings that are typically reified and capitalized as "goodwill" in the conventional capitalist enterprise have not been a core element of the conception of property rights in the professional firm.¹¹⁰

These professional principles have been violated as frequently as they have been espoused—firms have always varied widely in the extent to which they have approached social-republican organizational models, and the recent trend is toward both dilution of the professional norms and rejection of the social-republican models in favor of more conventionally capitalistic ones. Yet the prior history of firms organized on this model can be counted as a major instance of social-republican success. The principles still appeal to a constituency within the professional elite and some of the most successful law firms continue to adhere to them.¹¹¹

B. *Production Cooperatives*

Statutes dealing with cooperatives typically reflect a fairly loose conception of such organizations, but most require, or at least imply, distinctive procedures concerning at least either control or the distribution of residual returns. The Capper-Volstead Act exemption for agricultural cooperatives requires that an organization either allocate voting control on a one-per-member basis or that it allocate residual returns on the basis of patronage (work performed or goods sold through or bought from the cooperative) rather than financial investment.¹¹² The Internal Revenue Code exemption for cooperative income applies only to "patronage dividends" and not to residual returns on capital contributions.¹¹³ Capper-Volstead requires that the enterprise be operated "for the mutual benefit of the

110. See P. CARRINGTON & W. SUTHERLAND, ARTICLES OF PARTNERSHIP FOR LAW FIRMS (ABA 1961) (model provisions with a discussion of prevailing practices); see also *Siddall v. Keating*, 8 A.D.2d 44, 47, 185 N.Y.S.2d 630, 632-33, *aff'd*, 7 N.Y.2d 846, 164 N.E.2d 860, 196 N.Y.S.2d 986 (1959) ("good will is not ordinarily attributable to a law partnership"; to attribute it to a partnership would violate referral fee prohibition).

111. See *Gilson & Mnookin*, *supra* note 96; Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985).

112. 7 U.S.C. § 291 (1988).

113. I.R.C. § 1382(b)(1) (1988). A separate rule for agricultural cooperatives exempts dividends on capital stock if they do not exceed eight percent and all the stock is owned by the patrons. I.R.C. § 521 (1988).

members," and Subchapter T requires that it be operated "on a cooperative basis"; both standards limit the use of outside equity.¹¹⁴

State cooperative corporation statutes are typically enabling legislation designed to make clear that the corporate form is available to organizations that separate voting rights from capital contributions and distribute net returns to patrons. They rarely strongly require such features as a condition of organizing under the statute, though they sometimes prescribe them in the absence of a decision by the corporation to opt for a different arrangement.¹¹⁵

Although the mandatory statutory conditions are weak, nearly all producer cooperative shares are subject to transfer restraints, since the shares confer worker-member status. The restraints may mandate resale to the enterprise (which can then make its own decisions about whom to admit), or give the enterprise options, rights of refusal, or rights of approval with respect to the transfer of rights by departing members. Such provisions, however, are not radically different from those commonly found in conventional small business arrangements.

The nature and extent of accumulation constraints varies more widely. Some cooperatives (or, more generally, producer-owned enterprises) defy social-republican norms by allocating voting or control rights on a basis other than one person-one vote. The departures that are most easily reconciled with social-republican principles allocate voting on the basis of "patronage" (in a worker

114. The extent of the limit is unclear. *See* Rev. Rul. 82-51, 1982-1 C.B. 117. *Capper-Volstead* requires that agricultural cooperatives which do not limit voting power to one vote per member may not pay dividends on stock in excess of eight percent, but provides no explicit limit for cooperatives with egalitarian voting rules. 7 U.S.C. § 291 (1988).

The principle that dividends on capital stock be "limited" (*i.e.*, capped at moderate rates) appears in the rules of the Rochdale Cooperative Society that influenced 19th century British and American cooperatives and the rules of the International Cooperative Alliance that influence contemporary European ones. J. BONIN & L. PUTTERMAN, *ECONOMICS OF COOPERATION AND THE LABOR-MANAGED ECONOMY* 145-47 (1987); J. KNAPP, *supra* note 96, at 34.

115. *E.g.*, CAL. CORP. CODE § 12410 (West Supp. 1991) (cooperative membership shares nontransferable in absence of bylaw to the contrary); MASS. ANN. LAWS ch. 157A, §§ 6, 7 (Law. Co-op. Supp. 1991) (members must have equal voting rights; voting rights to nonmembers requires member authorization).

Some American cooperatives are organized under general incorporation acts. Modern corporation statutes are generally flexible enough to accommodate worker cooperatives. Many state cooperative statutes have not been recently revised and were designed with consumer or marketing, rather than producer, cooperatives in mind.

cooperative, the amount of work performed). Those least reconcilable allocate rights in proportion to capital contributions.¹¹⁶

Perhaps the most revealing accumulation issue concerns the economic rights of members on departure. Here we can distinguish three general approaches, only the last of which seems fully consistent with social-republican principle. The least consistent approach is what might be called the *unlimited equity* cooperative. Here there are no limitations on the amount for which a departing member may sell (to a permissible buyer). The member sells her interest for its market value. This is true of most older contemporary American cooperatives.¹¹⁷

Where the departing member can sell for market value, one might say that her interest in the firm is not social-republican property, since it represents an interest in the future earnings of the firm that can be realized without remaining a member. Moreover, if the cooperative has been successful, then the need of the new entrant to make a large payment will introduce inequality between the old and new members, and if the cooperative finances the purchase with a loan to the new member, this inequality will be reflected in lower current net payments to that member.

Nevertheless, two factors mitigate the tendency of unlimited equity provisions to dissolve social-republican property. First, most cooperatives are small businesses and, because of the high relative costs of disseminating and acquiring reliable information about such businesses, the market value of ownership interests in small businesses may reflect a greater discount of future earnings than that of large businesses. Second, since the memberships can only be sold to people who are acceptable to the existing workforce as peers (and who either have the sufficient cash or seem creditworthy), the pool of buyers will be limited, and this will impose a further discount. The interests reflected by these discounts—interests in future earnings that can only be appropriated by remaining with the enterprise—are kinds of social-republican property, though they are common features of small business generally, not just those styled explicitly in social-republican terms.

116. Mutual water companies and public irrigation districts often allocate voting rights (and assessments) in proportion to acreage or land values.

117. Examples are the plywood companies of the Pacific Northwest, cooperative taxicab companies in several American cities, and the cooperative garbage companies in the San Francisco Bay area. K. BERMAN, *WORKER-OWNED PLYWOOD COMPANIES* 194-96 (1967); R. RUSSELL, *supra* note 96, at 74-79, 123.

The second approach to capital appropriation can be called the *no-equity* cooperative. It is exemplified by the model of the self-managed firm espoused by Jaroslav Vanek, based in part on a critique of the Yugoslav experiments.¹¹⁸ In this model, the enterprise must be financed entirely by debt. Not only is outside equity prohibited, but so is inside equity, or self-financing through retained earnings. The Vanek firm does not accumulate capital; its net worth is always zero, and workers benefit only through current distributions. The zero-net-worth norm requires not only that earnings be paid out as earned, but that increases in firm goodwill or going concern value be immediately cashed out with borrowed funds.¹¹⁹

If the unlimited equity cooperative lacks social-republican property because all its capital is subject to individual appropriation, the no-equity firm lacks social-republican property because it cannot accumulate capital at all. Vanek's approach is designed to avoid inefficiencies attributed by neoclassical economists to the labor-managed firm,¹²⁰ but from a social-republican point of view, it creates new problems. Labor and product markets are competitive in the Vanek model. Though the compensation workers receive is variable, since it depends on enterprise performance, prospectively workers anticipate no more from association with their firm than

118. Vanek, *Some Fundamental Considerations on Financing and the Form of Ownership Under Labor Management*, in *THE LABOR MANAGED ECONOMY* 171-85 (1977).

119. The need to cash out capital gains is my own inference from Vanek's premises. Vanek himself apparently contemplates that the firm will be prevented from acquiring goodwill or other firm specific capital by (a) entry of competing firms that will eliminate rents and supra-competitive returns and (b) the requirement that intangible as well as physical capital be rented (or purchased with borrowed funds) rather than developed with internal resources. See J. VANEK, *THE GENERAL THEORY OF LABOR-MANAGED MARKET ECONOMIES* 386 (1970); McCain, *Empirical Implications of Worker Participation in Management*, in *PARTICIPATORY AND SELF-MANAGED FIRMS* 40 (J. Svejnar & D. Jones eds. 1982). But free entry could not eliminate supracompetitive returns as long as successful firms had confidential information about costs and revenues. And to the extent that competitive returns include a return to entrepreneurial risk or innovation, successful firms would still experience capital gains. Many intangibles could not be rented because they are necessarily developed internally (e.g., on-the-job learning) or because, being firm specific, they cannot serve as adequate collateral for the firm's payment obligations.

Obviously, the no-equity (or in Vanek's rhetoric, "pure rental") firm creates moral hazard problems: the lender assumes most of the risk without getting any control, while the workers have limited incentives to preserve the firm's assets.

Finally, note that in practice the attempt to preclude equity accumulation by constantly cashing out gains would involve probably insuperable valuation difficulties and transaction costs.

120. See *infra* note 180 and, more generally, J. BONIN & L. PUTTERMAN, *supra* note 114, at 13-18, 56-61..

the market rate for their services, which presumably they could get from other firms as well. If the enterprise is successful, workers will benefit, but they will be able to capitalize the success immediately. While workers get no additional payment when they leave, they have no strong economic interest in remaining either.

Thus, the centrifugal pull of market forces is likely to lead to high turnover that will jeopardize the identity of the enterprise as an enduring community. Changing market signals will constantly induce members to leave or require the quick assimilation of outsiders. These pressures may be weaker than the corresponding ones in the economy envisioned by neoclassical economics, but they will remain substantial, and Vanek's model has no strong economic force countering them. In the social-republican view, an important reason for the creation and persistence of firms, especially firms that can be plausibly viewed as political communities, is the productivity of a kind of goodwill capital or going concern value that is necessarily illiquid. But Vanek's requirement that such capital be cashed out to maintain net worth at zero precludes this critical economic solvent. From a social-republican point of view, the fact that most successful firms necessarily acquire capital is a virtue, not, as it appears in the Vanek analysis, a defect.¹²¹

The cooperative form most consistent with social-republican principle is the *limited equity* firm. The version with the most severe equity limitations is probably the one prescribed in Yugoslav market socialism prior to the reforms of 1988. Yugoslavia broadly prohibited both employment and private ownership of capital. Where these prohibitions applied, all workers over eighteen were

121. Although I think the no-equity model is incompatible with the most plausible formulation of social-republican principle, it does bear some affinity to social-republican *rhetoric*, and many social-republicans might mistake it for their ideal because they tend not to think of their enterprises as accumulating capital in many circumstances in which they do accumulate capital. I think this tendency is due in part to the fact that cooperators are relatively likely to view their interests in relational rather than financial terms. They may be especially resistant to the idea of "goodwill"—relations of trust and collaboration reified as capital.

Ideological cooperators influenced by the labor theory of value seem particularly likely to be influenced by such attitudes. However, even hard-headed businesspeople sometimes seem to be influenced by these attitudes in their dealings with cooperatives. For example, outsiders have noted the casualness and informality of the equity redemption practices of many mainstream agricultural cooperatives and the implied indifference to what, from a conventional capitalist point of view, appears to be substantial cross-subsidization. FARMER COOPERATIVE SERVICE, U.S. DEP'T OF AGRIC., EQUITY REDEMPTION PRACTICES OF AGRICULTURAL COOPERATIVES, FCS RESEARCH REPORT 41 (April 1977). Vagueness about capital rights on departure seems a common feature of American cooperatives.

members of the firm, or collective, and were entitled to equal votes both in the selection of management (directly or through representative councils) and on a wide range of policy decisions (subject, however, to a variety of severe extra-enterprise constraints and pressures). The collectives received capital from banks or state agencies subject to the duty to maintain its value through a depreciation reserve, to pay interest on it, and to pay taxes on net earnings. (For some enterprises, these duties were lightened by the failure of the system to take account of inflation in setting either depreciation requirements or interest rates, and by lax enforcement of debt obligations.) The members were the residual claimants on the firm's earnings. They decided, within significant limits, on the distribution of the net earnings after taxes among wages, reinvestment, and collective consumption. (The scope of this discretion varied over time; it appears to have been widest from 1965 to the early 1970s.) The workers, of course, could not alienate their rights of membership or capitalize their claims on earnings. They could benefit from their rights only to the extent they remain active members.¹²²

A version with less severe limitations is the one associated with the Mondragon network. Mondragon adheres to the one person-

122. See generally, H. LYDALL, *supra* note 5, at 82-88.

The 1988 reforms retained the notion of industrial capital as social property but diluted and narrowed its role in the economy. See Ellis, *Yugoslavia's Move Toward a Market Economy: An Analysis of the New Law on Enterprises*, 7 B.U. INT'L L.J. 301 (1989).

It seems doubtful that either the comparative success of the Yugoslav economy through the mid-1970s or its subsequent failure should be taken as evidence of the viability of social-republican property arrangements. The worker control norms were implemented only marginally. Moreover, the economy adopted a series of economically dubious practices that were not mandated by social-republican norms, including the rationing of capital at negative interest rates, the failure to enforce debt obligations, the maintenance of preclusive barriers to competitive entry, undisciplined monetary policy, and indiscriminate wage and price controls. See H. LYDALL, *YUGOSLAVIA IN CRISIS* (1989). Of course, in accounting for decline, it is difficult to separate the centrifugal pressures of ethnic and cultural division in an ineffectively coordinated federal system from the effects of economic policy decisions.

A distinctive arrangement with some kinship to the Yugoslav firm is that of Bewley's Cafes, a 400 worker restaurant chain in Ireland, which was transferred by its founder to a trust "for all those working in the firm, past, present and future." R. OAKESHOTT, *THE CASE FOR WORKERS' CO-OPS* 79 (1978). The situation of the Bewley workers resembles that of the Yugoslavs in that each worker participates in the current profits of the firm, but has no capital stake that she can appropriate on departure. But, while in both situations the firm capital is subject to a trust for future workers, in the Bewley firm it is under the direct control of nonworker trustees, while in the Yugoslav firm it is—in theory—under the direct control of the workers. Arrangements of this kind are facilitated in Britain by the Industrial Common Ownership Act, 1976, ch. 78; see R. OAKESHOTT, *supra*, at 74-107.

one vote principle, and limits income differentials between the lowest and highest paid members to a ratio of 1 to 3 (or 4.5 in exceptional cases). Members are paid weekly "advances" (as opposed to wages) at a fixed rate and then twice annually are paid or credited with a distribution of net earnings or losses. A portion of the net earnings is retained as internal equity finance.¹²³

In the Mondragon model, as in conventional cooperatives and partnerships, each member has an individual account ("internal capital account"). The account reflects whatever the member paid upon admission and the member's accumulated shares of retained earnings and losses. Distribution of earnings and losses is calculated with a formula that weighs both each member's "patronage"—hours worked—and the size of her capital account. The account is adjusted annually to reflect increases in the value of the firm based on appraisals of its assets. Interest is credited annually to each account. The accounts, and other rights in the firm, are not transferable by the members, but on departure the firm pays the member the amount in her account (though payment may stretch out over some years).

In contrast to the Yugoslav model, Mondragon permits members to capitalize a portion of their economic claims on the firm, but this portion is smaller than in the unlimited equity model for at least two reasons. First, although the stipulated price for the redemption of membership shares includes some allowance for inflation of individual assets, it excludes goodwill or going concern value. Moreover, thirty percent of the firm's income is allocated to collective, rather than individual, accounts that fund insurance and collective consumption activities such as education and recreation and, apparently, the subsidization of new entrants who are charged far less for entry fees than any market measure of the value of the rights they receive.¹²⁴

123. The description of Mondragon in this and the following paragraphs is based on Ellerman, *supra* note 98. For a description of an American cooperative based on the Mondragon model, see the description of the O & O supermarket chain in Philadelphia in Kreiner, *Worker Ownership as the Basis for an Integrated Proactive Development Model*, 15 N.Y.U. REV. L. & SOC. CHANGE 227 (1986).

124. Ellerman defends the collective reserve as both an accumulation constraint limiting inequality among members and as a safeguard against unrealistic expectations, minimizing the likelihood that the enterprise will prove unable to redeem its shares at the stipulated amounts. See Ellerman, *supra* note 98. The latter explanation seems weak. The collective reserve reduces the risk of disappointment only by eliminating the possibility of a more generous return; it is hard to imagine that exiting workers would prefer this. To the extent that there is a concern that the firm will be insufficiently liquid to fund redemptions—if for example, many workers retire at the same time—that

Some features of the Mondragon model are mandated by Spanish law on cooperatives. France and Italy, which along with Scandinavia have the most extensive cooperative movements, have statutes requiring the maintenance of collective reserves that cannot be individually appropriated on departure.¹²⁵ The cooperative model promoted by the Knights of Labor in the 1880s was basically a limited equity model.¹²⁶

C. ESOPs

Since 1974, the Internal Revenue Code has provided extraordinary tax benefits to employee stock ownership plans, in which employers fund employee pension benefits with their own stock. Although the provisions have been defended by the banker Louis Kelso, a prominent promoter, and Senator Russell Long, their prime legislative sponsor, in social-republican terms, the plans instituted under them have not been impressive from a social-republican point of view. They often give little or no control to employees. Many plans do not contemplate acquiring a substantial fraction of voting stock. Many plans provide that a substantial portion of their voting rights be exercised by trustees, who are appointed by management (and often are managers themselves), rather than by the

concern could be addressed by provisions for gradual redemption beginning before retirement or extending after it.

125. See COMMISSION OF THE EUROPEAN COMMUNITIES, III PROSPECTS FOR WORKERS' COOPERATIVES IN EUROPE (1984). The chapter on France says of the collective reserve that it belongs "to the co-operative as a unit and is in no sense the property of the workers—the latter merely have the right to enjoy the benefits deriving from its use." French cooperative law provides for the redemption of shares at book value with no adjustment for appreciation. According to the commentators, the "major difference between a worker cooperative and a conventional company is thus that there is no possibility of appreciation in the capital value of the business" of the former. Sibille & Ruatti, *Perspectives from France*, in *id.* at F14.

126. See *Rules and Regulations of the Jewel Co-operative Knitting Company of St. Louis, Mo.*, J. UNITED LAB., June 25, 1885, at 1016-17. The model, which was proposed as containing "the only principles . . . which can really and effectually supersede the wage system," provided that capital shares were to receive a fixed return of eight percent, workers were (apparently) to receive noncontingent advances (in lieu of wages), and then net income after the payment of these and other claims was to be divided equally among capital, labor, and customers. Job vacancies were to be filled by the enterprise management committee. Capital shares could be held by and transferred to any member of the Knights. A departing worker could transfer his capital shares, and thus capitalize anticipated dividend payments, but he could not cash out anticipated supracompetitive wage premiums by selling his job to a new entrant. This is in contrast to many contemporary cooperatives, such as the plywood group in the Northwest, where the newcomers see themselves as "buying a job." Greenberg, *Producer Cooperatives and Democratic Theory: The Case of the Plywood Firms*, in WORKER COOPERATIVES IN AMERICA 181 (R. Jackall & H. Levin eds. 1984).

employee beneficiaries. The statute permits withholding ESOP voting rights on a variety of issues, including the election of directors, from employees in privately-held companies; it also permits withholding voting rights on all issues in "leveraged" ESOPs to the extent that stock remains subject to outstanding debt. Managers can institute and (except in the rare cases where the terms of the plan or the extent of worker control precludes it) terminate ESOPs without employees' consent.¹²⁷ Thus, at most, the ESOP provisions merely create the possibility of tax-subsidized transfer of control to employees, a possibility that has been realized in only a small fraction of the plans established under them.¹²⁸

Even plans that pass through to workers the voting rights on controlling blocks of stock may be subject to social-republican objections. While such plans limit participation to employees, they may have only weak accumulation constraints. Allocations of stock to individual participants are based on participants' salaries. Higher paid employees thus receive more,¹²⁹ and senior workers will develop larger accumulations than junior workers.

In contrast to the typical situation with cooperatives, entering workers do not need to make a capital contribution to the ESOP. However, if voting rights are allocated in proportion to share allo-

127. Regarding the minimum requirements for voting rights of stock in tax-subsidized ESOPs, see I.R.C. §§ 409(1), 4975(d)(3), 4975(e)(8) (1988); regarding the minimum requirements for the "pass through" of stock voting rights to employee beneficiaries, see I.R.C. §§ 401(a)(22), 409(e), 4975(e)(7). The Department of Labor has taken the positions that the fiduciary norms of the Employee Retirement Income Security Act (ERISA) prohibit the "pass through" of votes on "unallocated" shares in leveraged ESOPs and that even where a plan may and does "pass through" voting to the beneficiaries, the trustee retains ultimate responsibility and must disregard the employee's direction when she determines that it is contrary to the employee's interests in secure retirement income. See U.S. Dep't of Labor, Opinion Letter on Tender Offers (Polaroid), 16 Pens. Rep. (BNA) 390 (Feb 23, 1989); U.S. Dep't of Labor, Letter on Proxy Voting by Plan Fiduciaries (Avon Products), 15 Pens. Rep. (BNA) 391 (Feb. 23, 1988).

Amendments effective in 1990 restrict certain subsidies for leveraged ESOPs to those in which voting on allocated shares is "passed through" and employees receive majority voting control. I.R.C. § 133(a)(6)-(7) (West Supp. 1991).

128. See Hansmann, *supra* note 96, at 1796-80.

129. With the authorization of the tax code, many ESOPs exclude significant categories of (typically lower-paid) employees, sometimes amounting to a majority of the work force. J. BLASI, *EMPLOYEE OWNERSHIP* 142-54 (1988). The code does impose a (very liberal) cap on the size of subsidized contributions on behalf of any particular employee, § 415, but under the cap it permits (through the rules regarding the "integration" of pension plans with Social Security) contributions of a higher percentage of salary for higher paid-workers than for lower-paid ones. See Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 433 (1987).

cations, as they presumptively are, then unequal share distributions will make for unequal control, potentially extremely unequal control. One response to this problem that has appealed to some unionists is an ESOP voting trust that requires the trustee to vote shares as a block in accordance with a participant majority vote, on a one person-one vote basis. Deborah Olson calls such an arrangement a "cooperative ESOP."¹³⁰

D. *The "Job as Property"*

Nineteenth century social-republicans saw the wage earner status as irreconcilable with social-republican values of independence. However, in recent decades reformers have speculated that it might be possible to vindicate social-republican values by reformulating the employment relation. They have proposed measures, such as "just cause" termination rules, that constrain the ability of the employer to use powers of discharge and discipline to subordinate employees in ways that are not reasonably required by the production process. The social-republican associations of such doctrines are reflected in the suggestion that they imply a vision of "the job as property."¹³¹

At the same time, some of the more adventurous recent initiatives in work organization have extended some of the characteristics associated with ownership to workers. Profit sharing and bonus compensation plans give workers a partial residual claim on enterprise earnings. Other reforms extend some incidents of control. "Team concept" production systems give workers some shop floor control over the implementation of production procedures. Joint

130. Olson, *Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases, and Co-operatives*, 1982 Wis. L. REV. 729, 818-22; see also *id.* at 757-58.

For small companies (*i.e.*, companies whose stock is not subject to the registration requirements of the Securities Exchange Act of 1934), the tax code authorizes arrangements in which the trustees vote shares in proportion to the results of a one-per-person vote by participants. Section 409(e)(5). For example, if 70 participants voted in favor of a resolution and 30 against it, the trustee would vote 70 percent of the shares in favor and 30 against regardless of the variations in shareholdings among participants. The "cooperative ESOP" idea differs from this arrangement in contemplating that, following the beneficiary vote, the trustee vote all shares in accordance with the views of a majority of the participants. The permissibility of the "cooperative ESOP" is open to doubt, and indeed in the view of the Labor Department, even clearly permissible (or mandated) "pass through" voting is subject to the trustees' duty to disregard beneficiary instructions that she believes are not in the beneficiaries' best interests. See *supra* note 127.

131. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885 (surveying and arguing for prohibitions on unjust dismissals).

labor-management committees sometimes give employees information and opportunities to address production design and even strategic business decisions over matters such as product development, subcontracting, and investment. Such opportunities are rarely extended as a matter of legally enforceable right, but in a few unionized plants they are guaranteed in collective bargaining agreements. Worker representation and voting rights on the board of directors of public corporations have been collectively bargained for in a few American companies. The more radical of these experiments seem to erode the line between ownership and employment.¹³²

More than these organizational experiments, economic developments over the course of the century have given substance to the idea of property rights in the job. In recent decades, a large fraction of American workers have developed long-term associations with a single employer.¹³³ In the more stable and often less competitive "primary" sector of the labor market, long-term employment is the norm. A striking fact associated with this system is that once an employee embarks on a career with a long-term employer her compensation will often exceed that available to her on alternative jobs. In some industries, this phenomenon is a consequence of personnel systems that restrict hiring to "ports of entry" at the lower tiers of job hierarchies and fill higher positions by internal promotion; thus, comparable jobs at other enterprises for a mid-career worker may be closed to outsiders. The fact that mid-career employees may have difficulty finding comparably paid jobs elsewhere is also a function of compensation structures that reward long-term tenure. These features in turn reflect the fact that the value of many employees is in large part a function of on-the-job training and socialization in skills and attitudes that, because they involve idiosyncratic aspects of the production process or the ability to collaborate effectively with a unique set of co-workers, are peculiar to the enterprise.¹³⁴

Such developments might seem capable of providing an infrastructure for a regime of social-republican property. The worker in a long-term employment relationship who is paid more than she could get in the external labor market has an economic stake in the

132. See generally T. KOCHAN, H. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986); Simon, *The Politics of "Cooperation" at the Workplace*, 1 *RECONSTRUCTION* 18 (Winter 1990).

133. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 *AM. ECON. REV.* 716 (1982).

134. P. DOERINGER & M. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 64-90 (1971).

enterprise. This stake is nontransferable. It binds her to the enterprise in a way analogous to a nontransferable cooperative ownership interest. Of course, to play a meaningful social-republican role, such an interest would have to be legally secured, whether by strong collective bargaining guarantees or individual protections such as "just cause" termination standards. Moreover, it would have to be complemented by accumulation constraints that would permit workers to participate in control and would limit inequality in control and reward.¹³⁵ Strong unions sometimes perform that role; some new experiments in work reorganization also take steps in this direction.

E. *Interfirm Coordination*

A variety of activities facilitate collaboration among separate firms, for example, price fixing, prescribing and maintaining quality standards, collecting and disseminating information, training and allocating workers, purchasing supplies, securing credit, and researching and marketing products. These activities are organized in a variety of ways. In agriculture, collective supply purchasing and marketing activities typically take the form of cooperatives, and farmers sometimes collaborate to produce power or water in cooperatives or mutual companies. Craft labor unions in, for example, the construction and garment industries, perform worker training and referral functions. Information, research, and standard setting activities are often organized by trade associations.

Such institutions played a central role in the 19th century social-republican visions of, for example, the Farmers' Alliance and the Knights of Labor, where they were expected to moderate the pressures of price and wage competition and enable small producers to attain economies of scale.¹³⁶ Much of the extensive producer cooperative sectors in France, Italy, and Scandinavia are linked by

135. Wage patterns in many mainstream enterprises seem to reflect at least implicit accumulation constraints. Unions typically bargain for more egalitarian wage distributions than prevail in nonunion plants. R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 79-82 (1984). And nonunion employers often create wage distributions far more equal than the distributions of their employees' marginal products, even when marginal products are readily measurable. Frank, *Are Workers Paid Their Marginal Products?*, 74 AM. ECON. REV. 549 (1984).

136. L. GOODWYN, *supra* note 3. The Knights' system is described in detail in C. HORNER, *PRODUCERS' COOPERATIVES IN THE UNITED STATES, 1865-1890* (Ph. D. diss., Univ. of Pittsburgh, 1978).

associations that provide credit and technical assistance.¹³⁷ Michael Piore and Charles Sabel have recently pointed to the analogous role of such institutions in a variety of contemporary industrial districts and networks and argued that they have fostered technological dynamism and flexible adaptation to changing markets.¹³⁸

American antitrust law reflects a classical liberal suspicion of such activities to the extent that they inhibit price competition (as well as a relative tolerance for the kind of coordination that occurs through the agglomeration of small firms into large ones). Labor and agriculture benefit from limited antitrust exemptions, but in nonagricultural product markets, the antitrust law prohibits such activities where they constrain price competition.¹³⁹

For our purposes, the important point is that the organization of such activities often has social-republican characteristics. Associations for the joint purchasing of supplies or marketing of products are typically organized as cooperatives; we have already noted that the tax and antitrust provisions benefitting cooperatives impose significant transfer and accumulation restraints, and members often voluntarily adopt additional ones.¹⁴⁰

Labor unions are required by statute to accord control to members on the basis of one person, one vote. They do not permit the transfer of membership rights. Members cannot individually capitalize their rights to collective capital. Union property is typically held in trust for the membership, and constitutions often provide that property go on dissolution to a related union organization.¹⁴¹

Trade associations are usually organized under nonprofit corporation statutes reflecting the common-law principles of voluntary

137. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 125, at vol. II, DK11-5 (on Denmark); vol. III, F31-6 (on France); vol. III, I1-25 (on Italy); M. BEST, *supra* note 31, at 209-25 (on Italy).

138. M. PIORE & C. SABEL, *supra* note 1, at 265-75 (1984).

139. *E.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); *see also* Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

140. *See supra* notes 112-113 and accompanying text. Supply and marketing cooperatives are pervasive in agriculture. Wholesale supply cooperatives serving retailers are significant in a variety of consumer goods businesses, notably groceries, hardware, and baking. Hansmann, *Ownership of the Firm*, 4 J. LAW, ECON. & ORGANIZATION 267, 285-91 (1988).

141. Labor Management Reporting and Disclosure Act of 1959, § 101(a)(1), 29 U.S.C. § 411(a)(1) (1988); LABOR RELATIONS AND THE LAW 973-74 (R. Mathews ed. 1953). At common law, unions were and are voluntary associations, subject in the absence of relevant statute or agreement to default principles that have a highly social-republican character. *E.g.*, Harris v. Backman, 160 Or. 520, 86 P.2d 456 (1939); Local Union No. 1, Textile Workers v. Barrett, 19 R.I. 663, 36 A. 5 (1896).

association. Memberships are not transferable. Voting is sometimes proportional to the size of dues payments, but is more often on a one-vote-per-member basis. Members cannot individually appropriate capital except on dissolution.¹⁴²

Thus, the principal types of institutions of interfirm cooperatives each frequently manifest social-republican characteristics.

V. THE POLITICAL ECONOMY OF SOCIAL-REPUBLICAN PROPERTY

Liberalism is the perspective from which republican and socialist ideas are most often and distinctly criticized. While there are myriad liberal criticisms relevant to social-republican property, two seem especially interesting, the first because of its prevalence, the second because of its plausibility.

The first criticism is that there is a strong trade-off between equality and economic productivity, and that social-republican property sacrifices the latter to the former.¹⁴³ The second is that

142. G. LAMB & C. SHIELDS, *TRADE ASSOCIATION LAW AND PRACTICE* 217-21 (1971).

Two features that one might expect to find in all forms of social-republican economic organization are, first, forfeitable membership, and, second, protection against arbitrary forfeiture. In the conventional corporation, individual investors, once admitted, cannot normally be involuntarily excluded (except in connection with certain fundamental restructurings of the business). In the classical at-will employment relation, employees can be excluded arbitrarily. By contrast, in the social-republican enterprise, members should not be exempt from expulsion, since the enterprise is premised on mutual trust and cooperation among members. At the same time, members should be protected against arbitrary exclusion, since they have an interest in the enterprise that is not fully compensated by the redemption of their membership on departure.

We have seen that this principle is explicitly recognized in the common law of voluntary associations, which permits expulsion but requires that it be for valid reasons and in accordance with fair procedures. See *supra* note 85 and accompanying text. The common law principle has been applied to trade associations and labor unions. *E.g.*, *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931). It is quite similar to the "just cause" dismissal doctrine a few states have applied to employees. The common law protects partnership interests with an analogous though slightly weaker standard requiring "good faith" (though not necessarily fair process) in expulsion decisions. *E.g.*, *Holman v. Coie*, 11 Wash. App. 195, 522 P.2d 515 (1974), *cert. denied*, 420 U.S. 984 (1975). Curiously, there is no such general common law principle for cooperatives, though the Sherman Act applies one to interfirm cooperatives (as well as to trade associations), *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), and producer cooperative by-laws typically contain "just cause" and due process provisions.

Of course, the interests of homeowners and tenants discussed in Part III are typically protected by requirements of judicial process in connection with dispossession. *E.g.*, CAL. CIV. PROC. CODE §§ 1159-1179a (West 1982).

143. See O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 265-68 (1985); Hansmann, *supra* note 96; Jensen & Meckling, *Rights and Production Functions:*

social-republican property achieves intrapolitical equality only at the expense of extrapolitical inequality, generating solidarity among the members of the communities it constitutes only by excluding outsiders who would be admitted into a polity attuned to liberal principles.¹⁴⁴

I am not prepared to offer here a full assessment of these criticisms but rather two brief suggestions. First, there is an important strand of contemporary economic discourse that is responsive to the first criticism and resonates with the social-republican view even when it does not use its rhetoric. One can hardly say that this discourse resolves the issue in favor of the social-republican view, but one can say that there is economically informed support for some major premises of that view. The second criticism is more troubling. It points to a tension in the doctrine's most basic commitments that social-republicans have not adequately addressed.¹⁴⁵

The discussion here is confined to some general presumptions about social-republican property at a fairly abstract level, although the evaluation of any specific social-republican reform would cer-

An Application to Labor-Managed Firms and Codetermination, 52 J. BUS. L. 469 (1979). Jensen and Meckling focus on the Yugoslav model. Hansmann's model disclaims strong transfer or financial accumulation constraints and hence represents a much weaker form of social-republican enterprise.

144. Although formulated in my own terms, this criticism draws on (1) the neoclassical economic critique of the producer cooperative or "Illyrian firm," see J. BONIN & L. PUTTERMAN, *supra* note 114, at 13-79, and (2) recent social-democratic critiques of what one might call the cultural republicanism inspired by Pocock, see Bell & Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1612-15 (1988); Freeman & Mensch, *A Republican Agenda for Hobbesian America*, 41 U. FLA. L. REV. 581, 606-11 (1989).

145. A third criticism that I will not take up in the text asserts that social-republican property interests are hard to enforce. The problem here is that the residual capital interest in social-republican property belongs either to the public at large or to some indeterminate group that includes future, as yet unidentified, members of the enterprise or organization. This means that enforcement must rest significantly on outsiders—state officials or members of associations such as community development corporations with monitoring functions—and these enforcers will lack both the incentives and the information that a private capital owner typically has to enforce her property rights.

The criticism identifies a real problem with many social-republican property interests. For example, enforcing restrictions against the subleasing at market rates of rent-controlled and limited equity housing is quite difficult. How telling this objection is depends on how we frame the comparison with liberal or social-democratic property regimes. If social-republican property is viewed in comparison with private capital interests, the enforcement process seems easier for the latter (though by no means unproblematic where, for example, the owner is a corporate shareholder). On the other hand, if we compare social-republican property enforcement with the enforcement of social-democratic tax and welfare interests (since social-republican property regimes are partial substitutes for tax-transfer redistribution), the problems of the former do not seem especially severe.

tainly turn on a variety of specific contextual features. I have in mind an economy where social-republican property is created either on wholly private initiative or through tax and regulatory regimes and as conditions on public or charitable grants or subsidies, and where it coexists with liberal private property (and other forms). Thus, I exclude an economy such as pre-1988 Yugoslavia's, where classical liberal property was prohibited in important sectors.

A. *The Potential Efficiency of Social-Republican Property*

1. Social-Republican Property v. Casino Capitalism

Social-republican property is inefficient by definition under some liberal definitions of efficiency, since it creates individual interests that cannot be exchanged even in circumstances where the owner and a willing purchaser would find it in their interests to do so. Nevertheless, under a slightly more expansive notion of efficiency, two sorts of arguments can be made for the potential efficiency of social-republican property. The first associates social-republican property with psychological or cultural dispositions favorable to productivity. The second sees social-republican property as a response to limitations of the market in coordinating individual choices in the workplace.

The first argument is the most difficult to formulate and substantiate, but elements of it seem to have intuitive plausibility to a broad range of people. The argument is that the set of attitudes associated with commodification that republicanism and socialism see as inimical to individual dignity and communal integrity are also inimical to productivity. Part of the argument is that narrowly economic calculation often leads to short-sighted judgments that frustrate long-run self-interest. But another, more elusive part is that both individual and collective welfare often require that individuals suspend economic calculation, because people are often most productive when they see their work as a form of self-expression rather than as a commodity. As John Maynard Keynes wrote, "If human nature felt . . . no satisfaction (profit apart) in constructing a factory, a railway, a mine or a farm, there might not be much investment merely as a result of cold calculation."¹⁴⁶

Commodification undermines the sense of intrinsic satisfaction in economic activities by eroding the sense of connection between the activity of work and its social meaning and by eroding the expe-

146. J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 150 (1936).

rience of work as membership in a community. Taken to an extreme this objection—for example, in the Utopian socialist exaltation of “use” value over “exchange” value—would lead to a repudiation of markets entirely. More commonly, the social-republican objection has focused only on capital markets and on two aspects of these markets that are nicely represented by two images Keynes invoked in his *General Theory*. In one, he compared the investment process to the card game “Old Maid” in which the object is to pass the Old Maid card to someone else before the game is over; in the other, he compared it to

those newspaper competitions in which the competitors have to pick out the six prettiest faces from a hundred photographs, the prize being awarded to the competitor whose choice most nearly corresponds to the average preferences of the competitors as a whole; so that each competitor has to pick, not those faces which he himself finds prettiest, but those which he thinks likeliest to catch the fancy of the other competitors, all of whom are looking at the problem from the same point of view.¹⁴⁷

Part of Keynes’s and the social-republican concern is simply the volatility of these markets; community requires more stability than these markets will tolerate. Another, more elusive dimension of the problem seems to involve what the republicans call corruption and the socialists call alienation. In this context, both terms connote the attenuation of the relation between the identity of the producer and the assets she works with. This attenuation occurs when owners start to view their assets, first, as something to be traded rather than worked, and second, as something whose value is determined by speculative opinion rather than by appraisals of the worth of what it will produce.¹⁴⁸ The shared intuition of Keynes and the social-republican view is that this attenuation leads to a weakening of the effort and imagination (or as Keynes put it, “animal spirits”) on the part of the producer. To some extent, this weakening may be a matter of the distractions from production of the constant signaling of the asset market. More fundamentally, it seems to involve a psychological shift toward complacency about production.

147. *Id.* at 155–56.

148. “Speculative opinion” here means “the activity of forecasting the psychology of the market” as opposed to “the activity of forecasting the prospective yield of assets over their whole life.” *Id.* at 158. Although social-republican rhetoric against speculation does not distinguish the two explicitly, I have the impression that its strongest objections were to investment associated with the former.

Keynes considered (though he ultimately rejected) a categorical prohibition on the alienation of capital as a response to the psychological problem (and to others).¹⁴⁹ The social-republican approach to property is a more flexible set of measures along this line. In theory it supports the maintenance of productive communities both by reducing the volatility of capital market pressures and by inhibiting the culturally corrosive effects of speculation.

This line of thought bears some relation to the recent critique of the corporate takeover phenomenon that finds a debilitating psychological effect on management resulting from the takeover threat.¹⁵⁰ The related proposals to inhibit the takeover process are in some respects akin to the transfer restraints of social-republican property. Social-republican concerns also resonate with the suggestion that the recent tendency in managerial recruitment to favor legal and financial backgrounds over engineering ones has adversely affected productivity. The complaint here is that legal and financial training discourages interest in production and personal identification with products.¹⁵¹

The second type of argument focuses on the fact that a broad range of important types of production requires illiquid, long-term investments. From the social-republican perspective, the most pertinent of such investments are those that resist commodification because they are embedded in particular relationships. One investment of this kind is individual education in knowledge or skills that is distinctively useful within the enterprise, venture, or bounded economic community. Another is education about the particular characteristics of another participant or potential participant in a common endeavor. Employers make such investments in recruiting and screening new employees; old employees make such investments when they train new employees, and we might consider this process an investment by the new employees as well. Enterprises make such investments in learning about their customers, suppliers, and trading partners. This type of learning might focus on both the reliability of the prospective collaborator and the taste and technical characteristics that define her needs (as a customer) or capabilities (as a supplier).

149. *Id.* at 160-61.

150. *E.g.*, R. REICH, *THE NEXT AMERICAN FRONTIER* 140-72 (1983); Drucker, *Corporate Takeovers—What Is To Be Done?*, 82 *PUB. INTEREST* 3 (1986).

151. Hayes & Abernathy, *Managing Our Way to Economic Decline*, *HARV. BUS. REV.*, July-Aug. 1980, at 74-76. David Halberstam's account of the postwar decline of the Ford Motor Company in D. HALBERSTAM, *THE RECKONING* (1986), is an extended illustration of this thesis.

Finally, a third related type of investment is the development of effective modes of collaboration. For example, employers may invest in professional services to train employees how to work together; even if they do not, the earlier stages of collaboration, when workers are necessarily experimenting and learning about alternative modes of working together, constitute a kind of investment in which lower short-term productivity is accepted as the price of learning that will eventually enhance long-term productivity. Initial relations between customers and suppliers or trading partners may also involve this kind of investment.

Such investments, where effective, create what some economists might call firm-specific human capital (recognizing that such capital may be involved in informal business relations and relations among, as well as within, firms). Such capital is likely to be a major source of an enterprise's goodwill or going concern value—the measure of the extent to which the value of the whole enterprise exceeds that of the sum of its parts.

The basic mechanisms of coordination associated with the market often seem inadequate for coordinating such investments. Spot markets are inadequate because firm-specific human capital investments require long-term coordination. Elaborately specified contracts are ineffective because the relevant contingencies are unforeseeable and contractual specification inefficiently rigidifies the relationship.

Yet, without specified contractual safeguards, collaborative behavior may make cooperators vulnerable in ways that deter people from engaging in it. Participants who invest in firm-specific assets risk that the others on whom the value of the assets depend will defect from the relationship when it is individually advantageous for them to do so. Employers who invest in employees risk that the employees will leave. Workers who invest in firm-specific skills risk that the employers will discharge them. Workers who help other workers acquire skills risk that those they help will displace them. Firms face similar risks in imparting valuable information to potential collaborators (who may also be potential competitors) or in undertaking efforts to learn about or develop relations with them. The value of such investments depends on the willingness of the others to continue collaboration even in situations where short-term individual interests might discourage it. The market, as portrayed in the economics and contract law associated with classical liberalism, seems incapable of facilitating long-term flexible cooperation.

From this perspective, the incomplete commodification or liquidity of firm-specific human capital may be a redeeming virtue. Legal and economic arrangements that make it more difficult or costly for parties to withdraw from the relationship may serve as safeguards that induce firm-specific human capital investments by reducing the risk of subsequent opportunistic withdrawal. For example, long-term employment guarantees may induce employee investments; deferred compensation arrangements may induce employer investments in employees. They do so, not by comprehensively specifying contingent obligations, but by locking the parties into a relationship in which each has an incentive to cooperate with the other while the specific contours of the collaboration remain undetermined.

Firm-specific human capital investments tend to reduce the external pressures of labor and product markets on the enterprise and to open space for political decisionmaking within the enterprise. This type of capital is embodied in the incumbent participants. Moreover, it is often inherently collective; no individual could appropriate his share simply by withdrawing unilaterally or threatening to do so. The external market prices for the participants' services are considerably less than their value to the enterprise. Since fully specified contracts are not possible and external markets do not fully determine distribution among participants, the participants have significant collective discretion to determine distribution themselves in terms of norms distinctive to their own community.¹⁵²

152. The argument above generalizes a point made about law firms by Gilson & Mnookin, *supra* note 96, at 353-71. For more general analyses in this spirit, see, M. AOKI, *THE COOPERATIVE GAME THEORY OF THE FIRM* 102-13 (1984); P. DOERINGER & M. PIRE, *supra* note 134, at 89-90; O. WILLIAMSON, *supra* note 143, at 242-50.

Given the relatively small number of worker-owned enterprises, their many and wide variations, and the idiosyncratic circumstances under which they tend to emerge, systematic empirical inquiry into the relative productivity of such enterprises is difficult. A survey of the empirical efforts to date concludes that there is no evidence that worker ownership has a negative effect on productivity. See Conte & Svejnar, *The Performance Effects of Employee Ownership Plans*, in *PAYING FOR PRODUCTIVITY* 143, 170-71 (A. Blinder ed. 1990). Most studies do not distinguish worker-owned firms with strong social-republican features from those without them. There are two studies comparing performance among cooperatives that purport to find some indication that collective as opposed to individual ownership of capital (as represented by nonappropriable reserves) has a negative productivity effect, but the findings are weak and ambiguous (and apparently, the specification of collective capital is based on accounting figures that exclude important intangibles). See Jones & Backus, *British Producer Cooperatives in the Footwear Industry: An Empirical Evaluation of the Theory of Financing*, 87 *ECON. J.* 488 (1977); Jones & Svejnar, *Participation, Profit Sharing, Worker Ownership, and Efficiency in Italian Producer Cooperatives*, 52 *ECONOMICA* 449 (1985). In their survey, Conte

Such decisionmaking may be done through hierarchical administrative means, but it can also be done through relatively democratic political means. The latter have at least two potential advantages. First, they may be better at surfacing information about the preferences and goals of the participants that is necessary to reach the most efficient accommodation. Second, the process of participation in decisionmaking may make for greater acceptance of or commitment to the decisions by the participants.

Thus, both the transfer and the accumulation constraints associated with social-republican property seem consistent with the development of firm-specific human capital. In areas of enterprise where the prospects for such investments are good, social-republican institutions may be conducive to, or at least compatible with, productive efficiency.

Conversely, areas where enterprises lack the potential to develop firm-specific human capital or goodwill are less likely candidates for social-republican organization. Two other negative indications for social-republican organization are relatively high differences in the external market capacities of the participants and relatively high demands for physical capital. Where external market capacities are unequal, the more powerful are likely to demand proportionately greater power and compensation within the enterprise. Interests in firm-specific human capital may constrain such demands, but at some point external inequalities are likely to overcome such constraints. Where firms have high demands for physical capital, they are likely to have to resort to external finance, and considerations of both efficiency and democracy often suggest that external finance of physical capital should be accompanied by external control. (The concept of worker control seems undemocratic in the context of capital-intensive industry, since it implies that here workers should have control of productive resources vastly disproportionate to their numbers.)

2. Some Counter-Arguments

The conclusion that social-republican enterprise, as exemplified most notably by producer cooperatives, is potentially efficient in a significant range of circumstances has been disputed extensively. Three arguments are most commonly made for the presumptive inefficiency of such enterprise: first, it requires a degree of collective

and Svejnar conclude that "the efficiency effects of collective ownership remain unclear." Conte & Svejnar, *supra*, at 169 n.32.

decisionmaking that is relatively costly in circumstances of diverse preferences and interests; second, worker ownership typically requires that workers make financial investments in their firms in addition to the human capital investments they necessarily make, making workers excessively vulnerable to firm and industry-specific business risks; third, worker-owned enterprises will have an inefficiently "short time horizon."¹⁵³

The first argument has been made recently by Henry Hansmann.¹⁵⁴ Hansmann points out that decisions by absentee investor-owners are simplified by their common interest in a limited unitary goal—profit. When owners are also workers, ownership decisions involve more variables and become more complex. The process of making decisions is more time-consuming and hence costly, and since there is no sure-fire method for reconciling divergent goals so as to maximize group welfare, the risk of poor decisions is greater. These costs and risks increase with the heterogeneity of the workforce that results from differences in backgrounds, skills, and positions in the division of labor. Thus, Hansmann finds it plausible that costs might be sufficiently small with work forces that are relatively homogeneous in such respects, such as corporate law firms. However, he thinks the costs of collective decision are likely to be prohibitive with any substantially heterogeneous workforce, and he finds that most of the successful examples of worker ownership involve homogeneous workforces.

The social-republican argument shares substantial common ground with Hansmann (by no means an unbending critic of worker ownership). A social-republican might be more optimistic about the possibilities of efficient resolution of differing preferences, but she would be the first to insist that substantial *inequalities* of power (whether due to outside market opportunities or internal political capacities) would be inimical to organizational success. Moreover, Hansmann's conclusion that worker ownership does not work with heterogeneous workforces depends on a fairly demanding definition of worker ownership involving direct worker management. He concedes that a more modest version in which a management subject to limited worker electoral control manages the corporation "in the interest of the workers" might be viable with a heterogeneous workforce, and he interprets Mondragon as a successful example of

153. See *supra* note 143 and accompanying text. For a longer list of objections and some responses to them, see Elster, *From Here to There; or, If Cooperative Ownership Is So Desirable, Why Are There So Few Cooperatives?*, 6 SOC. PHIL. & POL'Y 93 (1989).

154. Hansmann, *supra* note 96, at 1790-94 (emphasis in original).

this version.¹⁵⁵ This seems a substantial concession; the worker owners in such an enterprise would probably have considerably more power than most shareholder-owners in the typical public corporation.

Still, even with such qualifications, Hansmann's conclusion seems too pessimistic. If workforce heterogeneity tends to increase decisionmaking costs, there are two possible responses: we can try to narrow the range of worker decisionmaking, or we can try to decrease worker heterogeneity. Hansmann's conclusion seems to focus on the former response, but he acknowledges the latter and indeed mentions examples of it. For example, the worker-owners of the successful plywood cooperatives in the Pacific Northwest limit specialization and rotate members through all production jobs in order to minimize differences in knowledge and skills and differences in interest arising from different positions in the division of labor.¹⁵⁶ No doubt such firms also try to recruit workers who share values with existing members and are good at collective decision-making, and perhaps they also try to induce such values and skills through training.

Hansmann's pessimism seems to depend on an assumption that intractable social or technological constraints mandate forms of organization involving high degrees of heterogeneity. However, recent research on and experience with mass production manufacturing caution against reliance on such assumptions. The research disputes that the highly hierarchical and specialized mode of organization that dominated the economy for most of this century was ever the only efficient way such production could have been organized. The experience suggests that, whatever the case in the past, it is unlikely to continue to be the dominant paradigm in the future. The direction of the most innovative segments of the economy seems to be toward a flattening of hierarchy and a decrease in specialization.¹⁵⁷

Moreover, even if we grant that the costs of collective decision-making are irremediably high with heterogeneous workforces, it does not follow that the proper response is to narrow the range of worker decision, or that worker ownership is inefficient. The judgment on worker ownership is a comparative one, and the relevant

155. *Id.*

156. *Id.* at 1785-90.

157. See M. PIORE & C. SABEL, *supra* note 1; Sabel & Zeitlin, *Historical Alternatives to Mass Production*, 108 PAST & PRESENT 133, 133 (1985); *Who Needs a Boss?*, FORTUNE, May 7, 1990, at 52.

comparison is not between the ease of decisionmaking among worker-owners on the one hand and among investor-owners on the other, but between the ease of decisionmaking of worker-owners on the one hand and among investor-owners *plus employees* on the other. The greater ease of collective decisionmaking in the investor-owned firm is achieved by ignoring employee interests or by relegating them to nonownership decision processes or both. The costs of ignoring employee interests (which may be borne by the employer if the employees are able to insist on compensating wage differentials) and of these nonownership decision processes have to be taken into account in the comparative assessment. In unionized firms, the ancillary processes take the form of democratic voting procedures among workers (a structure Hansmann found inefficient in the worker ownership context, but which, given worker rights of self-organization, is potentially an element of almost any form of organization) coupled with a collective bargaining process with management.

The new learning on work organization often suggests that the costs both of inadequate consideration of employee interests and of cumbersome decisionmaking procedures have been high in many traditionally organized investor-owned firms. The degree of control given management in these firms simplified collective decisionmaking among managers but entailed an elaborate and often costly bargaining process to secure the necessary agreement among workers (who had to shoulder costs of collective decisionmaking among themselves in this process). From the employees' point of view, the traditional allocation of control now seems inefficient because it made expectations of job security unenforceable. In the more stable business environment of the pre-1970s postwar era, workers could more easily achieve job security without control over strategic investment and business decisions, but in recent years, job security has seemed to require limitation of managerial discretion over such matters as subcontracting, investment, and even pricing. From management's point of view, the old model sometimes seems inefficient because, in the absence of direct control over strategic decisions or direct guarantees of job security, employees bargained successfully for indirect substitutes that rigidified the production process, such as elaborate work rules, classifications, and seniority rules. Many mainstream managers have come to believe that a model that allowed more employee control over strategic decisions and more direct job security in return for more flexibility in the

production process would be more efficient than the traditional hierarchical one.¹⁵⁸

Contingent compensation, and participation in strategic, plant, and shop floor level decisions are all features of current mainstream experiments in industrial organization. These are the incidents of worker ownership. To be sure, few of the current experiments approach full worker ownership, and many extend control rights as a matter of managerial discretion rather than of worker right. However, such experiments imply a dissatisfaction with the traditional model which should preclude one from inferring from its previous preeminence that its allocation of control was uniquely or distinctively efficient.

The second claim against worker ownership is that it precludes adequate diversification of workers' wealth and thus subjects them excessively to the risks of a particular industry or business.¹⁵⁹ Since workers already have large human capital investments in the firm, the argument goes, for them to invest their financial assets there too would be foolhardy. Better that they be compensated in wages and save a portion in some diversified fund.

There are several answers to this claim. First, there is a trade-off between efficient diversification and efficient allocation of incentives. A worker whose investments (including human capital ones) were fully diversified would be indifferent to the fate of the firm. The larger the investment in the firm, the larger the worker's interest in its success. Of course, it does not follow from the fact that the worker is strongly interested in the firm's success that she has strong incentives to do her job well; the success of the firm depends on many things other than what any individual does, and the worker may feel that improving her own performance would make little difference in the firm's prospects for success. Still, with relatively small workforces and large ownership stakes, one might expect ownership to have an important effect on performance. Moreover, even in larger enterprises, workers may devise modes of informal mutual monitoring that give each worker the sense that good performance will be reciprocated and bad performance sanctioned.¹⁶⁰

158. See, e.g., T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 132; Simon, *supra* note 132, at 18.

159. See, e.g., Jensen & Meckling, *supra* note 143.

160. Effective informal mutual monitoring is one explanation for the substantial body of evidence that profit sharing, which involves some of the incentives and risks of

It is also possible that worker financial investments will have important psychological effects in conjunction with organizational reforms. Low-income protest organizations typically charge admission fees or dues large enough to represent a significant sacrifice by the member, though often too small to be an important source of organizational finance, because they feel it gives the paying member a sense of power that encourages participation and signals to the other members that the paying member is committed to the organization.¹⁶¹ Even where financial investments by workers in ownership create only small individual interests, the process of making the investments may create a strong collective sense of identity that motivates group collaboration and mutual monitoring.

Second, the diversification criticism assumes that in exchange for ownership the workers must make financial investments in addition to the human capital investments they make as employees. It is surely plausible that outside capital suppliers will insist on some control as well as financial return. However, the premise that control should go exclusively to financial capital suppliers and their agents is not so obvious. In Germany, workers receive seats on the board merely by virtue of their status as employees, and we have noted that in many American companies workers share in rights traditionally identified with ownership.¹⁶² It is possible that in some companies workers could be given partial "ownership" more formally without additional financial investments and without increasing prohibitively the cost of outside capital.

Third, if control is valuable to employees, it may be worth the costs of added risks. Investors pay premiums all the time in both cash and risk in order to achieve control. One narrowly economic

ownership, enhances employee productivity. Weitzman & Kruse, *Profit Sharing and Productivity*, in *PAYING FOR PRODUCTIVITY*, *supra* note 152, at 98-100.

Ironically, the most striking direct evidence of the potential efficacy of informal mutual monitoring by workers comes from worker efforts to *restrict* productivity. In conventional capitalist firms, it has often been the case that individual workers have substantial incentives to exceed production standards in ways that disadvantage workers as a group—for example, where such "ratebusting" leads the employer to raise the standards for everyone. In many settings, informal work groups have proven highly effective at enforcing their own norms of reasonable production despite the collective action problems in doing so and sometimes despite employer prohibition of their efforts. See S. MATHEWSON, *RESTRICTION OF OUTPUT AMONG UNORGANIZED WORKERS* 15-29 (1931). An advantage of worker ownership is that it realigns the incentives for such informal activity toward productivity.

161. See, e.g., L. BAILIS, *BREAD OR JUSTICE: GRASSROOTS ORGANIZING IN THE WELFARE RIGHTS MOVEMENT* 43 (1974).

162. See Summers, *An American Perspective of the German Model of Worker Participation*, 8 *COMP. LAB. L.J.* 333, 339-40 (1987), and sources cited *supra* note 158.

reason why employees might value control is to safeguard job security, since it has proven difficult to achieve such security through contractual specification. And job security may motivate firm-specific human capital investments as well as day-to-day effort.

Finally, the social-republican tradition has distinctive measures to achieve risk-spreading while preserving worker control. The basic idea is a form of insurance among independent enterprises administered cooperatively. The plan of the Farmers' Alliance, in which members would jointly pledge their lands as security for the repayment of debts for cooperatively purchased supplies, is a notable example, though the diversification achieved there was quite limited.¹⁶³ The Knights of Labor envisioned and experimented with a system in which the union operated as a confederation of members of independent cooperative enterprises, giving members financial assistance in times of distress.¹⁶⁴

The Mondragon system of cooperatives has a more elaborate system of interrelations. The cooperatives are engaged in a fairly diverse array of businesses. The high-earning cooperatives make payments to low-earning ones in order to narrow short-term intercooperative profit variation. This program is administered by a central institution governed by officers appointed by the member cooperatives. The individual cooperatives are also shareholders of a bank that finances new cooperatives and gives assistance to troubled ones.¹⁶⁵

Such arrangements may seem compatible with social-republican principles as long as the central institution is democratically controlled by its members. Nevertheless, there is still a substantial trade-off between worker control at the enterprise level and efficient diversification. Efficient diversification probably requires a fairly large pool of members, and effective insurance probably requires substantial central monitoring and control of members. Thus, members will have to cede some control to the central institution, and the larger the central institution, the less likely that members will feel a sense of participation and control in it. Still, inter-enterprise cooperation at a scale that preserves the possibilities of rank-and-file control may substantially diversify risk.

The third complaint about social-republican organization is that the members of such organizations tend to have short invest-

163. L. GOODWYN, *supra* note 3, at 74-80.

164. C. HORNER, *supra* note 136, at 188-216 (1978).

165. See W. WHYTE & K. WHYTE, *supra* note 98, at 61-62, 68-87.

ment horizons.¹⁶⁶ The implicit comparison here is to the outside-investor-controlled firm with liquid, tradeable claims. The idea is that an investor in such a firm is indifferent to when the enterprise will realize the income from a particular investment because she can always cash in her share of the enterprise's anticipated future earnings for a present lump sum. A social-republican investor, on the other hand, may be able to benefit from a particular enterprise investment only if she is still a member when the enterprise realizes the income. She may thus be reluctant to have the enterprise undertake projects that will not have paid off fully by the time she anticipates leaving.

One response to this complaint is that the ideal of the outside-investor-controlled firm with tradeable claims seems to be only partly feasible. Certainly, this model does not fully describe the typical large public corporation, which is not investor-controlled, or the typical small business, on which claims are not readily tradeable. The investment policies of large corporations are often influenced by managers and unions whose primary interest is in employment compensation during their tenures. (Takeovers seem to many observers to exacerbate, rather than mitigate, the short term bias of managers and employees.) Small businesses often have a large human capital component embedded in relations between existing manager-owners and their workers, and high information costs relative to firm value impede trading of claims. Thus, one of the more common uses of ESOPs is in sales of small businesses by departing founders to their employees.

Moreover, a broad range of firms will likely have age compositions for which the time constraint on investment is irrelevant. As Henry Hansmann writes:

[E]ven if workers could *never* withdraw capital from the firm, the workers as a group might be expected to have a long time horizon for investments since the median worker's expected length of tenure with the firm may well be as long as fifteen or twenty years, or even longer if pension payoff periods are included. And a fifteen-year investment horizon is extremely long by contemporary industrial standards.¹⁶⁷

3. Why Are There So Few Worker Cooperatives?

Critics of worker ownership often ask, if worker ownership is efficient, why do we see so few worker-owned enterprises in capital-

166. See, e.g., Jensen & Meckling, *supra* note 143, at 481-84.

167. Hansmann, *supra* note 96, at 1774 (citation omitted).

ist societies? Capitalist legal regimes are ostensibly neutral toward this form of ownership,¹⁶⁸ and the market would reward it if it were comparatively efficient.

Defenders often suggest that capitalists discriminate against worker-owned enterprises by denying them capital or refusing to deal with them without regard to efficiency. There certainly have been examples of such discrimination.¹⁶⁹ But there is no evidence of discrimination on a scale that would account for the small number of worker-owned enterprises.

Another explanation is that in a conventional capitalist environment, enterprises that start out as worker-owned may encounter strong incentives to shift to an investor-owned form once they become successful. It may be easier for the founders to avoid sharing the returns due to their initial success with newcomers if the latter are brought on as employees rather than as owners. Social-republican accumulation constraints might mitigate this effect, but there is no material incentive in conventional market circumstances for people to adopt such constraints spontaneously. Again, there are examples of initially worker-owned firms in which the founders have converted themselves into employers,¹⁷⁰ but not so many as to account for the small number of successful firms that have been worker-owned even for an initial period.

A more promising, but as yet tentative explanation makes several points.¹⁷¹ First, culturally dominant models of economic organization may have cognitively inhibited unbiased consideration by investors of deviant forms. Consider, for example, the resistance of American investors and managers to manufacturing methods successfully adopted decades ago in Japan that substantially decentralize responsibility to workers on the shop floor. In a few industries, notably automobiles, these methods recently have been proven effective with American workers, though usually at the initiative of Japanese investors and managers rather than American ones. Sec-

168. *But see supra* notes 55–58 & 88 and accompanying text.

169. *See, e.g.,* L. GOODWYN, *supra* note 3, at 304 (“The highly successful multi-state livestock marketing cooperative [established by midwestern affiliates of the Farmers’ Alliance] was killed by the simple decision of the Livestock Commission in Chicago to refuse to deal with the farmer cooperative. The decision was justified on the ground that the cooperative, in distributing profits to its membership, violated the ‘anti-rebate’ rule of the Commission!”).

170. *See infra* note 184.

171. *See* M. PIORE & C. SABEL, *supra* note 1; R. UNGER, *supra* note 1, at 585–86; L. WEISS, *CREATING CAPITALISM: THE STATE AND SMALL BUSINESS SINCE 1945* (1988); Levine & Tyson, *Participation, Productivity, and the Firm’s Environment*, in *PAYING FOR PRODUCTIVITY*, *supra* note 152, at 183–243.

ond, the efficiency of small, internally egalitarian enterprise may require a special infrastructure of financial intermediation, technical assistance, and cooperative production and marketing. Infrastructure of any kind is rarely provided through wholly private initiative, and public efforts in the United States have been relatively insensitive to the possibilities of small-scale, locally-rooted, human-capital-intensive enterprise. Third, the viability of social-republican enterprise is enhanced by types of macroeconomic and regulatory policies that promote financial stability and full employment. Financial stability benefits small enterprise by obviating the need for firms to undertake stabilizing activities that involve scale economies (for example, diversification), and, by increasing the market power of labor, full employment decreases the efficacy of authoritarian labor discipline and encourages investors to consider more egalitarian approaches to inducing worker cooperation. To the extent that plausible economic policies that might have enhanced both stability and employment levels have not been pursued, the failure to do so may count as a partial explanation for the paucity of social-republican enterprise.¹⁷²

172. Two further explanations should be noted. First, workers may have cultural and cognitive inclinations that cut against worker ownership. For example, there is good reason to believe that the upbringing and education of working class Americans, in comparison with those of upper class Americans, disproportionately emphasize obedience and conformity rather than creativity and initiative. See, M. KOHN, *CLASS AND CONFORMITY: A STUDY IN VALUES* (1969).

Second, the radically unequal distribution of capital cuts against the formation of worker enterprises. Capital owners tend to have far more capital than they can profitably employ in enterprises in which they work. Most workers have little capital of their own and have difficulty collateralizing debt. Of course, moderate-income people do establish a large number of (usually self-financed) businesses each year, and these businesses usually take the form of proprietorships or partnerships controlled by one or a few worker-investors, not worker cooperatives that extend ownership to the entire workforce. But if the number of workers able to make such investments is small as a percentage of the workforce, and if they are dispersed throughout the society, then the paucity of cooperatives may simply reflect the fact that would-be cooperators have difficulty finding collaborators.

The policy implications of these explanations are different and perhaps more ambiguous than the ones emphasized in the text. If considered undesirable, the cultural and cognitive inclinations against worker ownership might be changed by educational reform. The unequal distribution of capital could be addressed by global redistributive efforts. The extent to which the access-to-capital point supports more focused efforts to make capital available to would-be worker-owners is debatable. The prevailing distribution of capital is hard to defend from any political point of view. But given that distribution, the problems of moral hazard and adverse selection that arise from the inability of most workers to collateralize debt are real and would plague any credit program grounded in purely redistributive considerations.

However, from a social-republican point of view, the most important point is that no amount of evidence of *private, individual* decisions can settle the issue of the desirability of such enterprise. If one accepts the social-republican premise that the organization of work is a constitutive political issue, then that issue becomes a matter for public, collective decisionmaking. This view would see the question as one of collective second-order preference, a question that concerns not a particular choice in the context of a given social structure, but a decision about the kind of society we would like to make ourselves. The market is incapable of expressing such decisions.¹⁷³

In this respect, the issue of public support for employee enterprise ownership (or resident homeownership) is akin to the issue of public support for the arts. In both respects, support expresses, less a set of existing individual preferences (which are adequately served by the market) or redistributive concerns (which could be more efficiently pursued in other ways) than a shared ideal and an aspiration to change the society so as to move it toward that ideal. At least as relevant as the paucity of successful worker-owned firms in the absence of government subsidies is the apparent political popularity of public support for them.

B. *Equality and Exclusion*

The final critique of social-republican property is that it achieves equality only at the cost of exclusiveness. Any community is potentially exclusive, but communities founded on social-republican property may have a tendency toward greater exclusiveness than those founded on classical liberal property. Social-republican property gives people an economic stake that tends to bind them to the community, but it also creates disincentives to the admission of new members.

Liberals have often argued that consent to the norms and practice of the nation should be sufficient to entitle outsiders to admission and citizenship.¹⁷⁴ However, the more that admission and citizenship entitle entrants to economic equality with their fellow citizens, the more liberal admission policies entail drastic redistribution from old to new citizens. Social-republicans unprepared to accept this consequence—and traditionally few have been—must then

173. Elster elaborates a similar point in the language of “externalities” and “free rider” effects. See Elster, *supra* note 153, at 98–99, 104–05, 108–10.

174. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 80–95 (1980).

choose between sacrificing their commitment to equality by admitting new members without the economic prerequisites of citizenship or restricting membership to those who can bring with them sufficient wealth to secure their own economic independence.

Historically, the republican commitment to intrapolitical equality has often been accompanied by an exclusiveness that leads to relatively great toleration of extrapolitical inequality. The classical republics were founded on slavery and a variety of other subordinated roles for noncitizens, and this fact was not lost on antebellum American defenders of slavery who invoked republican rhetoric as readily as abolitionists. In the social-republican vision of the Jacksonian Democrats, a relatively radical vision of equality among white males accompanied an intransigent commitment to slavery and the exclusion of blacks and Native Americans from citizenship. Precisely because social-republicans saw citizenship as so thick with entitlement, they found it inconceivable that it could be widely extended. By contrast, it has been said of Whigs with classical liberal views, "their acceptance of human inequality made them more willing than Democrats to accord partial rights to blacks and Indians."¹⁷⁵

Today one can see in several countries on the receiving end of immigration streams some association between tolerance for inequality and relatively open immigration policies. The relative liberality of the United States in immigration matters seems a function of its relatively high tolerance of inequality among citizens. American citizenship can be dispensed with some generosity in part because it entails relatively little in terms of economic rights. (And even so, immigrants are screened to minimize the likelihood that they will take great advantage of some of the economic rights that are provided; reliance on public assistance is often disqualifying.¹⁷⁶) On the other hand, countries like Sweden or Canada, where citizenship entails relatively strong economic claims, have more restrictive

175. H. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 246 (1990).

The contemporary "republican revival" in constitutional law has attempted to reformulate republicanism to give it a more inclusive and cosmopolitan tone. See, e.g., Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988). The success of this effort is disputed. See, e.g., Bell & Bansal, *supra* note 144. For present purposes, it is sufficient to note that the logic of social-republican property arrangements exhibits a tendency toward exclusiveness that seems analogous to the one found in prerevival cultural republicanism.

176. 8 U.S.C. §§ 1182(a)(8), (15) (1988).

immigration policies.¹⁷⁷ The American labor movement's traditional opposition to liberal immigration has been based in part on its moderately egalitarian wage and welfare commitments.¹⁷⁸

Now consider the limited equity interests in real estate created by rent control regimes. One of the political functions of these interests is to anchor the citizen in the community by protecting her from displacement due to property appreciation. However, property appreciation typically reflects the desires of outsiders to enter the community. Universal controls choke off new construction and limit places for new entrants. Thus, the laws typically exempt new units and allow them to rent at market rates. This, however, introduces an inequality between new arrivals and oldtimers. New renters will pay vastly more for their units than older renters protected by rent control. The same dilemma attends property tax schemes that permit full reassessment only when the property is sold. This approach protects older residents from the pressures of property appreciation but only at the cost of introducing a severe inequality between such residents and newcomers who must pay higher taxes on comparable properties.¹⁷⁹

The problem also arises in the context of the social-republican business enterprise. Imagine an egalitarian enterprise composed of nontransferable individual claims on collectively held capital. The enterprise is successful; its value increases, and it can increase its profits by expansion. In these circumstances, the members face a dilemma. If they bring in new members on terms that preserve equality, they redistribute away from themselves, since they must

177. See Comptroller General of the United States, *Information on Immigration in 17 Countries* 14-28, 84-89 (Jan. 12, 1979).

The current wholesale assimilation of the population of East Germany by West Germany and the mass immigration of Russian Jews to Israel are exceptions that tend to confirm the rule. Here the extension of citizenship in societies with relatively strong egalitarian social commitments entails a radical economic redistribution in favor of the new citizens, but it would be hard to imagine such assimilation apart from the unique circumstances of pre-existing kinship between the old and new citizens.

178. See G. MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT 1890-1930*, at 30-73, 117-49 (1986).

179. Chief Justice Bird would have found the preference for long-term residents in California's Proposition 13 limited reassessment scheme unconstitutionally arbitrary, but the rest of the California Supreme Court disagreed. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 252-53, 583 P.2d 1281, 1302-08, 149 Cal. Rptr. 239, 260-65 (1978) (Bird, C.J., concurring and dissenting). The dominant view seems to be that the federal constitution permits legislative tax schemes to pursue republican equality at the expense of liberal equality. See Cohen, *State Law In Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87 (1990).

then allow new members to share in returns from capital they now control.¹⁸⁰ They will thus be tempted to expand in ways that preserve for themselves the returns from the firm's capital but subvert the social-republican character of the enterprise.

There are several ways of doing this. The old members can charge new entrants a large admission fee (or sell them shares at market value), as do most successful American producer cooperatives.¹⁸¹ They can give lower patronage returns to new entrants.¹⁸² They can forego internal expansion and spin off a separate firm to produce supplies for them on terms that will involve lower returns to workers in the spun-off enterprise.¹⁸³ Or the members can reconstitute themselves as capitalist employers and bring in the new entrants as employees, a practice of some American producer cooperatives as well as cooperatives organized on more strictly social-republican lines in postrevolutionary Mexico, in Peru under the Velasco regime, and in Chile under the Allende regime.¹⁸⁴ The most extreme response, of which there are many examples in Europe and America, is for the members to sell the enterprise to an outside investor, pocket the proceeds, and themselves become, along with the new entrants, employees.¹⁸⁵

180. In neoclassical theory, the egalitarian cooperative will expand only as long as a new worker generates income above the pre-existing average income per worker. On the other hand, the capitalist firm will expand as long as a new worker generates income above the marginal cost of employing her. Given declining marginal labor products, the cooperative will stop hiring at an earlier point than the comparable capitalist firm. See, e.g., J. BONIN & L. PUTTERMAN, *supra* note 114, at 13-18.

181. K. BERMAN, *WORKER-OWNED PLYWOOD COMPANIES 194-96* (1967) (Pacific Northwest plywood cooperatives); R. RUSSELL, *supra* note 96, at 75 (San Francisco Bay Area garbage cooperatives), 123 (Los Angeles taxi cooperatives).

182. This would most likely take the form of an agreement by which the new worker purchased a membership share from the firm on an installment basis (or the firm loaned the worker the money to purchase the share) with the firm deducting the payments from the worker's current compensation. This is the procedure at the Mondragon cooperatives, Ellerman, *supra* note 98, and at some law firms, though in the former and often the latter cases the purchase price is subsidized at a rate below the market value of the share.

183. See Frank, *supra* note 135, at 567-68 (speculating that mainstream enterprises use this procedure to constrain intrafirm wage inequality).

184. E. GREENBERG, *WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION* 60, 188 (1986) (16% to 36% of workers at Pacific Northwest plywood cooperatives studied in late 1960s were employees); C. MCCLINTOCK, *PEASANT COOPERATIVES AND POLITICAL CHANGE IN PERU* 319-42 (1981) (examples from Mexico, Peru, and Chile); R. RUSSELL, *supra* note 96, at 97-98 (garbage cooperatives), 119, 124 (taxi cooperatives).

185. K. BERMAN, *supra* note 181, at 85-92, 93-98 (plywood cooperatives); R. RUSSELL, *supra* note 96, at 100 (garbage cooperatives). Sidney and Beatrice Webb argued that successful cooperatives would inevitably self-destruct either by selling out to out-

An ambitious social-republican regime will respond to these threats of corruption, as Yugoslavia did, by prohibiting unequal treatment of new members. But the result of such a prohibition is likely to be exclusion: the incumbents can simply limit or forego expansion in order to preserve for themselves the returns from their capital.

When the group does admit new members, how will it decide which members to take? Since membership in a successful social-republican institution typically will carry rewards with an economic value greater than the entry price, there will be a surplus of prospective qualified entrants. One would expect that the members, if permitted, would rank prospective entrants in terms of personal qualities the members value. Should they be permitted to do so? Here the social-republican tradition is ambiguous. Radical social-republicans like Thomas Skidmore have occasionally argued for allocation of social-republican property by the state on lines of strict equality.¹⁸⁶ But the most salient mode of allocation in the republican tradition is on the basis of consanguinity through inheritance. Inheritance plays a prominent role in, for example, Harrington's program.¹⁸⁷ In general, social-republican institutions have often been associated with property allocation practices involving nepotism, ethnocentrism, racism, and sexism.

American immigration policy was for many decades openly racist, ranking prospective entrants on the basis of judgments of racial superiority. More recently, the most important preferences have been for relatives of American citizens. While such nepotism is generally not considered problematic for immigration decisions, it would be for decisions about interests in housing, voluntary associations, and productive enterprises.

Many believe that an important factor in the survival of the cooperative housing form among upper-income owners has been its superior ability to facilitate various forms of discrimination in the selection of new entrants.¹⁸⁸ Unlike the rental form, the co-op gives incumbent members the power to select new ones, and in contrast to the condominium form, the co-op's cross-collateralization feature

siders or by bringing in new members as employees. For their argument with numerous European examples, see S. WEBB & B. WEBB, *Special Supplement on Co-operative Production and Profit-Sharing*, in II THE NEW STATESMAN 1 (1914).

186. See P. CONKIN, *supra* note 17, at 237-40.

187. See J. HARRINGTON, *supra* note 21, at 236-38.

188. See Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEG. STUD. 25, 31-32 (1991).

gives residents both an incentive for discrimination on financial grounds and a pretext for discrimination on other, illegal grounds. Rent-controlled housing units are typically allocated to relatives or friends of landlords or departing tenants. In homeowners' associations, alienation restraints—"restrictive covenants"—were once practically synonymous with racial segregation.¹⁸⁹

Ethnic homogeneity is a notable feature of the Mondragon cooperatives and of some American ones as well.¹⁹⁰ The admission practices of American craft unions, once bastions of social-republican ideology, were until recently flagrantly nepotistic, ethnocentric, racist, and sexist (and are still often tacitly so).¹⁹¹

Indeed, social-republican economic organization has occasionally appealed to colonialist projects of ethnic and economic domination. European colonial powers desiring to consolidate control of colonies by establishing permanent settlements of their own people have found that capitalist enterprises have their drawbacks, especially their tendency to permit native labor to underbid and displace European wage-earners. Land grants to Europeans, conditioned on residence and cultivation and subject to alienation restraints, have thus appealed to colonizers as a way of creating stable European settlements abroad. Gershon Shafir has recently interpreted the origins of the Israeli kibbutz in the light of such colonial practices. In his view, the Zionist movement adopted the social-republican ideal of an enterprise owned in common by its workers in response to the difficulties of inducing permanent Jewish migration to Palestine and to the demands of the nascent Israeli labor movement for exclusive access to jobs created by Jewish investment; in other words, the appeal of the kibbutz was, in part, that it facilitated the exclusion of Arabs from Jewish enterprise.¹⁹²

189. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). For a rich treatment of the problem of exclusion in the context of residential associations, see Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989).

190. On the significance of Basque culture for the Mondragon cooperatives, see W. WHYTE & K. WHYTE, *supra* note 98, at 254-65. Russell's account of the decline of cooperative organization in a San Francisco garbage disposal company emphasizes the common Italian backgrounds of the founders, their recruitment of new entrants through family ties for decades, then the declining willingness of young Italian family members to take jobs as garbage men, and the cleavages and tensions that arose when the enterprise was compelled to recruit from among blacks and Latinos. R. RUSSELL, *supra* note 96, at 92-94.

191. See W. GOULD, *BLACK WORKERS IN WHITE UNIONS* 281-96 (1977).

192. G. SHAFIR, *LAND, LABOR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT, 1882-1914*, at 75-78, 146-86 (1989). The property laws of indigenous peoples such as the American Indians are less troubling examples of the association of

Of course, the cruder forms of ethnic, race, and gender discrimination are forbidden in America by the civil rights laws. Even to the extent such laws are enforced, however, they leave a broad range of latitude for discrimination based on ascriptive qualities that are troubling. One response to such concerns would be to legislate tight constraints on entry decisions. The most extreme and effective way to preclude discrimination would be to have new entrants determined by queuing or lottery.¹⁹³ The composition of the queue or the lottery pool could be determined by some independent state agency in accordance with limited criteria of minimum suitability for membership in the institution (e.g., evidence of responsible prior conduct and, in the case of productive enterprises, relevant skills). When openings occurred, the agency could allocate them within the class so determined to those who had waited the longest or by lot. Such procedures are commonly used to allocate publicly subsidized housing units. Although they are not currently used in connection with rent controlled housing or subsidized enterprises, they probably could be.

There is, however, a strong social-republican objection to limiting incumbents' power to select new members in this way. The tendency to selectivity is not a mere side-effect of social-republican property; it is a function of the voluntariness and cohesion implicit in the social-republican ideal of community. As Michael Walzer writes of producer cooperatives, "Once a commune has been established, what is really at stake is the admission of new members [If the members] cannot choose their co-workers, it is difficult to see in what sense they can be said to 'control' their workplace." Thus the members should be permitted to choose new entrants on the basis not only of "ability to do the job," but also of "the sense they have of [a] common life."¹⁹⁴

I find this point overstated. It is true that social-republican institutions require a sense of community, or "common life," but it is not at all clear that this sense has to pre-exist the formation of the institution or each new member's admission to it. Indeed, institutions left free to choose their own members often seem to mistake mere ethnic or surface similarity for the deeper understandings and associations of community. In such institutions, exclusivity often

social-republican property arrangements with efforts to strengthen ethnically-bounded communities. See McChesney, *supra* note 12, at 312-15.

193. See Greely, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113 (1977).

194. M. WALZER, SPHERES OF JUSTICE 162 (1983).

seems associated with shallowness rather than depth of communal relations. Walzer's point that admission of new members is the central political focus seems true of such institutions precisely because their limited sense of shared purpose does not provide a basis for a richer collective agenda. At the same time, diverse individuals thrown together by chance in circumstances where they have strong incentives to cooperate—the military combat unit is the archetypal example in American culture—often develop strong communal bonds.

Social-republican property draws on the logic of this latter phenomenon. Its defining features are individual rights that can only be enjoyed through membership in the institution. Such rights are incentives for people to develop a "sense of a common life" that may compensate for the relative lack of a pre-existing one. Thus, the members' power to choose new entrants may be less important to social-republican institutions than to others.

It is one thing to require an institution that has decided to expand to give up the power to choose new members or share it with an independent agency or an impersonal process; it is another to take from the institution the power to decide when and how many new members to admit. We have seen that, if social-republican enterprises are free to determine the size of their membership, successful ones will expand less rapidly than comparable capitalist ones.¹⁹⁵ This tendency will exacerbate the inequality between relatively successful and relatively unsuccessful enterprises.

Thus, there is a case for social control, not only of the designation of new members, but of the size of the enterprise. One example of an effort of this sort is the New Jersey Supreme Court's *Mount Laurel* decision holding unconstitutional various "exclusionary zoning" practices and requiring the accommodation of low income housing construction.¹⁹⁶ Or consider the *Associated Press* case in which the United States Supreme Court found the news consortium's practice of limiting admission to one newspaper in each locality violated the Sherman Act and ordered the consortium to admit prospective entrants on nondiscriminatory terms.¹⁹⁷

195. See *supra* note 180.

196. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

197. *Associated Press v. United States*, 326 U.S. 1 (1945). Commentators differ about whether this case involved the forced sharing of enterprise-specific capital, see R. POSNER & F. EASTERBROOK, *ANTITRUST* 768–69 (2d ed. 1981), or simply the prohibition of an exclusion motivated solely by anticompetitive purposes, see H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 283–85 (1985).

Another approach to the problem of interenterprise inequality that is at least superficially more consistent with enterprise autonomy is free or subsidized entry of new enterprises to compete with the more successful older ones.¹⁹⁸

However, carried far enough to resolve the problem of exclusion, either forced admission or subsidized entry would amount to a repudiation of the social-republican ideal. As membership in the institution were forcibly expanded, the value of individual social-republican claims would decline and ultimately disappear. While some competitive entry is needed to spur innovation and level large rents, too much competitive entry will threaten the organizational capital that sustains flexible cooperation and long term investments.

One social-republican mechanism that may tend to dilute this problem is federation of independent enterprises engaged in mutual insurance. The "joint note" cross-collateralization procedure of the Farmer's Alliance is one example. The Mondragon system in which the earnings of the various federated cooperatives are pooled and partly leveled is another.¹⁹⁹ Such practices reduce inequalities across affiliated enterprises. Obviously, however, they do not benefit nonmembers, and such federations would not readily accept new members with below average earnings prospects.

Moreover, such federations are susceptible to two sorts of pathologies. They can become powerful forces for acquiring and exercising monopoly power and for exerting pressure on the state for favors, as both the federated enterprises of American farmers and the associations of proprietors of the communally held *ejido* land in Mexico illustrate.²⁰⁰ Alternatively, in their efforts to constrain member inequality or to achieve coordination, these federations can so restrict the conduct of their members as to undermine their autonomy. This seems to have been the case in Yugoslavia with the system of inter-enterprise "social compacts" (reinforced by the role of the party and the state) introduced in 1974.²⁰¹

198. This approach is prominent in the market socialist literature. See, e.g., J. VANEK, *supra* note 119, at 386-87.

199. Ronald Gilson and Robert Mnookin have interpreted the "lock step" seniority compensation practice of some corporate law firms as a form of intra-enterprise mutual insurance of this type. Gilson & Mnookin, *supra* note 96, at 341-46.

200. See G. McCONNELL, *THE DECLINE OF AGRARIAN DEMOCRACY* 69-85 (1953); M. PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* 124 (1979).

201. C. PROUT, *supra* note 10, at 48-81. Ellen Comisso has suggested that the Yugoslav system is prone to oscillate in cycles of decentralization in response to productivity problems and recentralization in response to growing inter-enterprise inequality. E.

In some respects, the dialectic of internal and external equality is inherent in any democratic vision that makes room for decentralized collective self-organization. For example, the resistance to organizational expansion noted by critics of the Yugoslav model can also be found in the behavior of unions under social-democratic regimes. Unionized workers can share in the returns to firm-specific capital and thus have incentives similar to cooperative members to resist expansion that would bring in new members who would dilute these returns. In the union context, this takes the form of insistence on high wage levels that can be expected to induce employers to set employment at relatively low levels or "two-tier" wage scales that pay new employees at different rates than incumbent ones. More broadly, it takes the form of a "dual labor market" in which the institutions that provide security for the better off workers in the organized sector lower the wages or increase the insecurity of workers in the unorganized sector. Literature in the social-democratic vein has recently emphasized these difficulties and suggested that their solution requires more inclusive and centralized union structures.²⁰²

Recognizing the difficulty common to social-republican and more mainstream institutional arrangements might lead one to conclude that the problem of internal versus external inequality is not distinctive to the social-republican view, but represents a pervasive "dilemma of industrial democracy."²⁰³ Nevertheless, the dilemma seems especially salient for the social-republican view because of its relatively central commitment to equality and decentralized organization. The plausible argument of recent social democratic literature that issues of inter-enterprise equity require centralized organization should trouble social-republicans. Certainly, the failure to elaborate responses to these issues is a central failing of much social-republican literature.

CONCLUSION

Social-republican property is neither as anomalous nor as implausible as the dominant mainstream conceptions of property often suggest. In a variety of contexts, it probably has a valuable role to play in connection with public subsidies for housing and business

COMISSO, *WORKERS' CONTROL UNDER PLAN AND MARKET* (1979). This is an instance of the "Communist reform cycle." R. UNGER, *supra* note 1, at 49-51.

202. See Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1.

203. M. AOKI, *supra* note 152, at 56.

development. This role is to encourage enterprise democracy and to prevent the private appropriation of the subsidies. Social-republican property could play this role either in the form of explicit transfer and accumulation restraints, or in the form of the implicit restraints associated with enterprises distinctively constituted by "firm specific human capital," or both.

But vindicating the democratic aspirations associated with this type of property will require attention to the problem of exclusion. The problem can be addressed either through constraints on admission and expansion decisions by established enterprises or through subsidizing new competing institutions. Either approach, however, could threaten the vitality of social-republican institutions. The critical task is to design constraints on exclusion without excessively impairing the autonomy and security necessary for such institutions to flourish.